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A

SELECTION OF CASES

ON

AGENCY.

BY

EUGENE WAMBAUGH, LL.D.,

PROFESSOR OF LAW IN HARVARD UNIVERSITY

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PREFACE.

In selecting and arranging these cases, the purpose has been to furnish material for the study of the principal topics of Agency, including some topics frequently classed under the head of Master and Servant. As far as practicable, use has been made of those famous cases with which it is peculiarly important that the student should become acquainted. The order of the chapters and of the sections has been determined, not by the views of analytical jurists or of codifiers, but by the supposed convenience of students; and consequently the plan has been to place in close juxtaposition topics that throw light upon one another, and to present the easiest and the most fundamental topics as early as possible. The cases as to each topic have been arranged chronologically. The statements by the reporters, and the opinions of the judges, have been reprinted in full, with exceptions indicated in the foot-notes; but the arguments of counsel have usually been omitted. The citations in the foot-notes have been intended to include only such cases as may profitably be examined by students.

Thanks are due to Professor William A. Keener, of the Columbia Law School, and Professor Jeremiah Smith, of the Harvard Law School, for cordial permission to use lists of cases prepared by them. It is matter of regret that it

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is impossible to acknowledge, otherwise than in the most general terms, indebtedness to the very numerous other workers — counsel, judges, reporters, digesters, text-writers — from whose labors, covering several centuries, the compiler has derived aid at every step.

EUGENE WAMBAUGH.

April 23, 1896.

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CASES ON AGENCY.

CHAPTER I.

INTRODUCTORY TOPICS.

SECTION I.

Qui facit per alium facit per se.[1]

ANONYMOUS.

Common Pleas. 1304–5.

[*Fitzherbert's Abridgment, Annuitie, pl.* 51.]

Annuity against the heir upon a deed of grant made by the father until the plaintiff[2] was advanced by the grantor or his heirs to a suitable benefice.

Tilton. After the death of our father our mother gave to the plaintiff, by our procurement and to discharge us, the deanery of T., of which the plaintiff is still seised.

Herle. The writing is, until he be advanced "by the grantor or his heirs," and so we are not, &c.

Hengham [C. J.]. Qui per alium facit per se ipsum facere videtur, and have care that he answer over.

Herle. The mother of the defendant gave us the benefice for our service, and not in discharge of the annuity. Ready.

And the other side said the contrary, &c.

---

[1] Among the rules appended to the Sext, promulgated by Pope Boniface VIII. in 1298, are the following: "lxvii. Quod alicui suo non licet nomine, nec alieno licebit. lxviii. Potest quis per alium, quod potest facere per se ipsum. . . . lxxii. Qui facit per alium, est perinde, ac si faciat per se ipsum." Sexti Decretalium, lib. v. tit. xii., De regulis juris, according to the text of Friedberg's edition of the Corpus Juris Canonici, vol. II., column 1124. See 1 Pollock & Maitland's History of English Law, 93, 196. — Ed.

[2] Fitzherbert says defendant; but that appears to be an error. — Ed.

West's Symboleography, part I., sec. 3, *Of the Fact of Man* (1590):
Now the fact of that person, and the person himselfe, are to be considered. The fact is the covenant or agreement, or the offence, which two are the onely way making obligations.

The person is hee which either agreeth or offendeth, and beside him none other.

And both may be bound either mediatly or immediatly.

Immediatly, if he which is bound do agree.

Mediatly, when if he which by nature differeth from him, but not by law, whereby as by some bond hee is fained to be all one person, doth contract or offend, of which sort in some cases be those which be in our power, as a wife, a bondman, a servant, a factor, an Atturney, or Procurator, exceeding their authoritie.

SECTION II.

Who can be an Agent.

(*A*) General Principles.

Perkins' Profitable Book, secs. 184–187 (1532): —

184. All such persons as can grant for themselves may make livery of seisin for themselves, *viz.* in their own right, and as servants to others, in the same manner and form as they may grant, &c., *mutatis mutandis*, &c. . . .

185. And as to such persons as cannot make livery of seisin in their own right, but may as servants to others, know, that a monk, friar, or canon, &c., professed,[1] or a married woman, cannot make livery of seisin for themselves, *viz.* in their own right; and if they make any livery of seisin in their own right, it is void; because persons professed in religion cannot have any land in their own right, except he be severed from the same house of religion, &c.

186. And although a married woman may be seised in her own right with her husband, yet livery of seisin made by her alone, without the agreement of her husband, is void; insomuch that notwithstanding such livery of seisin, her husband and she may have an assise, if he be seised of the freehold in her right: but in such case, if the husband be seised in his own right, then notwithstanding such livery of seisin made by his wife, he shall have an assise in his own name, &c.

187. But if a monk or other person professed in religion, or a feme covert, make livery of seisin according to the deed of a person able to make a feoffment in his own right, and by a letter of attorney made to

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[1] On civil death, see 1 Pollock and Maitland's History of English Law, 416–421.— Ed.

him or her by the same feoffor so to do, then such feoffment is good; because the feoffee in such case is not in in the land by him or her that made the livery of seisin, but by the feoffor. . . .

Coke on Littleton, 52 a (1628): —

Few persons are disabled to be private attorneyes to deliver seisin; for mounks, infants, fem coverts, persons attainted, outlawed, excommunicated, villeins, aliens, &c., may be attorneyes. A fem may be an attorney to deliver seisin to her husband, and the husband to the wife, and he in the remainder to the lessee for life.

Coke on Littleton, 187 b (1628): —

Albeit baron and feme (as Littleton here saith) be one person in law, so as neither of them can give any estate or interest to the other, yet if a charter of feoffment be made to the wife, the husband as atturney to the feoffor may make liverie to the wife; and so a feme covert, that hath power to sell land by will, may sell the same to her husband, because they are but instruments for others, and the state passeth from the feoffor or devisor.

CHASTAIN *v.* BOWMAN.

Court of Appeals of South Carolina. 1833.

[1 *Hill's S. Car. Law,* 270.]

Tried before Mr. Justice Evans, at Abbeville — Spring Term, 1833.

This was an action on the case, against the defendants as common carriers on the Savannah River, for a loss sustained by the burning of the plaintiff's cotton on board their boat. The boat was passing down the river when the plaintiff came to a landing, and asked if it could carry his cotton. The patroon (a slave belonging to one of the defendants) answered that it could. The cotton was received, and was burnt on board the boat before it reached Augusta. It was proved that the defendants had given general instructions to their patroons to take in freight whenever it could be had, and that, in one instance, one of the defendants had received pay for freight engaged by his patroon. There was also some evidence to show the general custom of the river. Some witnesses proved that it is the custom to allow patroons to take in freight generally, and others, that they are only allowed to receive freight when a boat is not fully laden.

The presiding judge charged the jury that the defendants were not liable unless the patroon was his master's agent, and authorized to take in freight; that the authority might be proved by showing that such was the custom of boat owners, or by proving that the defendants had given such authority; that to establish a custom, it must be proved to be universal; that a slave might be the agent of his master, and, if his agency was established, the master was bound; and whether the agency of the slave was established in this case, was a question submitted to their decision. The jury found for the plaintiff, and the defendants appealed, and move for a new trial on the ground of error in the charge of the presiding judge.

JOHNSON, J., delivered the opinion of the court.

From the instructions given to the jury, it is more than probable that they found the verdict on the ground that the defendants had constituted their patroon, the slave Jack, their agent to contract with the plaintiff for carrying his cotton, and on that ground it can be well sustained.

It is not questioned that a master may constitute his slave his agent, and I cannot conceive of any distinction between the circumstances which constitute a slave and a freeman an agent, — they are both the creatures of the principal, and act upon his authority. There is no condition, however degraded, which deprives one of the right to act as a private agent; the master is liable even for the act of his dog done in pursuance of his command. Two witnesses, Beck and Eaton, prove that defendants had given general instructions to their patroons to procure freight whenever they could, and in one instance it is shown that one of the defendants received the price of freight on produce so received and carried by the patroon, a distinct recognition of their authority to contract for them; and there is not a tittle of evidence that this authority was ever rescinded. The authority was general as to that particular business, and the contract to carry was directly in pursuance of it. The defendants were therefore bound.

The proof of the custom appears to me to have been too equivocal to have supported the verdict on that ground alone. To make a good custom it must be proved to be general; and if the proof had been that those concerned in the navigation of the Savannah River had, from time immemorial, authorized and permitted their slave patroons to contract for carrying freight, the defendants would have unquestionably been bound by it; but the proof here, with the exception of one witness, is confined to particular instances, and it is not very obvious that that witness clearly understood what is meant by a general custom.

Motion dismissed.

HARPER, J., absent.

Wardlaw, for the motion.
Calhoun, *contra*.

COBB, RELATOR, *v.* JUDGE OF THE SUPERIOR COURT OF GRAND RAPIDS.

SUPREME COURT OF MICHIGAN. 1880.

[43 *Mich.* 289.]

MANDAMUS. Submitted April 13. Decided April 14.

Smiley, for relator.

Maher, for respondent.

MARSTON, C. J. In a cause pending in the Superior Court of Grand Rapids some of the defendants appeared by an attorney and afterwards, at their request and with the consent of their attorney, a substitution was made under which a third person not an attorney of the court appeared in the cause as their agent. The present motion raises the right of a party to appear in a court of record by an agent who is not an attorney duly licensed to practise as such. It was claimed on the argument that parties have such right under sec. 24, art. vi. of the Constitution.

Under the legislation in force at the time of the adoption of the Constitution no person was permitted to practise as an attorney or counsellor at law, except in the county court, or as a solicitor or counsellor in chancery, unless approved by the court for his good character and learning, and duly admitted.

The Supreme Court was authorized to grant to any citizen of the State, of good moral character and of the age of twenty-one years, a license to practise as an attorney, upon an examination, if satisfied that the applicant possessed sufficient legal learning and ability to discharge the duties of such office. Such attorney is required to take the constitutional oath of office, and may be removed or suspended by the several courts in which he is authorized to practise. 2 Comp. L. § 5622 *et seq.* These and other provisions then and still in force show how carefully the right to practise as an attorney was guarded, not in the admission to practise alone, but in regard to their standing and retaining such rights thereafter. This legislation and our entire practice relating to attorneys has always been observed, and was never supposed to conflict in any way with the constitutional provision referred to. Our rules of practice in reference to the service of papers are framed upon the same theory, and do not recognize the right of parties to appear by agents or persons who are not attorneys and solicitors of the court, and we are of opinion that the word "agents" as used in the Constitution does not give the broad authority claimed by the respondent in this case. The Constitutional Debates referred to on the argument throw no real light upon this question.

If the word "agent" as used in the Constitution, is not to be construed as synonymous with the word "attorney," what is to be the result? Parties may appear by agents possessing no legal qualification or even ordinary intelligence, and of the worst possible character; they may be minors, and may even be persons who have been disbarred and removed by this court from practising as attorneys and solicitors. They could not practise as attorneys, possessing neither the legal nor moral qualifications for such a position, and yet they could appear as agents. They would possess the rights of attorneys, but not be subject to the responsibilities; their removal by the court, if they could be removed, would be a mere idle ceremony. Litigants might again employ them and authorize them to appear and represent their interests, so that persons who could not practise as attorneys could as agents, with equal rights and powers. Such could not have been the intention of the framers of our fundamental law, or of the people in adopting it.

There are still additional reasons for this view. Attorneys are licensed because of their learning and ability, so that they may not only protect the rights and interests of their clients, but be able to assist the court in the trial of the cause. Yet what protection to clients or assistance to courts could such agents give? They are required to be of good moral character, so that the agents and officers of the court, which they are, may not bring discredit upon the due administration of the law; and it is of the highest possible consequence that both those who have not such qualifications in the first instance, or who having had them have fallen therefrom, shall not be permitted to appear in courts to aid in the administration of justice. One of the principal powers possessed by courts for the protection of the public, and to maintain the high standing, character, and reputation of the bar, is the right to expel members who have been shown guilty of immoral acts, thus rendering them unworthy to longer retain their position as officers of the court. This court has had occasion heretofore to disbar attorneys convicted of crime, or shown guilty of some serious offence. Such persons can no longer appear as attorneys in any court of record, and it is equally clear that they would have no right to appear, and should not be permitted to represent any person in court, either as attorneys, agents, or otherwise. If they have such power or right their position is better than before, and the judgment of this court is practically of but little force or effect. An examination of the opinions of this court in the Matter of Mills, an attorney, 1 Mich. 392, and of the People *v.* May, 3 Mich. 598, will show the importance of this question.

The writ must issue as prayed for.

The other Justices concurred.[1]

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[1] The early history of attorneys at law may be traced in Glanvill, lib XI.; Bracton de Legibus, fo. 334, 342–343; Statute of Westminster II., 13 Ed. I., stat. 1, c. 10, s. 7; Fleta, lib. iv., c. vi., § 7, lib. vi., c. vi., § 14, lib. vi., c. ix., §§ 7, 9–11; Britton, fo. 119 b, 120, 285 b–287. And see 1 Pollock and Maitland's History of English Law, 190–196.

"Any suitor in any court of this state shall have the right to prosecute or defend his suit, either in his own proper person, or by an attorney or agent of his choice." Constitution of Michigan, art. vi., sec. 24 (1850). — ED.

SECTION II. (*continued*).

(*B*) INFANCY.

WATKINS *v.* VINCE.

NISI PRIUS. 1818.

[2 *Starkie*, 368.]

THIS was an action on a guarantee by the defendant, by which, as was alleged, he had guaranteed to the plaintiff the payment for 100,000 bricks, to be supplied to one *Hampson*.

The guarantee was in the hand-writing of *James Vince*, the son of the defendant, a minor of the age of 16. It was proved that he had signed for his father in three or four instances, and that he had accepted bills for him.

Gurney for the defendant objected, that this was too slight evidence of authority given to the son to warrant the receipt of the guarantee in evidence against the father; but —

Lord ELLENBOROUGH held, that this was sufficient *prima facie* evidence, in the absence of any inducement on the part of the son to commit a crime.

Gurney afterwards objected, that such a guarantee required a stamp; but —

Lord ELLENBOROUGH overruled the objection, the guarantee being a contract relating to the sale of goods, and therefore within the exception in the statute. *Verdict for the plaintiff.*

Topping and *V. Lawes*, for the plaintiff.
Gurney, for the defendant.

JACOB WIDRIG, BY NEXT FRIEND, *v.* LESTER B. TAGGART.

SUPREME COURT OF MICHIGAN. 1883.

[51 *Mich.* 103.]

ASSUMPSIT. Defendant brings error. Affirmed.

Cobb & *Ely*, for appellant. Recoupment may be had against an infant suing for the value of his services. Moses *v.* Stevens, 2 Pick. 332; Thomas *v.* Dike, 11 Vt. 273; Hoxie *v.* Lincoln, 25 Vt. 210; Judkins *v.* Walker, 17 Me. 38; Vehue *v.* Pinkham, 60 Me. 142.

Geo. W. Mead, for appellee. In an infant's action for the value of his services no deduction can be made for his own breach of the

contract of employment. Whitmarsh *v.* Hall, 3 Den. 375; Derocher *v.* Continental Mills, 58 Me. 217; Robinson *v.* Weeks, 56 Me. 102; Vent *v.* Osgood, 19 Pick. 575; Gaffney *v.* Hoyden, 110 Mass. 137; Meeker *v.* Hurd, 31 Vt. 642; Dallas *v.* Hollingsworth, 3 Ind. 537; Meredith *v.* Crawford, 34 Ind. 399; Ray *v.* Haines, 52 Ill. 485; Kearney *v.* Doyle, 22 Mich. 294.

GRAVES, C. J. The plaintiff, a minor of the age of nineteen, labored as a farm hand for defendant from the last of March until the early part of July, a space of eighty-five days, and brought this action to recover for the service. The defendant had previously paid him $45. The jury found in his favor, and allowed him $5.87, and the defendant brought error to this court.

At the trial the defendant proposed to recoup damages by showing that the labor sued for was performed under an express contract with the plaintiff to serve for seven months at $17.50 per month, and that he quit during the term and just before harvest; but the court ruled out the defence. The plaintiff admitted he was not entitled to recover at as high a rate as $17.50 per month, and the circuit judge told the jury that the measure of recovery would be what the services were worth at that season, after bearing in mind that the value might be less than in case the labor had been extended or continued through the summer. The value found by the jury was at the rate of $15.50 per month, — a sum less than the lowest value in the evidence. We discover no error.

The plaintiff, in consequence of his infancy, was not compellable to pay damages for withdrawing from his contract engagement. Recoupment is, in substance and effect, a cross-action, and unless the party whom it is attempted to subject to it could be compelled to respond for the damages by an independent action against him, he cannot be reached by recoupment; and such was the position of the plaintiff.

Persons who contract with minors must understand that they do so at the risk of greater or less disadvantage. The adult binds himself, but the infant does not. And the law has not found it possible to maintain these conditions of inequality, and at the same time secure to the adult the same measure of remedial right which obtains where both parties are of full legal capacity.

The judgment must be affirmed with costs.

The other Justices concurred.[1]

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[1] And see Vasse *v.* Smith, 6 Cranch, 226 (1810); Moses *v.* Stevens, 2 Pick. 332 (1824), Hoxie *v.* Lincoln, 25 Vt. 207 (1853). — ED.

SECTION II. (*continued*).

(*C*) COVERTURE.

EMERSON *v.* BLONDEN.

NISI PRIUS. 1794.

[1 *Esp.* 142.]

ASSUMPSIT for the use and occupation of certain rooms in the plaintiff's house, which had been let to the defendant.

The defendant and his wife had taken the apartments at a certain rent, the wife had made the bargain, and had agreed to give three months' notice of quitting. Having quitted without notice, the action was brought to recover the three months' rent.

A witness for the plaintiff proved a demand of the rent from the defendant's wife, and that she had acknowledged the sum claimed to be due, and had promised payment.

Mingay, for the defendant, objected to this evidence, as it was admitting the declarations of the wife, and her acknowledgment of debt to charge the husband.

It was answered by the plaintiff's counsel, that the defendant having in the present instance permitted his wife to act for him, in making the agreement, and settling the terms upon which the lodgings were taken, that he had thereby constituted her his agent for that purpose, and should therefore be bound by her acts and admissions.

Lord KENYON said, that the rule of law had been correctly stated by the plaintiff's counsel, that where a wife acts for her husband in any business or department, by his authority and with his assent, that he thereby adopts her acts, and must be bound by any admission or acknowledgment made by her respecting that business, in which by his authority she has acted for him, and that therefore in the present case her admission of the debt due to the plaintiff, on account of the lodging, was competent and admissible evidence to charge the husband.

The plaintiff had a verdict.

Erskine and *Baldwin*, for the plaintiff.

Mingay, for the defendant.

SECTION II. (*continued*).

(*D*) THE STATUTE OF FRAUDS.[1]

WRIGHT *v.* DANNAH.

NISI PRIUS. 1809.

[2 *Camp.* 203.]

GOODS bargained and sold. Plea, the general issue.

The action was brought for the value of four sacks of clover seed. The parties having met on the corn exchange in London, entered into a negotiation for the sale of this seed; and after they had agreed on the price, the plaintiff wrote the following memorandum of the contract: —

"Robert Dannah, Windley, near Derby.
4 sacks clover seed, at £6 18*s.*
Per Fly Boat."

After the plaintiff had written this memorandum, the defendant, who overlooked him while he wrote it, desired him to alter the figures 18 to 16, — £6 16*s.* being the price agreed on. This the plaintiff accordingly did. They then parted, the memorandum being left with the defendant.

Park objected that this was not a sufficient memorandum within the statute of frauds, not being signed by the party to be charged by it, or his authorized agent.[2]

Garrow and *Puller*, *contra*, submitted that the defendant had made the plaintiff his agent for the purpose of signing the memorandum, by overlooking and approving of what he had written; and they put the case of a man incapable from disease or ignorance of writing for himself.

Lord ELLENBOROUGH said the agent must be some third person, and could not be the other contracting party.[3]

Plaintiff nonsuited.

Garrow and *Puller*, for the plaintiff.

Park, for the defendant.

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[1] The pertinent parts of the statute are reprinted *post*, p. 52. — ED.

[2] 29 Car. 2, c. 3, § 17, enacts, "that no contract for the sale of any goods, &c., for the price of £10 or upwards, shall be good except, &c., or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." — REP.

[3] *Acc.*: Sharman *v.* Brandt, L. R. 6 Q. B. 720 (Ex. Ch. 1871). — ED.

FAREBROTHER *v.* SIMMONS.

KING'S BENCH. 1822.

[5 *B & Ald.* 333.]

ASSUMPSIT by the plaintiff, an auctioneer, against the defendant, for not taking or clearing away or paying the purchase-money, being £34, for a lot of turnips, standing and being on certain land. Second count, for crops of turnips bargained and sold, etc., and the usual money-counts. Plea, general issue. At the trial before WOOD, B., at the last assizes for the county of Surry, the only question was, whether there was a sufficient contract in writing to satisfy the statute of frauds. It appeared that the contract given in evidence was the book in which the plaintiff himself had written down the different biddings opposite to the lots, and which book had been duly stamped. The learned Judge directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter a nonsuit. *Marryat*, in last Michaelmas Term, obtained a rule *nisi* for that purpose, and cited Wright *v.* Dannah, 2 Camp. 203.

Gurney and *Abraham* now showed cause. This was no interest in land; for the turnips having ceased to grow, the land merely was a warehouse for them. But even if this be not so, the book is sufficient to take the case out of the statute. For the plaintiff may be considered as the agent of both himself and the defendant for the purpose of reducing the contract into writing. The case of Wright *v.* Dannah is distinguishable. There the party who wrote the memorandum was the person who made the sale for his own benefit. Here it is the case of an auctioneer, who has no personal interest in the transaction.

ABBOTT, C. J. The most favorable way for the plaintiff is to treat the question as a case of goods sold and delivered; and then, the goods being above the price of £10, the case will fall within the 17th section of the statute of frauds, which requires some note or memorandum in writing of the bargain, to be made and signed by the parties to be charged by it, or their agents, thereunto lawfully authorized. Now, the question is, whether the writing down the defendant's name by the plaintiff, with the authority of the defendant, be in law a signing by the defendant's agent. In general, an auctioneer may be considered as the agent and witness of both parties. But the difficulty arises, in this case, from the auctioneer suing as one of the contracting parties. The case of Wright *v.* Dannah seems to me to be in point, and fortifies the conclusion at which I have arrived, viz., that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record.

Rule absolute.

BIRD *v.* BOULTER.

KING'S BENCH. 1833.

[4 *B. & Ad.* 443.]

ASSUMPSIT for goods sold and delivered, and goods bargained and sold. Plea, the general issue. At the trial before LITTLEDALE, J., at the Hereford Spring Assizes, 1832, it appeared that the goods in question (wheat, the property of one Smith) were a lot sold at an auction, and knocked down to the defendant by the plaintiff, who was the auctioneer, at a price exceeding £10. The course pursued at this sale was, that the parties as usual signified their biddings to the auctioneer, who repeated them aloud; and when the hammer fell, one Pitt, who attended as the auctioneer's clerk, called out the name of the purchaser, and, if the party assented, made an entry accordingly in the sale-book. In the present instance, the auctioneer having named the defendant as the purchaser, Pitt said to him, "Mr. Boulter, it is your wheat;" the defendant nodded, and Pitt made the entry in his sight, he being then within the distance of three yards. The question was, whether a note or memorandum of the bargain had been made, pursuant to 29 Car. 2, c. 3, s. 17, by the party to be charged, or his agent thereunto lawfully authorized. A verdict was taken for the plaintiff, and leave given to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

The *Solicitor-General* (with whom was Whately) now showed cause. It is still, perhaps, *vexata quæstio*, whether sales by auction are within the seventeenth section of the statute of frauds at all, but see Kenworthy *v.* Schofield, 2 B. & C. 945; but it is not necessary to discuss that point. The objection taken on the other side was, that under the seventeenth section, one contracting party cannot constitute the other his agent, to sign the memorandum (which, it was said, was the effect of the present transaction); and Wright *v.* Dannah, 2 Campb. 203, and Farebrother *v.* Simmons, 5 B. & A. 333, were cited. In the first of those cases, Lord ELLENBOROUGH held, that the agent who signed the memorandum must be a third person, and not one of the contracting parties; and, in the other, ABBOTT, C. J., referring to Wright *v.* Dannah, held that an auctioneer's signature was not sufficient, where he sued as one of the parties to the contract. But the doctrine of these cases is not borne out by the words of the statute; and, at common law, there is nothing to prevent one contracting party from being the agent of the other; an obligor, for instance, from giving an obligee a power of attorney to execute a bond for him; a lessee from executing a lease as attorney of the lessor; a party from accepting a bill by procuration, payable to his own order; assuming the authority in each case to be complete, which would be matter of evidence. It was admitted here that Smith, the owner of the goods, might have maintained the action. But the defendant is either bound by the contract originally, or not bound; if he is bound, it does not matter by whom the action is brought, so that it is a party entitled to enforce the contract by action; and this was the view taken by the learned Judge at the trial. But there is no need to contest the cases cited. Here the memorandum was not signed by the auctioneer, who sues, but by another party, Pitt, who signed the contract by the defendant's immediate authority. If it is rightly held that a contracting party cannot be the agent to sign under section 17, that restriction will surely not be extended to his clerk. The court here called upon

Ludlow, Serjeant, and *Justice*, *contra*. To decide in favor of the plaintiff, the court must overrule Farebrother *v.* Simmons, 5 B. & A. 333. It is not disputed that, if Smith had sued, an entry by the auctioneer would have been a sufficient memorandum to bind the purchaser; so also would an entry by his clerk. In Henderson *v.* Barnewall, 1 Y. & J. 389, HULLOCK, B., observed that "an auctioneer's clerk, who writes down the name of the buyer in his presence, is the agent of both parties." But then, whether the auctioneer or the clerk sign, the same objection arises, that the memorandum is signed by one of the contracting parties, who is plaintiff in the suit; for the clerk's signature is that of his master. [LITTLEDALE, J. Then you would say that an auctioneer can, in no case, bring an action like this in his own name.] He is not obliged to sue; the vendor may. If the auctioneer makes himself the plaintiff, he must take the consequent disadvantages. [TAUNTON, J. May not the vendor have two agents; one to extol the commodity, the other to do the mechanical work of making the memorandum in the sale-book?] The latter is an essential part of the auctioneer's duty; the clerk, in doing it, represents him; and it was proved in this case that Pitt was the clerk and servant of Bird. His receipt for money would have been that of Bird, and would have charged Bird, and not Pitt himself. Edden *v.* Read, 3 Camp. 339. The auctioneer, in this case, on knocking down the lot, says, "It is Mr. Boulter's" (the defendant); and the clerk writes; that is, in effect, that the auctioneer writes by the hand of his clerk. If not, where is the memorandum by an agent lawfully authorized? for there was no attempt at the trial to establish a distinct agency in the clerk. And if the signature is to be made available as that of the auctioneer given by the hand of his clerk, Wright *v.* Dannah, 2 Camp. 203, and Farebrother *v.* Simmons, 5 B. & A. 333, apply. [PATTESON, J. In Blore *v.* Sutton, 3 Mer. 237, the signature of an agent's clerk acting for and under the direction of the agent, in a case within sect. 4 of the statute, was held not to be a memorandum by the authorized agent of the principal.] The dictum of HULLOCK, B., in Henderson *v.* Barnewall, 1 Y. & J. 389, contradicts this. [PATTESON, J. That was not called for by the case before the court.] In a sale by auction the knocking down constitutes the contract; the entry is a requisite superadded by the statute, but it is not a distinct transaction.

[LITTLEDALE, J. May it not be said that the clerk is constituted a deputy by all the room?] He goes to the sale in a definite character, hired to act for a particular master; he could not sue any other person for work and labor; and the auctioneer might sue for labor done by his clerk. The clerk acts as a mere automaton under the direction of the auctioneer.

DENMAN, C. J. I think this case is distinguishable from Wright *v.* Dannah, 2 Camp. 203, and Farebrother *v.* Simmons, 5 B. & A. 333; and it appears to me that the clerk was not acting merely as an automaton, but as a person known to all engaged in the sale, and employed by any who told him to put down his name. Without, therefore, interfering with the cases that have been cited, I think this rule must be discharged.

LITTLEDALE, J. With respect to the cases relied upon in support of the rule, there is certainly a difficulty in saying that a purchaser shall be bound by a contract or not, as the action is brought by one party or another. It is, indeed, irregular that the real buyer or real seller should make the other party his agent to sign a memorandum under the statute; but when that is done through a third person the objection is removed. An auctioneer is enabled by law to sue the purchaser, but, according to the rule insisted upon for the defendant, an action of this kind could not be maintained by the auctioneer. I think that a clerk employed as Pitt was in this case, must, in an action brought by the auctioneer, be considered as his agent for the purpose of taking down the names, and also as the agent of the several persons in the room for the same purpose, and to prevent the necessity of each purchaser coming to the table to make the entry for himself.

TAUNTON, J. I very much agree with my brother LITTLEDALE as to the difficulty in Farebrother *v.* Simmons, 5 B. & A. 333. But there is no necessity to overrule that case. The Chief Justice there says, in the close of his judgment, "Wright *v.* Dannah fortifies the conclusion at which I have arrived, viz., that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party on the record." It is a sufficient distinction between that case and this, that in the former the auctioneer, whose signature was relied upon, was the party suing; here the signature is by a third person. I would, however, go farther than this. Under the circumstances, I think Pitt may be considered to have been the agent of the vendor. It is not necessary to suppose that the vendor rested a particular confidence in the auctioneer for the purpose of putting down the names in the sale-book. He may be taken to have constituted that person his agent for the making of such entries, whom the auctioneer might choose to appoint. If so, Pitt was agent for the vendor, and also for the persons in the room who saw him acting as he did under the auctioneer, and by their acquiescence constituted him their agent for the business which they saw him performing. At all events he is a third person, and not a contracting party on the record.

Patteson, J. It is not necessary here to overrule Farebrother *v.* Simmons, 5 B. & A. 333. It may be correct to say, as there laid down, that the signature must be by a third person, and not by a contracting party on the record. Here it was so. According to the evidence, Pitt was seen by all the parties at the sale making the entries in the sale-book; it was inconvenient that each purchaser should come to the table for that purpose, and, by nodding as the names were called, they authorized him to act as he did. *Rule discharged.*

SECTION III.

Who can be a Principal.

(*A*) General Principles.

STEAD *v.* THORNTON.

King's Bench, 1832.

[3 *B. & Ad.* 357, *n.* (*a*).]

Assumpsit for money had and received. At the trial before Parke, J., at the Yorkshire Lent assizes, 1831, it appeared that the money in question was part of the bankrupt's estate, and had been received by the defendant in the capacity, as it was alleged, of agent to his brother, who was assignee of the bankrupt, but who became insane, and was so during the whole time when the money was received. He was afterwards removed, and the present assignee, the plaintiff, appointed in his stead. At the trial it was contended that the money having been received by the defendant as agent for his brother, the late assignee, there was no privity of contract between the parties to this action, that it ought to have been brought against the representatives of the late assignee, and that the defendant was answerable to them alone. The learned judge directed a nonsuit, with leave to move to enter a verdict for the plaintiff. A rule *nisi* having been obtained accordingly,

John Williams and *Starkie* now showed cause, and restated the ground of nonsuit. The imbecility of the former assignee makes no difference; he was assignee in point of law till removed, and the defendant would have been liable in an action brought by him for the money received on account of the estate. The assignee's want of intellect would have been no defence to such an action against his agent. The defendant then continues to be legally liable for this money to the representatives of the late assignee, and therefore no privity of contract can be raised between the defendant and the new assignee. Sect. 66 of the bankrupt act, 6 G. 4. c. 16, applies only to debts due to the bankrupt at the time of the fresh assignment; here the debt was not due to the bankrupt, but to the former assignee.

F. Pollock (and *Alexander* was with him), *contra.* The former assignee having been insane, the defendant must be taken to have received the money on his own responsibility, and not as agent. Where a person receives money with knowledge that another party is or will, under certain circumstances, be entitled to it, there is sufficient privity to make the receiver liable at the suit of such other party. Littlewood *v.* Williams, 1 Marsh. 589; 6 Taunt. 277. The argument on the other side would introduce a circuity of action: a new assignee would have to sue the old, and he to sue the agent, who had received money and not paid it over. Such agent cannot indeed be liable to two sets of assignees at the same time, but he may be to both successively. De Cosson *v.* Vaughan, 10 East, 61, shows that under the former bankrupt acts a new assignee might recover in debt upon a judgment recovered on behalf of the bankrupt's estate by an assignee who had been removed; and that case is applicable here. (Here he was stopped by the court.)

Lord Tenterden, C. J. We are not called on to decide how the case would be if the defendant had received this money as the duly constituted agent of the former assignee. He could not be so, that assignee having been incompetent to appoint any agent. He is, therefore, in the situation of any other person who has received and has in his hands a part of the bankrupt's estate, and is undoubtedly liable to those who represent that estate.

Parke, J. If the receipt of this money had taken place under such circumstances that the former assignee could have been charged with it, as he might if he had received it by his agent or clerk, I should have thought this action not maintainable. But here the receipt was that of the defendant alone, who stood in the situation of a mere stranger, and held the money subject to the claim of the assignees who might be afterwards appointed.

Patteson, J. It is unnecessary to say what might have been the case if the defendant had received the money as agent to his brother. It is sufficient that he did not stand in that situation, the brother being incapable of having an agent.

Rule absolute.[1]

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[1] With this case compare Read *v.* Legard, 6 Ex. 636 (1851), and Debenham *v.* Mellon, 6 App. Cas. 24 (1880).—Ed.

SECTION III. (*continued*).

(*B*) INFANCY.

BARTHOLOMEW *v.* DIGHTON.

QUEEN'S BENCH, 1595–6 AND 1597.

[*Cro. Eliz.* 424.]

ERROR upon a judgment in the Common Pleas, because the plaintiff, being an infant, sued by attorney and recovered, whereas he ought to have sued by his guardian. But the Court upon the motion held that in regard the plaintiff hath recovered, and it is for his benefit, and no prejudice by his appearance by attorney, that it should not be assigned for error: but they would advise. And afterward, Pasch. 39 Eliz., being moved, it was held clearly to be error. And the judgment was reversed for that cause.

WHITTINGHAM'S CASE.

STAR CHAMBER, 1602–3.

[8 *Co.* 42 *b*]

THE case in the Star Chamber, Hil. 45 Eliz., was, that Richard Whittingham was seised of three messuages, &c., in Crayford, in the county of Kent, held of the Queen in socage, as of the manor of Newberry in Crayford in fee; and by his will in writing devised them to Prudence, his bastard daughter, and her heirs, and died. Prudence, being within age of 21 years, by deed, as was pretended, did enfeoff Stephens and others of the said tenements in fee, and died within age without issue; and whether this feoffment should prevent the Queen of her escheat was the question. And, on consideration had with the two Chief Justices, it was resolved that if there be lord and infant-tenant, and the infant makes a feoffment in fee, and executes it by livery of seisin by his own hands, and afterwards dies without heir, that the lord should not take benefit of any escheat in that case.[1] . . .

But afterwards it appeared in the principal case, that the said supposed feoffment of the said Prudence was executed by letter of attorney made by the said Prudence; wherefore it was resolved that it was void, and that the land did escheat to the Queen.

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[1] The report is shortened by giving only the passage as to the power of attorney. — ED.

RAMES *v.* MACHIN.

COMMON PLEAS. ABOUT 1608.

[*Noy*, 130.]

IN an Ejectione firm., by the Court, That a lease for years for an infant to try the title, is good enough, because it is for his advantage. Note 21 H. 6. 31, letter of attorney by an infant to receive livery and seisin for him.[1]

LESSEE OF LAWRENCE *v.* McARTER.

SUPREME COURT OF OHIO. 1840.

[10 *Ohio*, 37.]

THIS is a motion to set aside a verdict, taken for the defendant, in an action of Ejectment, in the county of Knox.

William Barton, Sen., was once the owner of the land.

He died, and his will was proved in 1802. By it he devised the land "to my four sons, Gilbert, William, Joseph, and George, or the survivors of them, and their heirs and assigns, to be equally divided among them when the youngest attains the age of twenty-one years."

All the sons survived the testator.

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[1] "And that which is to his advantage an infant can do: for if a feoffment be made to an infant who makes a letter of attorney to another person to take livery of seisin for him, this livery of seisin is well made, and lawfully; the cause is because this is for his advantage. And the law is the same if an infant make me the bailiff of his manor, and to have the care and administration of his goods; if afterwards he will bring action of trespass against me, I plead the aforesaid matter in bar well enough, and he can have against me a writ of account, which will be to his advantage." *Per* AYSCOGHE, J., in Botteler *v.* Newport, Y. B. 21 H. VI. 31 (1442–3).

"All such gifts, grants, or deeds made by an infant, as do not take effect by delivery of his hand are void. But all gifts, grants, or deeds made by an infant by matter in deed, or in writing, which take effect by delivery of his own hand, are voidable by himself, and his heirs, and by those who have his estate." Perkins' Profitable Book, sec. 12 (1532).

"The words 'which do take effect' are an essential part of the definition; and exclude letters of attorney, or deeds which delegate a mere power and convey no interest. . . .

"The distinction between the deeds of femes covert and of infants is important: the first are void; the second voidable. . . .

"Powers of attorney are an exception to the general rule as to deeds; and a power to receive seisin is an exception to that. The end of the privilege is to protect infants. To that object, therefore, all the rules and their exceptions must be directed." *Per* Lord MANSFIELD, C. J., in Zouch *v.* Parsons, 3 Burr. 1794, 1804, 1805, 1808 (1765). — ED.

George, the youngest son, attained twenty-one years in 1816.

Gilbert died in 1812, intestate and without issue.

William died prior to 1812, and left a son William and a daughter, his heirs-at-law.

Joseph was living when George arrived at full age, and the defendant now holds his interest.

In 1815, before he came of age, George gave to his brother Joseph a letter of attorney, to sell his lands, and they have been sold under it, and the defendant claims the title.

In 1835, George conveyed to the plaintiff.

In the same year William, the grandson, conveyed to the plaintiff.

M. A. Sayre and *R. C. Hurd*, for the plaintiff.

1. The letter of attorney from George Barton is void, because at the time of giving it he was an infant. There may be doubts whether an infant can make a valid deed of bargain and sale, or of lease and release, but a letter of attorney, conveying no present interest, is spoken of in all the books as a mere nullity. Zouch *v.* Parsons, 3 Burr. 1804; Saunderson *v.* Marr, 1 H. Bl. 75; Stafford *v.* Roof, 9 Cowen, 626; 2 Kent Com. 234, 236; Fonda *v.* Van Horne, 15 Wend. 631; 3 Bac. Ab. 598; 2 Roll. Ab. 2; Noy, 130; Palm. 237; Roll. Rep. 242; 8 Co. 45 *a*.

An act done by another for an infant, which act must necessarily be by letter of attorney under seal, is absolutely void. Whitney *v.* Dutch, 14 Mass. 461.

A letter of attorney given by an infant is absolutely void. Pyle *v.* Cravens, 4 Littell, 18; Burton on Real Property, 69; Law Library No. 67; 1 Story's Eq. 247; Bingham on Infancy, 34; Story's Agency, 7.

H. Stanbery, *C. Delano*, and *H. B. Curtis*, for the defendant.

1. There is scarcely any question more vexed than whether the acts of infants are void or voidable.

This court was pressed with the difficulty arising from the contrariety of the cases, in Drake *v.* Ramsay, 5 Ohio Rep. 251, but settled no general rule.

The older cases seem inclined to make the acts of infants void rather than voidable, and though no recent case is found directly overruling these decisions, yet the rule of late recognized is based on a different principle, holding the acts of an infant void where they are to his prejudice, but voidable where they may be beneficial to him; and leaving their ratification, or disaffirmance, to his mature judgment, at full age. 2 Kent's Com. 236; Oliver *v.* Houdlett, 13 Mass. 239; Kline *v.* Beebe, 6 Conn. 503.

In Vin. Ab. 384, it is said, If a man makes a deed of feoffment to an infant, and the infant makes a letter of attorney to another to take livery for him, this is good, because it is for his benefit. S. P. 1 Roll. Ab. 730; Whitney *v.* Dutch, 14 Mass. 457.

Lane, C. J.[1] The effect of this interpretation is, that William Barton, the grandson, took one half the share of his father who held one fourth the land under the will, and one sixteenth as the heir of his uncle Gilbert, which is now the property of the plaintiff, and is five thirty-seconds of the entire estate.

The same rule of construction gave to George Barton ten thirty-seconds, which is likewise held by the plaintiff, under a deed from him, unless George was divested of his title by the sale under the letters of attorney, given, in his minority, to his brother Joseph.

It is claimed by the plaintiff that these letters of attorney are void, incapable of ratification, and never well executed.

We are then led to the oft discussed, and yet not settled question, as to what acts of an infant are void and what voidable. No accurate test has yet been propounded to determine this important point, and the authorities seem rather to decide individual cases than to give a comprehensive and intelligible rule. Yet in all, and from the earliest, we find it laid down that deeds which do not derive their efficacy from delivery only are void; and it has been held in many cases, and, as far as I can learn, without a dissenting opinion, or a contradictory authority, that letters of attorney, conveying no present interest, are absolutely null.

It would be a bold act to attempt to withstand this body of precedent, and we cannot but recognize it as destructive of that part of the defendant's title.

It is therefore unnecessary to consider any further questions. The plaintiff is entitled to fifteen thirty-seconds of the land.

The defendant is to have the benefit of the law for the relief of occupants. *Motion granted.*

WILLIAM D. WAPLES *v.* RICHARD F. HASTINGS.

Superior Court of Delaware. 1842.

[3 *Harrington*, 403.]

Judgment confessed on bond and warrant of attorney, dated 18th of February, 1836. On the application of defendant, rule to show cause why the judgment should not be vacated, on the ground that the defendant was an infant at the date of the bond and warrant of attorney.

At the hearing it appeared that the defendant was born on the 24th of April, 1816. He was acting as a man of full age in 1836, doing business as a partner with his father; generally understood to be of age, and voted at the general election in that year. In March, 1840, he executed a paper under hand and seal, expressly to recognize and confirm this bond and warrant of attorney given to William D. Waples, in February, 1836. The judgment was confessed on the 23d of February, 1836.

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[1] The report has been abbreviated by omitting from the arguments and from the opinion passages as to the nature of the estate transmitted to the sons by the will. — Ed.

Houston, in support of the rule.

Ridgely, *contra*.

Bayard replied.

BY THE COURT. The bond and warrant of attorney of an infant are void. 3 Com. Dig., *Enfant*, B, Co. Lit. 172 *a*.

The court, on motion, will set aside a judgment on a warrant of attorney executed by an infant. 3 Com. Dig., *Enfant*, B; 2 W. Bl. 1133; 1 H. Bl. 75, Saunderson *v.* Marr.

Even if the contract could be confirmed after full age, it would not set up the warrant of attorney. 2 B. & C. 824, Thornton *v.* Illingworth.

The bond and warrant of attorney failing, the judgment is without authority and must be vacated.

The cases of suits against femes covert as femes sole have only decided that the court will not permit the defendant to set up her coverture in a summary way, but put her to plead the coverture.

Rule absolute.[1]

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[1] "An act which an infant is under a legal incapacity to perform is the appointment of an attorney, or, in fact, an agent of any kind. And this rule depends upon reasoning which, if somewhat refined, is yet perhaps well founded. The constituting of an attorney by one whose acts are in their nature voidable is repugnant and impossible, for it is imparting a right which the principal does not possess, — that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, the power of attorney is not operative according to its terms; if they are binding upon the infant, then he has done through the agency of another what he could not have done directly, — binding acts. The fundamental principle of law in regard to infants requires that the infant should have the power of affirming such acts done by the attorney as he chooses, and avoiding others, at his option; but this involves an immediate contradiction, for to possess the right of availing himself of any of the acts, he must ratify the power of attorney, and if he ratifies the power, all that was done under it is confirmed. If he affirms part of a transaction, he at once confirms the power, and thereby, against his intention, affirms the whole transaction. Such personal and discretionary legal capacity as an infant is vested with is, therefore, in its nature, incapable of delegation; and the rule that an infant cannot make an attorney is, perhaps, not an arbitrary or accidental exception to a principle, but a direct, logical necessity of that principle. But if the considerations suggested as the foundation of this rule be not satisfactory, the rule itself is established by a conclusive weight of authority." 1 American Leading Cases (5th ed.), 247.

For a discussion of the distinction between void and voidable, see The State *v.* Richmond, 26 N. H. 232, 237-239 (1853), *per* Bell, J., and Markby's Elements of Law §§ 274, 649-652, 764. — ED.

HARDY *v.* WATERS.

SUPREME JUDICIAL COURT OF MAINE. 1853.

[38 *Me.* 450.]

ON exceptions from *Nisi Prius*, HATHAWAY, J., presiding.

Assumpsit, on a promissory note, payable to a *minor*, who was under guardianship. The note was indorsed to the plaintiff, by a brother of the payee, also a minor, being authorized by the payee to write his name thereon. Since this suit was commenced, the guardian had approved of the transfer to plaintiff.

The defence was that the note had not been legally negotiated, and therefore the plaintiff could not maintain this action. The court ruled otherwise, and the plaintiff recovered the amount of the note. Defendant excepted.

Cutting, for defendant.

It is not contended that an infant payee may not indorse and transfer a note payable to him or his order, as was decided in Nightingale *v.* Withington, 15 Mass. 272, or make a ratification after becoming of age, as in Whitney *v.* Dutch, 14 Mass. 457.

But it is denied that an infant under guardianship has such authority; or having such authority, can delegate to another; or if to another, an infant.

It is settled beyond controversy that an infant cannot delegate authority to an agent or attorney to transact business or appear in his behalf.

An infant is also incapable of assuming any power as an agent or attorney. More especially if the infant delegating such power be under guardianship. If a decision adverse to these propositions be pronounced by this court, it would overturn all the elementary law on this subject.

"The assignment of a promissory note by an attorney in fact of an infant obligor is void, though the infant be present at the assignment." Semple *v.* Morrison, 7 Monroe (Kentucky), 298, cited in 2 Sup. U. S. Dig. 159.

The consent of the guardian, since the commencement of the suit, cannot affect the rights of the parties as they existed when the suit was instituted. Ford *v.* Phillips, 1 Pick. 202; Thing *v.* Libbey. 16 Maine, 55.

Peters, for plaintiff, cited 15 Mass. before cited; 22 Pick. 540; Nightingale *v.* Withington, 15 Mass. 272; 2 Kent's Com. 235; 1 N. H. 73; 10 Peters, 71; 7 Cowen, 179; 1 Met. 559; Whitney *v.* Dutch & *al.* 14 Mass. 457.

SHEPLEY, C. J. — It is admitted that an infant may transfer a promissory note payable to himself by indorsement. It is denied that he can confer upon another the power to do it for him, the reason is, that an indorsement by an infant is voidable; while his act conferring power upon another to do it for him is void.

If the act of transfer in this case be voidable only, it is to be regarded as valid until avoided; and it can be avoided only by the infant or his heir or personal representative. If the power to indorse by another was void, it could not be ratified, and the plaintiff could acquire no legal interest in the note; and the approval of the guardian since the commencement of the suit cannot aid him.

In the case of Whitney *v.* Dutch, 14 Mass. 457, the right of an infant to empower another, otherwise than by an instrument under seal, to do an act for him. which he might lawfully perform himself, was fully considered. It was admitted, if the court were confined to the letter of the authorities, it must conclude, that the act could not be performed by delegated power.

Considering, that the object of the law was to protect infants from injury, and that this would be fully effected by regarding contracts so entered into as voidable and not void, the court came to the conclusion that there could be no difference, upon principle, between the ratification of a contract made by an infant and one made through the intervention of another person acting under parol authority from him.

Changes in the law respecting negotiable paper are undesirable, and should not be made without strong reasons for them. The decision in that State was made, and the rule of law established, while this State composed a part of it. It should not, after it has been so long received as the law, be abrogated merely because other highly respectable courts have come to a different conclusion, especially when it is not perceived, that it has been, or is likely to be productive of any injustice or mischief. *Exceptions overruled.*

TENNEY, APPLETON, and RICE, JJ., concurred.

SECTION III. (*continued*).

(*C*) COVERTURE.

OULDS AND OTHERS *v.* SANSOM.

COMMON PLEAS. 1810.

[3 *Taunton*, 261.]

THIS was a writ of right. The demandants, three coheiresses, *femes covert*, suing without their husbands, by their attorney, demanded certain premises in Leighton, Essex. They counted upon the seisin of Mary Lewis, and averred that upon her death, for that she died without issue of her body, the right descended to John Spriggs, father of the demandants, who was cousin and heir of Mary Lewis, but only argumentatively, whereas the cousinage of the said John to the said Mary ought to have been directly and expressly shown by the count.

Best, Serjt., in support of the demurrer, took a preliminary objection, that *femes covert* could not make an attorney.

Shepherd, Serjt., admitted he could not answer this objection.

LAWRENCE, J. It is matter in abatement of the writ. The judgment must be *quod breve cassetur.*

Judgment for the tenant.

SUMNER *v.* CONANT.

SUPREME COURT OF VERMONT. 1836.

[10 *Vt.* 9.]

EJECTMENT, to recover a lot of land in Barnard, numbered 165. The plaintiff claimed to derive title from Benning Wentworth, as one of the original grantees of said town of Barnard. On the trial of the cause, the plaintiff gave in evidence a copy of the charter of the town of Barnard, which grants the town in sixty-nine equal shares to the persons therein named. After naming other grantees, the shares of Gov. Wentworth are mentioned as follows: "His Excellency Benning Wentworth, Esq., a tract as marked in the plan, 'B. W.' to contain five hundred acres, which is to be accounted two of the within shares." The shares of Gov. Wentworth were not designated on the plan by the letters "B. W." being marked thereon. The plaintiff also offered in evidence a copy of the will of Benning Wentworth, who devised the whole of his estate, both real and personal, to Martha Wentworth, his wife. A copy of the will of the said Martha Wentworth, who devised all her real, personal, and mixed estate to her daughter, Martha Wentworth, wife of John Wentworth, in tail-general, with power to sell and dispose of such part of the personal or real estate as might be best spared, for her and her family's comfortable support, and to do good to the poor and needy. A power of attorney from John Wentworth and Martha, his wife, to Isaac Shepherd, authorizing the said Shepherd, in the name of the said John and Martha, "to prosecute, sue for, and recover all and every the right and rights commonly called the Governor's right, or farm, situate and being in the State of Vermont, in every township in said State, containing five hundred acres, more or less, and reserved to His Excellency, the late Governor Benning Wentworth" and also empowering the said Shepherd "to convey all and every such right or right or rights in said State of Vermont, in our name, and to give deeds of quit claim to purchasers of the same." The plaintiff also offered a deed from the said John Wentworth and Martha, his wife, executed by said Shepherd as their attorney, to Henry A.

Randall, conveying (among other lands) Gov. Wentworth's two rights in Barnard. Also, a power of attorney from said Randall to said Shepherd empowering the said Shepherd, as the attorney of said Randall, to sell and convey, in the name of said Randall, by quit-claim deed, any or all of the said Randall's lands, and a deed from said Randall, executed by said Shepherd, as his attorney, to the plaintiff, conveying (among other rights) Gov. Wentworth's two rights in Barnard. Also, a copy from the proprietors' records of said town, which show that a meeting was called "to see if the proprietors will rectify any mistakes, if there should be any found, in the proprietors' records," "to see if the proprietors will finish laying out and dividing the remainder of the undivided lands in said Barnard," and for other purposes, as specified in the warning; that the proprietors met on the 6th of October, 1795, and chose "a committee of three to look into the proprietors' records and state the mistakes and make report at the next meeting;" that the meeting adjourned to the 14th of October, 1795; that the proprietors met pursuant to the adjournment, and the committee, appointed at the previous meeting, reported that on examination of the records they found that, at a former meeting of the proprietors, a division of lands in said Barnard had been made, and the lots on which the settlers lived were voted to them in lieu of the lots by them drafted, and the remainder of said division was made by draft; that the clerk, through mistake, entered on the records all the voted and drafted lands, as voted, making no distinction, and that they had "entered the voted and the drafted lands as follows: Governor's two shares, drafted, 166, 169, 265, 165, 168, 264," which report the meeting voted to accept.

The several deeds and letters of attorney above set forth were duly executed and acknowledged, and the magistrate who took the acknowledgment of Martha Wentworth certified that she was examined separate and apart from her husband. The defendant objected to the introduction of all the foregoing evidence, except the copy of the charter, and the several wills of Benning Wentworth, but the court overruled the objections, and admitted the evidence. The plaintiff also gave evidence, tending to prove the marriage of Michael Wentworth to the said Martha Wentworth first named, on the 19th December, 1770; and also, of the said John Wentworth to the said Martha Wentworth, secondly above named, on the 7th January, 1802, and that the said Benning Wentworth died, prior to the 31st day of October, 1770, and that the said John Wentworth died on the 3d day of June, 1831; and it was conceded that the defendant was in possession of the land in controversy. On the trial, the counsel for the defendant contended and requested the court to charge the jury: 1. That by the terms of the charter, if Benning Wentworth acquired any rights under such charter, he acquired a right, in severalty, to 500 acres of land in one separate and distinct tract, and not a right to five or six different tracts located in different parts of the town, and that it was incumbent on the plaintiff to show the land sued for to be a part of said tract; 2. That, inasmuch as the tract attempted to be granted by said charter to said Benning Wentworth was not therein described with such certainty that it could be known and distinguished from the lands granted by said charter to the other grantees therein named, said grant was void as to said Wentworth; 3. That the said Benning Wentworth never had any legal interest in the land in question, bv virtue of said charter; 4. That neither the plaintiff nor any of the persons from or through whom his pretended title passed ever had any legal right or interest to the land in question, by virtue of any division of the lands in Barnard, shown by the evidence in the case to have been made by the proprietors of said town. But the court refused so to charge the jury, but did charge them to the contrary thereof. Whereupon the jury returned a verdict for the plaintiff, and the court rendered judgment thereon; to which decision and charge the defendant excepted.

Aikens & Edgerton, for the defendant.

T. Hutchinson, for plaintiff.

The opinion of the court was delivered by

ROYCE, J.[1] The case shows that all the right of Benning Wentworth came by devise to Martha, the wife of John Wentworth, about 1803; and the only remaining question is, whether the plaintiff has acquired her title. This depends on the validity of the power of attorney, executed by her and her husband to Shepherd, in October, A. D. 1808. The power was undoubtedly good for all the purposes mentioned in it, except that of conveying lands; because the husband alone was competent to authorize all necessary acts to accomplish those purposes. And whether it was also good for the purpose of passing her title to the lands is a question of great importance, and one which has never been decided in this court to our knowledge.

At common law, a woman under coverture could make no conveyance of her lands, except through the agency of a court of record. She could neither convey directly by deed, nor authorize any one to convey for her. All her present right to convey by deed is therefore conferred by statute. The requisites of a common deed of conveyance are prescribed by the fifth section of the act regulating conveyances. It must be "signed and sealed by the party having good and lawful authority thereunto," and "signed by two or more witnesses, &c." The ninth section contemplates that such deed may be executed by attorney, and discloses some of the requisites of the power of attorney. The words are, "such power having been signed, sealed, and acknowledged before a justice of the peace, by the party having lawful right to make the same." Thus far the statute is applicable to all persons having a legal right to act under it, whether by conveying their lands directly, or empowering agents to convey. No personal disabilities are as yet mentioned, or provided for. But the twelfth section relates exclusively to the case of a

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[1] The opinion is abridged by omitting paragraphs not bearing upon the power of attorney. — ED.

feme covert attempting to convey her lands by deed. The right is there given or recognized to convey "by deed of herself and baron;" and as a protection against any improper influence of the husband, her separate examination and acknowledgment are made necessary, and required to be certified upon the deed. The question now presents itself, whether this deed may not be executed through the instrumentality of a third person. Though it is generally true that what a person has a right to do in his own affairs, he may authorize another to do for him, yet this is by no means universally true. An infant may execute and deliver a deed of his land, which will be effectual in law, unless he afterwards elects to avoid it; while his authority to another to deed for him, is merely void. Reeve's D. R. 251. The disability of a *feme covert* is not founded, like that of an infant, upon a supposed want of discretion, but results from a legal subjection to her husband, which is presumed to deprive her of that freedom of will which is essential to the validity of contracts. And that this disability emphatically applies to the delegation of powers is shown by the familiar case of an attorney to defend a suit, whom, it is everywhere said, the wife cannot appoint. It is contended, however, that in this instance, the statute has removed her disability. This proposition is defended on two grounds: 1st. That the power to convey, and the deed executed by the agent, being parts of one entire conveyance, constitute the deed which the statute has authorized; 2d. That, the right to convey being expressly given, the power to create an intermediate agency should be upheld, as one of the necessary, or usual, means for exercising that right. The first ground here taken would lead to a very free and loose construction of the statute. The power of attorney is strictly no part of the conveyance, but a mere qualification of the person who is to make it. Much less is it the deed of conveyance itself, of which alone the statute speaks. It is known that the power and deed are distinct instruments, not merely executed at different times, but acknowledged by different persons, — the power by the party making it, and the deed by the agent who executes it. Such were the facts in this case. And how can it be maintained, except upon a subtle and strained construction of the act, that Martha Wentworth has ever executed and acknowledged the deed which professes to convey her estate? In our opinion, the terms of the statute do not justify a conclusion so wide of their apparent import.

The remaining ground is open to most of the observations already made. I shall suggest but a simple additional objection, which consists in the inability of the wife to revoke a power of this description, without the concurrence of her husband. Whether this consideration alone would be fatal to the power in every case, it is certainly of great and decisive force in the present. The power in question extended to all the rights granted, or reserved, to Gov. Wentworth throughout this State; the property to be affected was consequently large, and the business of the agency was doubtless expected to continue through a course of years. To sustain the power, under such circumstances, would be to place the valuable estate of a wife beyond her own control, and not unfrequently subject it to the waste of a faithless agent, or an unwise and improvident husband.

Judgment of the County Court reversed, and new trial granted.[1]

ADAM HENCHMAN *v.* JOSEPH ROBERTS AND ELIZABETH ROBERTS.

SUPERIOR COURT OF DELAWARE. 1836.

[2 *Harrington*, 74.]

RULE to show cause why a judgment entered against husband and wife should not be set aside, because the warrant of attorney was given by the wife after marriage.

The court said that the judgment against the wife was void, being confessed on a void authority, as a married woman cannot execute a letter of attorney; and the judgment, being a joint one, must be set aside as against both. *Rule absolute.*[2]

Wales, for plaintiff.

Booth, for defendant.

WEISBROD *v.* THE CHICAGO & NORTH-WESTERN RAILWAY COMPANY.

SUPREME COURT OF WISCONSIN. 1864.

[18 *Wis.* 35.]

APPEAL from the Circuit Court for Winnebago County.

Ejectment, for a strip of land lying near the middle of what was commonly known as Broad Street in the city of Oshkosh. The plaintiff claimed the premises as part of lot 1, block E, and lot 26, block D, in the 2d Addition to said city. The defendant claimed to occupy and use the premises as the property of one Miller, under a license from him. The grounds upon which the parties severally rested their claims are fully and clearly stated in the second paragraph of the opinion, *infra*. In making out his chain of title to lot 26, block D, the plaintiff offered in evidence the record of a power of attorney from Arabella Crary to Leonard P. Crary, dated June 11th, 1853, and admitted that said Leonard was the husband of said Arabella at the time the instrument was executed; also the record of a warranty deed from Arabella Crary and Leonard P. Crary to the plaintiff, executed in June, 1854, by said Leonard as attorney in fact of said Arabella and for himself; but the evidence was excluded on the ground that a wife could not at that time execute a valid power of attorney to her husband, nor execute a deed by her husband as attorney.

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[1] *Accord:* Steele *v.* Lewis, 1 T. B. Mon. 48 (1824); Administrators of Earle *v.* Earle, 20 N. J. L. 347, 360 (1845); Lewis *v.* Coxe, 5 Harrington, 401 (1852); Mott *v.* Smith, 16 Cal. 533, 556–557 (1860). And see Holladay *v.* Daily, 19 Wall. 606, 609 (1873).—ED.

[2] As to the judgment against the husband, see Mendenhall *v.* Springer, 3 Harrington 87 (1840); Britton *v.* Wilder, 6 Hill, 242 (1843). — ED.

After considerable evidence had been introduced on both sides as to so much of the land in dispute as fronts lot 1, block E, the court instructed the jury, in substance, that if Miller's land included all the west half of Broad Street, and extended beyond the centre of said street, but did not extend to the east line of the street, so that a strip of land remained between the east line of the Miller purchase and the east line of Broad Street, to which Miller had no title, then his quit claim deed to the plaintiff did not convey to the latter that part of the street lying east of its centre and in front of plaintiff's lot; and if the defendant's track was constructed upon the strip so described, the plaintiff could not recover. Verdict and judgment for the defendant.

Whittemore & Weisbrod, for appellant.

M. A. Edmonds, for respondent.

By the Court, DIXON, C. J. A *feme covert* may at the common law be an attorney of another to make livery to her husband upon a feoffment; and a husband may make such livery to his wife. She may act as the agent or attorney of her husband, and as such, with his consent, bind him by her contract or other act; or she may act as the agent of another in a contract with her own husband. Story on Agency, § 7. If it is no violation of the common law principle of the unity of husband and wife for the wife to act as the agent or attorney of her husband, the conclusion would seem irresistibly to follow, that it is no infringement of the same principle to allow the husband to act as the agent of the wife in cases where by law she is *sui juris* and capable of acting for herself. At common law, the separate existence of the wife was for many purposes merged in that of the husband, and she could do no act. Incapable of acting for herself, she could not appoint another to act in her stead. Her disability was general, and hence we find no cases in the books of agency in her behalf, either by her husband or another; certainly none by her husband, unless they be some of very recent date, and which have arisen since the enactment of statutes enlarging the rights of married women, and in which the capacity of the husband to act as the agent of his wife seems rather to have been assumed than decided. Thus it will be seen from the report that it was assumed by the Court of Appeals, in Hauptman *v.* Catlin, 20 N. Y., 247, that the husband might act as the agent of his wife in transactions respecting her separate estate. Her separate property was charged in an action at law, under the lien act, upon a contract made by her husband as her agent. The opinion in the case was written by the same learned judge, whose language in White *v.* Wager, 25 N. Y., 328, is quoted by counsel for the respondent to prove that the husband cannot act as such agent. Thus, too, it was assumed by this court in Hobby *v.* The Wisconsin Bank, 17 Wis., 167. But in neither case was the capacity of the husband to act, or the power of the wife to appoint him, directly raised or discussed. The question passed off *sub silentio.* But, as we have already said, there seems on principle to be no reason to doubt the correctness of the doctrine thus assumed. The disability of the wife has in many respects been removed by statute, and she is now capable of acting not only by herself but by an agent, with no express limitation upon her power of appointment. If the doctrine of unity does not stand in the way, as it seems it cannot, then we see nothing to prevent her making her husband her agent, whenever she chooses to intrust him with the management of her affairs. It is true that the Court of Appeals held, in White *v.* Wager, that the statute does not enable the wife to convey land to her husband. It is also true that the statute does not authorize her to receive by gift, grant, etc., from her husband any real or personal property; and yet it would hardly be contended that this limitation upon her power to receive directly abrogates the common law rule that she may act as the agent of her husband in the sale and disposition of the same property to others. So too at the common law she could not take by grant or gift from her husband; still she could convey to others as his agent. The distinction arises from the inherent difference between a mere power to convey and the conveyance itself. The former is not regarded in the law as a contract, whilst the latter is. Hence a person incapable of contracting may be the donee of a power; and husband and wife, for the purpose of giving and receiving a power either to and from each other or third persons, are to be considered as if no relation of marriage existed between them. For these reasons we are of opinion that the power of attorney from Arabella Crary to her husband, and the deed from her to the plaintiff executed by her husband as her attorney in fact, should have been received in evidence.[1]

The judgment is therefore reversed, and the cause remanded for further proceedings according to law.

MORDAUNT BODINE ET AL., RESPONDENTS, *v.* MATILDA KILLEEN, APPELLANT.

COURT OF APPEALS OF NEW YORK. 1873.

[53 *N. Y.* 93.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiffs, entered upon a verdict.

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[1] A paragraph not dealing with Agency is omitted. — ED.

This was an action for goods alleged to have been sold and delivered by plaintiffs to defendant, a married woman, between May and September, 1869.

For several years prior to May 1, 1869, the defendant had carried on business on her own account at 400 Broome Street, in the city of New York, and was accustomed to purchase stock in trade of plaintiffs. Up to the early part of 1868 such purchases were made through her husband, acting as her agent. He being taken ill, she subsequently made the purchases and payments herself. On May 1, 1869, she sold out to her husband, and he opened and continued a similar business for himself in Twenty-eighth Street, and made purchases therefor of the plaintiffs upon credit.

The court charged the jury in effect that they were only to determine in this case whether notice was given plaintiffs by defendant of her retirement from business; that in case the plaintiffs had no such notice the verdict must be in their favor, to which defendant excepted; that if plaintiffs had notice of such fact or knowledge of facts sufficient to put them upon inquiry in respect thereof, and neglected to make it, the verdict must be for the defendant.

Defendant's counsel requested the court to charge the jury, that in case they were satisfied from the evidence that defendant at the time of the purchases in question was not actually engaged in business on her own account, no recovery could be had against her in this action. The court refused so to charge, and defendant excepted. The jury found a verdict in favor of the plaintiffs.

Moses Ely, for the appellant.

Cyrus Lawton, for the respondents.

ALLEN, J. With the removal of common-law disabilities from married women, corresponding liabilities have necessarily been imposed upon them. They take the civil rights and privileges conferred, subject to all the incidental and correlative burdens and obligations, and their rights and obligations are to be determined by the same rules of law and evidence by which the rights and obligations of the other sex are determined under like circumstances. To the extent, and in the matters of business in which they are by law permitted to engage, they owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. Their common-law incapacity cannot serve as a shield to protect them from the consequences of their acts, when they have statutory capacity to act.

A married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. Sherman *v.* Elder, 24 N. Y., 381. Where there is no legal capacity to contract, a party will not be estopped by falsely representing that he has capacity, that is, the incapacity is not removed by any fraudulent representation of the actor. The law will not permit one legally incapacitated to do that indirectly which he or she cannot do directly. That is especially the case in respect to infants and married women laboring under the common-law disabilities, the law imposing the disqualifications from motives of public policy, and for the safety of those regarded as weak, and needing this protection. Keen *v.* Coleman, 30 Penn., 299; Lowell *v.* Daniels, 2 Gray, 161; Goulding *v.* Davidson, 26 N. Y., 604. But the reason of the rule ceasing with the removal of the incapacity, the rule falls. In the management and control of her separate property, when acting by agents, a *feme covert* is answerable for the frauds of her agent while acting within the scope of the agency, although the fraud may be without her knowledge or assent. Baum *v.* Mullen, 47 N. Y., 577. By statute (Laws of 1860, chap. 90) a married woman may carry on any trade or business on her sole and separate account, and the earnings from her trade or business are her sole and separate property, and she may sue and be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole. She has all the legal capacity to do every act incident to the business or trade in which she may engage which a *feme sole* would have, that is, full legal capacity to transact the business, including, as incidents to it, the capacity to contract debts and incur obligations in any form, and by any means, by which others acting *sui juris* can assume responsibility.

This defendant, for many years prior to May, 1869, had been doing business in New York City as a retail grocer, buying her goods of the plaintiffs on credit. During most of the time, and until some time in the year 1868, her husband had acted as her agent in making the purchases and payments. The husband was taken ill in 1868, and from that time she made the purchases and payments to the plaintiffs, but there was no revocation of the agency of the husband. About the first of May she transferred the business to her husband, who subsequently carried it on at a different place in the same city, and bought the bills of goods for which action is brought during the month of May. The jury have found that there was no notice to the plaintiffs of the change in the business, and that they had no knowledge of it. Credit was in fact given to the defendant, and not to her husband. The plaintiffs had the right to presume that the business of the defendant, and the agency of her husband in respect to it, continued until actual notice of change in the business, and a revocation of the agency. Suffering the plaintiffs to act upon this presumption, she is estopped from alleging the contrary. She had capacity to continue the business in which she had been engaged, and whether she expressly represented to the plaintiffs that the business was still hers and her husband was her agent, or the facts were legally and naturally inferable from her acts, or her silence, is immaterial. She is bound by the appearances which she has given to the transaction, and upon the faith of which others have acted, up to the limits of her legal capacity to act. In other words, to the extent of her legal capacity, the apparent authority of the husband to act for and bind her must be taken as the real authority, so far as others have been induced to act upon it, and have parted with their property upon the faith of it. It is simply because the defendant had the power to contract the debt for which this action is brought, that she may be estopped by her acts from disputing her liability, and the existence of this capacity takes the case out of the principle of the authorities relied upon by the counsel for the appellant. This is the only question presented by the record, or urged by the appellant, although it is made the subject of several exceptions in different forms upon the trial. The case was well disposed of at the circuit.

The liability of the defendant does not depend upon the fact that she was actually carrying on a business or trade on her sole and separate account, but upon her capacity to do so, with the other circumstances establishing her liability.

The judgment must be affirmed.

All concur. *Judgment affirmed.*

SECTION IV.

What Acts can be done through an Agent.

COMBES' CASE.

COMMON PLEAS. 1613.

[9 *Co.* 75 *a.*]

IN replevin by William Atlee, against Daniel Banks and Thomas Osborn, of taking of his cattle at Harmonsworth, in a place called Walnut-tree Close, in the county of Middlesex, &c. Which plea began Trin. 8 Jac. Reg. Rot. 330. Upon the pleading, and issue joined, and special verdict given, the case was such. Thomas Combes, copyholder in fee of ten acres of pasture in H. of the manor of Harmonsworth, in the county of Middlesex, by his deed 22 November, 5 E. 6, constituted and ordained William Combes and Stephen Erlie, two copyhold tenants of the same manor, his lawful attornies, to surrender *vice & nomine suo* to the lord of the said manor, the said ten acres of pasture to the use of John Nicholas and his heirs, and afterwards at a Court held of the said manor 8 *Julii anno* 6 E. 6, the said attornies *tunc tenentes dom' per copiam Rot' Cur' in eadem Cur' ostenderunt scriptum præd' gerens dat' prædict' 22 Nov' anno 5, supradicto, et iidem Willielmus et Stephanus authoritate eis per præd' literam attornatus dat' in plena cur' sursum reddiderunt in manus dom' præd' decem acras pasturæ ad opus & usum præd' Johannis Nicholas hæredum et* *assignatorum suorum*, who was at the same court admitted accordingly; and that within the said manor there was not any custom to surrender copyhold lands, &c., by letter of attorney, either in court or out of court. And if the said surrender by letter of attorney of the said lands held by copy, &c., was good or not, was the doubt, which the jury referred to the consideration of the court. And this case was argued at the bar, in Michaelmas, Hilary, and Easter terms, and in this term, and in this it was also argued by the justices at the Bench; and in this case two points were moved: 1. If a surrender could be made by force of the letter of attorney; 2. If the attorneys had pursued their authority.

As to the first, it was unanimously agreed by all the judges in their several arguments, that the surrender in the case at bar made by letter of attorney was good; and their reason was, because every copyholder having a customary estate of inheritance may, *de communi jure*, without any particular custom, surrender his lands held by copy in full court, and therefore in pleading the copyholder need not allege a custom within the manor to surrender in court; for that which is the usage *per totam Angliam* is the common law as it is held in 34 H. 8 Br. Custom 59, & 34 H. 8, Dy. 54, *quod habetur consuetudo inter mercatores per totam Angliam, &c.*, is no good manner of alleging a custom, for that is the common law; and in the Book of Entries, Tit. Tresp. Divisione Copyhold 1, f. 568, no custom is alleged to enable a copyholder to surrender in full court, no more than that a copyholder may make a lease for one year; because that he may do by the general custom of the realm, which is the common law, *vide* Bracton, *lib.* 2, c. 8. Then if a copyholder may surrender his estate in court by the general custom of the realm, which is the common law, from thence it follows that he may do it by attorney, as a thing incident by the common law: and that will more clearly appear if the reason of such things which a man cannot do by attorney be well considered. And therefore if a man has a bare authority coupled with a trust, as executors have to sell land, they cannot sell by attorney; but if a man has authority, as absolute owner of the land, there he may do it by attorney, as *Cestui que use* might after the statute of 1 R. 3, and before the statute of 27 H. 8, for *Cestui que use* had an absolute authority to dispose of the land at his will, without any confidence reposed in him, as appears in 11 Eliz., Dyer, 283, and there a judgment is cited in 25 H. 8 accordingly, against the opinion of some judges in 9 H. 7. 24. But in the case at bar, the copyholder has a customary estate of inheritance, and not an authority or power only. Also there is a difference betwixt a general absolute power and authority as owner of the land, as aforesaid, and a particular power and authority (by him who has but a particular interest) to make leases for life or years. And therefore if A. be tenant for life, the remainder in tail, &c., and A. has power to make leases for twenty-one years, rendering the ancient rent, &c., he cannot make a lease by letter of attorney by force of his power, because he has but a particular power, which is personal to him; and so was it resolved in the case of the Lady Gresham at the assizes in Suffolk in *quadragesim'* 24 El. by Wray and Anderson, Chief Justices, Justices of Assise there. Also there are some things personal, and so inseparably annexed to the person of a man, that he cannot do them by another, as doing of homage and fealty: so it is held in 33 E. 3, Trespass 253, the lord may beat his villain for cause, or without cause, and the villain shall not have any remedy; but if the lord commands another to beat his villain without cause, he shall have an action of battery against him who beats him in such case. So if the lord distrains the cattle of his tenant, although nothing be behind, the tenant for the respect and duty which belong to the lord, shall not have *trespass vi et armis* against him: but if the lord commands his bailiff or servant in such case to distrain where nothing is behind, the tenant shall have an action of *trespass vi et armis* against the bailiff or servant. 2 H. 4. 4. a. 11 H. 4. 78. b. 1. H. 6. 6. a. 9 H. 7. 14. a.

Littleton, in his chapter of Burgage, holds that where in a borough he who is seised of lands in fee may devise by custom, there the owner of such land may devise that his executors shall sell, which they shall do as attornies to him, 3 E. 3. Coron. 310. by the custom of a manor a freehold will pass from one to another by surrender in court, against the will of the lord, and where the custom is such, the tenant may do it by attorney, *vide* 14 H. 4. 1. a. by Hankford, *& vide* 19 Ass. p. 9.

And it was said, as he to whose use a surrender is made may be admitted by attorney, so a copyholder may surrender by attorney in full court; and the case of him to whose use seems the stronger case, because he who is to be admitted is to do fealty, which none can do fealty but he who shall be admitted, and therefore in such case the lord may refuse to admit him by attorney; but if he admits him by attorney, it is good enough.

But Hil. 28 Eliz. in Chapman's case it was held in the King's Bench that where the custom of a manor is, that the copyholder out of court may surrender into the hands of the lord of the manor by the hands of two customary tenants, who in effect are but instruments or attornies of the copyholder to take his surrender, that in such case the copyholder by his attorney cannot surrender into the hands of the lord by the hands of two copyhold tenants; for inasmuch as the surrender in such case ought to be warranted by the custom, the surrender without special custom to warrant it by attorney will not be good. Also that was upon the matter by attorney to make a surrender by others who are but attornies, for that is not warranted by the particular custom of the manor to make a surrender out of court. But in the case at bar the common law, and no particular custom, warrants the surrender, and therefore it may well be made according to the rule and reason of the common law by attorney. But it was resolved, that the attorney ought to pursue the manner and form of the surrender in all points according to the custom, as the copyholder himself ought to have done; as if the surrender by the custom ought to be by the rod, or by any other thing, or in any other manner, the attorney ought to pursue it. And the Chief Justice said that the style of a copyholder imports three things: 1. *Nomen*, his name. 2. *Originem*, his commencement. 3. *Titul*, his assurance. His name is tenant by copy of court-roll, for his name is not tenant by court-roll, but by copy of court-roll, who is the sole tenant in law that holds by copy of any record, charter, deed, or any other thing. 2. His commencement, *ad voluntatem domini;* for at the beginning he was but tenant at the will of the lord. 3. His title or assurance *secundum consuetudinem manerii*, for the custom of the manor has fixed his estate, and assured the land to him so long as he doth his services and duties, and performs the customs of the manor. And therefore Danby saith in 7 E. 4. 19 a. that by the custom he is as well inheritable to have the land, as tenant to hold his freehold by the common law. And it was resolved that this case was stronger, because the letter of attorney was made to those who were tenants by copy, &c., of the said manor. But it was agreed that where an infant at the age of fifteen years may make a feoffment that he cannot do it by attorney, because a custom which enables a person disabled by the law ought to be pursued, and an infant can do nothing to pass anything out of him by attorney: *vide* 11 H. 4. 33. a. and it would be hard if men in prison, or sick, or beyond the sea, could not make surrenders of their lands held by copy for payment of their debts, or preferment and advancement of their wives and children, &c. *Nota*, reader, this is the first case that I have known which was adjudged in this point.

2. It was resolved that when any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act of him who gives the authority. And where it was objected that in the case at bar, that the attornies have made the surrender in their own names; for the entry is *Quod iidem Willielmus et Stephanus, &c., sursum reddiderunt, &c.* It was answered and resolved, *per totam curiam*, that they have well pursued their authority: for first they showed their letter of attorney, and then they *authoritate eis per præd' literam attornat' dat' sursum reddiderunt, &c.*, which is as much as to say, as if they had said, we as attornies of Thomas Combes, surrender, &c., and both these ways are sufficient; as he who has a letter of attorney to deliver seisin saith, I as attorney to J. S. deliver you seisin; or I by force of a (this) letter of attorney deliver you seisin; and all that is well done, and a good pursuance of his authority: but if attornies have power by writing to make leases by indenture for years, &c., they cannot make indentures in their own names, but in the name of him who gives them warrant. But if a man by his will in writing devises that his executors shall sell his land, and dies, there the executors in their own name may sell the

land for necessity, because he who gives them authority by his will (which takes effect after his death) is dead; and yet in such case the vendee is *in* by the devisor.

HYDE *v.* JOHNSON.

COMMON PLEAS. 1836.

[2 *Bing. N. C.* 776.]

IN this action the plaintiff, in order to recover a debt barred by the Statute of Limitations, offered in evidence at the trial before the under-sheriff, a letter written by the defendant's wife, in her husband's name, at his request, offering to pay the debt by instalments, and sent by him to the plaintiff.

The evidence was objected to as not signed "by the party chargeable thereby," within the meaning of 9 G. 4. c. 14, § 1; but the under-sheriff received it, and a verdict was taken for the plaintiff with leave for the defendant to move to set it aside, and enter a nonsuit instead, if the court should be of opinion that the letter ought not to have been received. Accordingly,

Chilton having obtained a rule *nisi* to that effect,

Byles showed cause. It is true the statute requires the acknowledgment to be signed by the party chargeable thereby, and, except in § 7, where it recites the statute 21 Jac. 1, c. 16, does not employ the word "agent;" but a man's agent is as much implied in the mention of himself as his executor or administrator; and great inconvenience would ensue if a party were not allowed in all cases to bind himself by the recognized acts of his agent. According to that construction of the statute, a party unable to write would never be capable of making a binding acknowledgment of a debt. In Whippy *v.* Hilary, 3 B. & Adol. 399, it was held that the Statute of Limitations was not barred by a letter in which the defendant stated "that family arrangements had been making to enable him to discharge the debt; that funds had been appointed for that purpose, of which A. was trustee; and that defendant had handed the plaintiff's account to A.; that some time must elapse before payment, but that defendant was authorized by A. to refer the plaintiff to him for any further information;" but that was because by the statute 9 G. 4. the acknowledgment must be signed by the party chargeable thereby; and such letter did not charge the defendant.

Kelly and *Chilton* in support of the rule.

If the signature of an agent be admitted, parol evidence must also be admitted to prove the agent's authority, and then all the inconvenience will be reproduced which the statute was passed to obviate. And after the recital of the statute 21 Jac. 1, c. 16, which contains the word "agent," the omission of that word in the enacting part of 9 G. 4.

c. 14, cannot be esteemed accidental. The object no doubt was to exclude the temptation to perjury in the proof of agency. Where a written acknowledgment has been destroyed, parol evidence may be given of its contents: Haydon *v.* Williams, 7 Bing. 163; but that is on the general principle which admits secondary evidence where primary has existed, but is no longer forthcoming. Here the statute meant to exclude the question of agency altogether. As to the difficulty suggested with respect to parties who may be unable to write, they may at least affix their mark, as in other cases. In Lyde *v.* Barnard, 3 Cr. M. & Ros. 101, Lord Abinger, C. B., says: "The obvious policy of this statute was to prevent that fraud and perjury which had been found by experience, or was thought probable, to arise from trusting to evidence of less authority than that of a written document."

Cur. adv. vult.

Tindal, C. J. The short question in this case is, whether a letter offering to pay a debt by instalments written by the defendant's wife to the plaintiff in her husband's name, and at his request, and afterwards sent by him to the plaintiff, is a sufficient acknowledgment or promise "made or contained by or in some writing, signed by the party chargeable thereby," within the meaning of the 9 G. 4. c. 14, § 1.

The question turns entirely on the construction of the statute, and it amounts in other words to this,— does the statute 9 G. 4. c. 14 extend to a writing signed by an agent of the party, or is it confined to a writing signed by the party himself? Looking at the words of the statute, it is confined in terms to a writing "signed by the party chargeable thereby." And as the effect of that statute is, for the first time, to introduce a legislative exception into the statute of 21 Jac. 1, c. 16, and thereby *pro tanto*, to repeal it, we do not feel ourselves justified in extending such exception beyond the plain and unambiguous meaning of the words employed therein. The legislature has, in many statutes, given equal efficacy to written instruments when signed by the parties, and when signed by their agents; but in all those cases express words have been employed for that purpose. The Statute of Frauds, in its third section, requires for the purposes of that section, a note in writing to be signed by the party, "or their agents thereunto lawfully authorized by writing;" in the fourth section, a memorandum or note in writing is required, "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized;" in the fifth section, a devise of lands is required to be made in writing to be "signed by the party so devising, or by some other person, in his presence, and by his express directions;" in the seventh section, a declaration of trusts of any lands shall be in writing "signed by the party;" and lastly, the seventeenth section requires upon the sale of goods, that there shall be some note or memorandum in writing of the bargain, "signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." It appears, therefore, that the legislature well knew how to express the distinction, not only be tween a signature by the party, and a signature by his agent: but also to describe the different modes by which agents for different purposes are to be appointed. The same observation arises upon referring to the more recent statutes, 3 & 4 W. 4. c. 2, § 42, and c. 42. § 5. When, therefore, we find in the statute now under consideration that it expressly mentions the signature by the party only, we think it a safer construction to adhere to the precise words of the statute, and that we should be legislating, not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent. And we feel ourselves the more compelled to adopt this construction, as we find the seventh section of this same statute recites the seventeenth section of the Statute of Frauds; so that the legislature must have had in their view, at the very time of passing this statute, and therefore must have intended, the distinction between writings signed by a party, or signed by his agent.

Some inconveniences have been pressed in the course of the argument upon our attention, in cases where a total inability of parties to sign may exist; but the nature of the signature which is necessary to comply with the requisites of the statute is such as to make it almost impossible to suppose a case in which a party could not make such a signature as would satisfy the statute. And, after all, in construing a statute, we must not look to cases of very rare and singular occurrence, but to those of every day's experience; and whatever may be the consequence, we must interpret the statute according to the plain import of the language employed in it.

Upon the whole, we think in this case, the latter was not a sufficient writing signed by the party, to take the case out of the operation of the enactments of 21 Jac. 1. c. 16. And, therefore, direct a nonsuit.

Rule absolute.[1]

IN RE WHITLEY PARTNERS, LIMITED.

COURT OF APPEAL. 1886.

[32 *Ch. D.* 337.]

THIS company was registered on the 10th of November, 1873, as a company limited by shares. The memorandum of association purported to be signed by eight persons, the name of Mr. Callan appearing last, as a subscriber for 100 shares; and the articles of association purported to be signed by him in respect of the same number of shares. The company was unsuccessful and was ordered to be wound up. Mr. Callan was put on the list of contributories for 100 shares, and about the end of May, 1880, received notice of a call. He placed the matter in the hands of his then solicitor, and, as he deposed, heard no more about it till December, 1882, when he was served with orders for payment of calls. He disputed his liability, alleging that he had never agreed to take shares in the company nor signed the memorandum or articles.

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[1] The doctrine of this case was abrogated by the Mercantile Law Amendment Act 19 & 20 Vict. c. 97, § 13.

See Swift *v.* Jewsbury, L. R. 9 Q. B. 301, 310–313, 316 (1874).— ED.

On investigation it appeared that the signature of Mr. Callan to the memorandum and articles was not in his own handwriting, but had been written by a Mr. Oakley, who had simply signed Mr. Callan's name without anything to indicate that the signature was not written by Mr. Callan, but by some other person as his attorney or agent, Mr. Oakley deposed that in October, 1873, he received from Mr. Callan authority, verbally and by telegram, to sign Mr. Callan's name to the memorandum and articles, but it was not alleged that any authority was given by deed, nor was any written authority produced, and Mr. Callan denied having given any authority at all. Vice-Chancellor Bacon having refused to remove the name of Mr. Callan from the list of contributories, Mr. Callan appealed.

Theodore Ribton, for the Appellant.

Marten, Q. C., and *Oswald*, *contra*, were not called upon.

COTTON, L. J. This is an appeal from a decision of Vice-Chancellor Bacon, who has refused to remove the name of the appellant, Mr. Callan, from the list of contributories. It is conceded that his signature to the memorandum and articles was not written by himself, but the liquidator contends that it was written by his authority. The appellant says that this is not enough, even if there was authority, which he denies. The case turns upon these questions, there being no other evidence that Mr. Callan ever agreed to take shares. Now there is nothing in the Companies Acts expressly requiring that the memorandum and articles must be signed by the subscribers with their own hands, but it is contended by the appellant that the Act according to its true construction requires personal signature. Sect. 6 of the Companies Act, 1862, provides that "any seven or more persons associated for any lawful purpose may by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company," and by sect. 11 it is provided that the memorandum of association "shall be signed by each subscriber in the presence of, and attested by, one witness at the least." The appellant contends that as nothing is said in the statute about signature by an agent, these expressions must mean that the signature is to be affixed by the subscriber himself. In support of this, Hyde *v.* Johnson, 2 Bing. N. C. 776, is referred to. That case I think was decided on the special ground that the enactment which the court was then considering was one of a series of enactments which made a distinction between a man's signing by himself and signing by an agent, and it was therefore considered that where signature by an agent was not mentioned the Act required signature by the man himself. That may be quite right, but in the present case the enactment we have to construe is not one of a series of enactments some of which refer to signature by an agent, and I think it would be wrong to hold that an enactment simply referring to signature is not satisfied by signature by means of an agent. Suppose seven persons sitting round a table with a view to signing a document, and one of them says to another, "Sign it for me," are we to say that the signature affixed under this authority is insufficient? I am of opinion that it is quite effectual. The signature in the present case is irregular, for it ought to have been "P. Callan, by Oakley his attorney;" but this irregularity will not make the signature invalid if there was authority to affix it.

It was urged that assuming authority to have been given it was not duly given, for that as the memorandum of association is equivalent to a deed, the authority to sign it ought to have been given by deed. That is a fallacy. The memorandum has for certain purposes the effect of a deed. But it is not a deed. An authority to sign and seal an instrument must be given by deed, but though signature of the memorandum is made by the Act equivalent to signing and sealing, the memorandum is not signed and sealed. The authority to sign it therefore need not be given by deed.

[His Lordship then entered into a consideration of the evidence on the question whether Mr. Callan had given authority to sign the memorandum, and stated his conclusion to be that such authority had been given, and that the memory of Mr. Callan, who had been much engrossed by political matters at the time, was defective on this subject.]

BOWEN, L. J. I am of the same opinion. [His Lordship then stated his reasons for agreeing with the conclusion of Lord Justice Cotton as to the question of fact.]

As regards the question of law, it is contended by the Appellant that it is not sufficient for a man to sign the memorandum of association by an agent, but that he must sign it himself. In every case where an Act requires a signature it is a pure question of construction on the terms of the particular Act whether its words are satisfied by signature by an agent. In some cases on some Acts the courts have come to the conclusion that personal signature was required. In other cases on other Acts they have held that signature by an agent was sufficient. The law on the subject is thus summed up by Blackburn, J., in Reg. *v.* Justices of Kent, Law Rep. 8 Q. B. 305, 307: "No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature." Quain, J., then says. "We ought not to restrict the common law rule *qui facit per alium facit per se*, unless the statute makes a personal signature indispensable." Archibald, J., says: "I think this case comes within the common law rule, *qui facit per alium facit per se*, and there is nothing in the statute to qualify the operation of that maxim. It is easy to understand that there may be cases in which a different construction must be put on particular statutes." Hyde *v.* Johnson, 2 Bing. N. C. 776, was decided on the ground that Lord Tenterden's Act was to be read along with the Statute of Frauds, which expressly refers to signature by an agent, and that a clause which contained no reference to an agent was therefore to be held to require personal signature. In the present statute there is nothing in the way in which the memorandum of association is dealt with to show that the Legislature intended anything special as to the mode of signature. The principle of Hyde *v.* Johnson therefore cannot be invoked in this case, and the general rule that a man may sign by an agent is not interfered with. I agree with Lord Justice Cotton that there is no ground for requiring the authority to sign the memorandum of association to be given by deed.

FRY, L. J. I cannot usefully do more than express my entire concurrence in the judgments of the Lords Justices.[1]

SECTION V.

How an Agent is appointed.

(*A*) GENERAL PRINCIPLES.

BARR *v.* LAPSLEY.

SUPREME COURT OF THE UNITED STATES. 1816.

[1 *Wheat.* 151.]

APPEAL from the Circuit Court of the District of Columbia. This cause was argued by *Jones*, for the appellants and complainants, and *Harper*, for the respondents and defendants.

JOHNSON, J., delivered the opinion of the court.

The object of this bill is to obtain a specific performance of an alleged agreement to receive a quantity of cotton bagging, at a specified price, in satisfaction of certain judgments at law. The defendants deny that the circumstances proved ever rendered the agreement final and obligatory upon them; and this is the principal, perhaps the only, question the case presents.

It appears that the complainants were indebted to one West, who assigned this debt (then unliquidated), together with the residue of his estate, to Lapsley *et al.*; that Lapsley liquidated the debt with the Barrs, and took their notes payable at different periods, making up, together, the amount due. These notes having become due, and judgment being recovered on some of them, in October, 1811, the Barrs addressed a letter to Lapsley, in which they offer to pay him in cotton bagging, at thirty-three cents per yard, by instalments, at certain periods. On the 17th of December, in the same year, Lapsley answered their communication, and the following words, contained in that letter, are all that the court deem material to the point on which they propose to found their decision: "We are willing to take cotton bagging in liquidation of the three last notes, delivered at the period you propose, but not at the price you offer it." "We expect that you give us satisfactory accounts for the punctual performance of your engagements, and to this effect we shall direct Mr. M'Coun, to whom we propose to write by the next mail." On another passage of this letter, and a letter written by West, on the 18th of December, it has been contended that certain conditions were imposed upon the Barrs, which it was incumbent upon them to comply with before they could claim the benefit of the offer contained in Lapsley's letter. But, as the opinion of this court is made up on a ground wholly unaffected by this question, we deem it unnecessary to notice this point. It appears that Lapsley never, in fact, instructed M'Coun on the subject of this letter of the 17th of December. But Warfield, the agent of the Barrs (who were absent from home on the receipt of that letter), supposing his principals to be referred to M'Coun as the authorized agent of Lapsley, notified to him the acceptance of Lapsley's offer, and remained under the impression that the agreement had become final, notwithstanding M'Coun's declining, altogether, to act, for want of instructions. Lapsley, on the other hand, alleges that the notification of acceptance ought to have been made to himself, and assigns the want of an answer from the Barrs as his reason for never having given instructions to M'Coun.

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[1] And see Finnegan *v.* Lucy, 157 Mass. 439 (1892). — ED.

This state of facts presents an alternative of extreme difficulty. On the one hand, Lapsley, by writing that he shall direct M'Coun, by the next mail, plainly pointed to a mode of expediting the conclusion of the agreement, through the agency of a representative on the spot, and when he intimated his intention to write by the next mail, showed that it was not his intention to await Barr's answer. This was well calculated to delude Barr into the idea that Lapsley would recognize no notification but that which should be made to M'Coun. On the other hand, how far could M'Coun, unempowered, uninstructed as he was, legally act, to bind Lapsley by his acceptance of the notification? Or, if he had received instructions from Lapsley, what obligation was he under to have undertaken the agency? Under the pressure of this dilemma, there is but one principle to which the court can resort for a satisfactory decision. Something remained for Barr to do. The notification of his acceptance was necessary to fasten the agreement upon Lapsley. For this purpose, he very rationally addressed himself, in the first place, to M'Coun; and the reference to Lapsley's letter would have been a sufficient excuse for not returning an answer until a reasonable time had elapsed for M'Coun to receive the expected communication from Lapsley. But when he found M'Coun uninstructed, and unwilling to act under the letter addressed to Barr, his course was plain and unequivocal. A letter to Lapsley, transmitted by the mail, would have put an end to all doubt and difficulty. This is the method he ought to have pursued, and for not having pursued this course, we are of opinion that the bill was properly dismissed below.

Decree affirmed.

MEADER *v.* PAGE, APPELLANT.

SUPREME COURT OF VERMONT. 1866.

[39 *Vt.* 306.]

BOOK account. The case was heard upon the auditor's report at the June Term, 1866, STEELE, J., presiding, when judgment was rendered for the plaintiff; exceptions by defendant. In respect to item number four, the one in dispute, cash $11.00, the auditor reported as follows: "It appeared that the defendant, about the month of October, 1862, left his home in Ryegate for New York, and has since that time been living and at work in the state of New York, a considerable part of the time, being at home several months at a time, at several different times since leaving home, his wife and family remaining at his residence at Ryegate; that Mrs. Page has kept house and managed affairs at home; that the defendant has from time to time sent home money to his wife to use in taking care of the family; that in June, 1863, one of the defendant's children died at Ryegate; that the defendant was at home at the time and agreed with one Jenkins, of Bradford, to furnish a set of gravestones for the child, and also a set for the defendant's father (who died previously), at the sum of $25.00. The defendant then returned to New York, agreeing to send home money to his wife to pay for these gravestones. Jenkins furnished and set up the gravestones, as agreed, where they now stand, and subsequently the defendant sent home money to his wife to pay for them. It so happened when the money was sent the article of flour was rising in price, and had advanced to fifteen dollars per barrel, and Mrs. Page was advised that it would advance higher, perhaps to $20.00, and desiring to provide a supply for the time to come, bought a barrel, at $15.00, and at the same time bought several other articles at the store for family use, and paid out of the money so sent, and had n't enough left to pay for the stones, when Jenkins should call for it, which was soon expected; she therefore borrowed $13.00 of the plaintiff, and when Jenkins came she paid for the gravestones therewith, and with other money she had left on hand. Mrs. Page agreed to pay the plaintiff back the money, when she borrowed it, in two or three weeks, and he called on her for the money, but she not having it paid him two dollars only, and the balance, eleven dollars, not being paid, the plaintiff subsequently charged to the defendant, which is the item No. 4, in his account. It did not appear to what extent the defendant gave his wife authority to transact business at home; he left her there to manage for him at home, what might be necessary to be done, considering their respective situations, and the defendant testified that his wife took care of business pretty well, quite as well as the neighbors generally did, and would have done very well, if the neighbors had let her alone. It did not appear that he ever gave her any specific instructions, or that he left business to be done by any other person than his wife. He had no other agent. It appears that Mrs. Page took care and got along at home by her own efforts and with what money her husband sent or gave her from time to time. It did not appear that the defendant ever acknowledged that his wife borrowed any money of the plaintiff or that he ever promised to pay the plaintiff."

Leslie & Rogers, for the defendant.

A. Underwood, for the plaintiff.

The opinion of the court was delivered by

PECK, J. In relation to the item of $11.00 in the plaintiff's account, it cannot be assumed that the credit was given by the plaintiff to the defendant's wife and not to the defendant. The auditor does not so find, and the facts, in the absence of such finding, do not lead to that conclusion. As the defendant was absent at work in New York, and only occasionally at home, and his wife remaining at the defendant's residence in Ryegate with his family, managing his affairs at home, it is probable the plaintiff may have expected the payment would be made through the agency of the wife. But this does not show that the plaintiff did not give the credit to the husband, especially as he was sending money home to his wife from time to time as the wants of the family and the necessity of his business affairs left in charge of his wife required. The credit must be intended to have been given in fact to the defendant.

But it is insisted that the wife had no authority to bind the defendant in the transaction of borrowing this money. This proposition is correct if it is to depend simply on the implied power of a wife arising from the legal relation of husband and wife without reference to the attending circumstances. Nor does the case come within the principle of those cases where the husband abandons his wife, or turns her away without cause, destitute of means of support; for here was no such state of facts. Nor is any express authority shown to borrow money, either generally or in this particular instance. But it is conceded by the defendant's counsel that a wife may bind the husband in certain domestic affairs, such as are usual to intrust with the wife. The extent of this power, however, depends very much on the attending facts and circumstances. It is usually more extensive in case of the absence of the husband for long periods of time than when he is at home managing his own business. But upon the facts reported in this case, there was an agency in fact arising from the absence of the husband, and from his having left his wife with the care of the family and in the management of his affairs at home. This agency, however, was not unlimited. The power must be construed in reference to the nature and extent of the business affairs entrusted to her charge. On this point the report is not very full or explicit. It appears, however, that the defendant's wife "kept house and managed affairs at home, and that the defendant from time to time sent home money to his wife to use in taking care of the family," etc. The auditor reports also that "it did not appear to what extent the defendant gave his wife authority to transact business at home; he left her there to manage for him at home what might be necessary to be done, considering their respective situations," and that the defendant testified that his wife took care of business pretty well, quite as well as the neighbors generally did, etc. This shows that the defendant gave his wife some scope for the exercise of her judgment in his business affairs. Considering that she borrowed the money (the $13.00) to help to pay a debt that the defendant himself contracted, and which he directed her to pay, and which she did pay, we think under the circumstances stated in the report, it came within the scope of her agency. It is true the defendant sent his wife money to pay that debt for the gravestones when they should be delivered and set up, but as flour was rising in price, and she being advised it would soon be still higher, she judged it prudent and good economy to buy a barrel of flour for the family with a portion of the money, which she did at $15.00, and some other articles at the store for family use, and borrowed the $13.00 to make up with what she had, a sum sufficient to pay the debt for the gravestones. The flour and other articles were for the use of the family, and must be intended as necessaries in kind; and it is not found by the auditor that they were not necessary, in fact, under the circumstances. The auditor further reports that it did not appear that he, the defendant, ever gave her any specific instructions; that he had no other agent; that his wife took care and got along at home by her own efforts and what money her husband furnished her from time to time. From this and other facts reported, it is evident that the defendant contemplated his wife, in such small matters as are embraced in the plaintiff's account, would exercise her judgment and discretion. If she had paid for the gravestones out of the money the defendant sent her, and borrowed the money in question to buy the flour, there can be no doubt but it would have charged the husband. The using of some of the money sent as she did, and replacing it with the money borrowed, is the same in effect, and was within the scope of her agency, and the plaintiff had a right so to understand it. There was an agency in fact, and what she did was within the scope of her apparent agency. The item of forty cents for horse to Wells River must be regarded as embraced within the domestic affairs intrusted to her charge, without proof of the actual necessity for it at the time. No questions is made as to any other items, except item for the halter which is not before us, as the plaintiff did not except.

Judgment affirmed.[1]

PAGE *v.* METHFESSEL.

SUPREME COURT OF NEW YORK, GENERAL TERM, FOURTH DEPARTMENT. 1893.

[71 *Hun*, 442.]

APPEAL by the defendant, Anton G. Methfessel, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Oswego on the 25th day of July, 1892, upon the report of a referee, with notice of an intention to bring up for review upon such appeal the order made by the referee herein, dated June 4, 1892.[2]

In the complaint, it is alleged that at divers times between October 7, 1890, and June 10, 1891, the plaintiffs, at the request of defendant and on his promise to pay therefor, sold and delivered to him goods at prices agreed upon and payable in sixty days, amounting to and of the value of $4078.90. The answer denies, in substance, all the allegations of the complaint, except that the defendant admits he has been requested to pay certain moneys to plaintiffs.

Van Hoevenberg & Holt, for the appellant.

D. P. Morehouse, for the respondents.

MERWIN, J. All of the goods for which a recovery has been had in this case were ordered by "Philip Michel, Agent," and were shipped by plaintiffs to "Philip Michel, Agent," at Stapleton, Staten Island, and were charged in the same way upon plaintiffs' books. The referee has found that the defendant, by his acts and conduct in these and similar prior transactions with plaintiffs, held Michel out to them as his agent in purchasing these goods, and that in reliance upon that, and in the belief, induced by such acts and conduct, that defendant was the principal behind Michel, they made the sales in question. In other words, it was held that the plaintiffs had the right to treat the defendant as the principal in the transactions. The question in this case is whether such finding of the referee is sustained by the evidence.

The plaintiffs are manufacturers at Minnetto, Oswego County, of shade-cloth, window-curtains and fixtures, under the firm name of the Minnetto Shade-Cloth Company. The defendant, since April 1, 1886, has resided at Stapleton, Staten Island, and owned there a factory building for the manufacture and decorating of shade-cloth into window-shades. During this period, Philip Michel, who is a practical window-shade manufacturer, lived at Stapleton. In the latter part of April, 1866, and before the 29th, the business of manufacturing and decorating window-shades at defendant's factory was commenced under the name and style of "Philip Michel, Agent," and such business was carried on under that name until after June 9, 1891. During this time Michel was the practical shade maker and managing agent of the business, and defendant was the office man and book-keeper, and had charge of the finances of the business. On the 29th April, 1886, Michel, as agent, had a negotiation with one Gillett, who was a salesman and agent of the plaintiffs in reference to the purchase of goods from the plaintiffs for the purpose of manufacturing and decorating in said factory. Gillett inquired of Michel as to his financial responsibility, and Michel replied, "I have a friend who will advance me some money to do business;" and thereupon Michel took Gillett to the house of defendant, introduced him to defendant, and then left. After Michel left, Gillett asked defendant whose agent Michel was, and defendant replied: —

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[1] See Church *v.* Landers, 10 Wend. 79 (1833); Benjamin *v.* Benjamin, 15 Conn. 347 (1843); Felker *v.* Emerson, 16 Vt. 653 (1844). — ED.

[2] The reporter's statement has not been reprinted in full. — ED.

"He has been unfortunate, and cannot use his own name. I am ready to assist Mr. Michel according to my ability. All the orders received from Mr. Michel, countersigned by myself, I will be responsible for."

The defendant, then, at Gillett's request, wrote, signed, and delivered to him a memorandum, of which the following is a copy: —

STAPLETON, April 29, 1886.

I herewith declare myself to be responsible for all orders sent by Phil. Michel, Agent, to the Minnetto Shade-Cloth Company, if the same are countersigned by me.

A. G. METHFESSEL.

After this, and on the same day and occasion, an order was signed and delivered to Gillett, as follows:

Philip Michel, Agent.

1 pc. ea. 18–32–38–62–66–68–64–58.
Philip Michel, Agent, Stapleton. A. G. METHFESSEL.

These goods were shipped as directed, and soon thereafter the plaintiffs received in payment thereof from the defendant, by mail, his individual check on the German-American Bank of New York for the amount of the order, less a discount of 2 per cent allowed for payment within 30 days. The next order seems to have been about May 25th, and not countersigned by defendant, by reason of his absence. On the 21st June, 1886, the defendant writes to the plaintiffs, inclosing an order, as to which he says: "You will oblige me by sending at your very earliest convenience to Phil. Michel, Agent." He also inclosed his check for the amount of seven bills from May 25th to June 14th. In this letter he also says: —

> "Our intention is to pay always cash, and, if we do not do it this time, it is because I was absent on a trip west, and we thought that the goods bought of you in the first days of May would last until my return. Orders, however, coming in earlier and larger than we expected, Mr. Michel applied to you for more goods, which you sent without my guaranty, thereby doing us a favor, for which we feel grateful. I send the full amount of those seven bills, trusting that you will allow all the discount you possbly can, and deduct the same from the amount of next bill."

After the first order, none were in form countersigned by defendant. Some orders, however, were sent by the defendant himself, and many letters of defendant are in evidence, from which it might be inferred that the defendant had a personal interest in the business. For instance, on the 25th September, 1886, he sends an order for certain specified goods, and adds, "We will soon give you larger orders." The goods, however, were mainly ordered by "Philip Michel, Agent," and all were shipped and charged in that form. The dealings were quite large, comprising hundreds of orders, aggregating about $35,000, and continued to June 9, 1891. All of the goods so ordered and shipped, down to October 2, 1890, were paid for, from time to time, by the individual checks of the defendant on the German-American Bank of New York, inclosed in letters written by him to the plaintiffs. The orders since October 2, 1890, are the items involved in this suit. All the goods sent by the plaintiffs were used at the factory in Stapleton, and all the proceeds of their sale after being manufactured, excepting a small amount, were turned over to, and received by, the defendant, and were deposited by him, with other moneys belonging to him, in his bank account with the German-American Bank. It is shown on the part of the defendant that Michel was in fact the agent of his wife, and employed the defendant as his book-keeper and cashier, and that defendant kept an account of the moneys received, and checked them out as directed by Michel. All this, however, was unknown to plaintiffs. Defendant was in a position to know of all the orders sent, and no objection was made by him that they were not countersigned by him, or that Michel did not have authority to bind him.

These are the main features of the case. It seems to me very clear that the evidence warranted the conclusion that the limitation or condition in the writing of April 29, 1886, that the orders should be countersigned by the defendant, was waived by the defendant, or at least that the plaintiffs had a right to believe that it was not required by defendant. In his letter of June 21, 1886, he excused the want of it, and treated it as a favor that the plaintiffs sent the goods without it; and for four years and upwards, thereafter, he paid the bills without question, and without any suggestion that the countersigning was important. If the limitation was waived, that left the declaration of defendant general, — that he would be responsible for all orders sent to plaintiffs by Michel as agent. This responsibility was, in effect, acknowledged by the defendant, so far as the plaintiffs were concerned, from June, 1886, to October, 1890. The plaintiffs were informed of no other person as principal. The defendant himself gave orders, and indicated a personal interest in the business. The authority given by the paper of April 29, 1886, was never revoked. The plaintiffs had a right to assume that the authority continued after October, 1890, as it had existed before. Bodine *v.* Killeen, 53 N. Y. 93.

It is suggested that the credit was not given to defendant, because the goods were charged to Michel as agent. That form of charge indicated that credit was not given to Michel individually, and there was no other known to plaintiffs, to whom credit would be given, except the defendant. The plaintiffs' agent, before the commencement of the negotiation in April, 1886, was informed that Michel was insolvent, and it is easy to infer that no one intended or expected that credit would be given to him. It is also suggested that the plaintiffs did not testify that they relied on defendant. In such a case, it is said in Brown *v.* Bowen, 30 N. Y. 520, that, in the absence of proof of the effect of the admission on the party setting up the estoppel, it is for the jury to say whether, on the facts, the several essential parts of the estoppel are proved. In the present case it was a question of fact whether the defendant, by his acts and conduct, held out Michel to the plaintiffs as his agent, and whether, from such acts and conduct, the plaintiffs were led to believe, and did believe, that the defendant was the principal, and relied on this in selling the goods in suit. The conclusion of the referee on this subject should not, I think, under the circumstances of this case, be disturbed.

But it is said that the plaintiffs were guilty of laches in allowing the bills in suit to accumulate. Still, the defendant, by reason of his position in the business, presumptively knew all about the orders that were being sent to plaintiffs, and knew that the bills in suit were not paid. He was bookkeeper, and had charge of the finances, and the proceeds of all the goods sent by the plaintiffs, including those in suit, were turned over to him. He made no suggestion to the plaintiffs that he did not propose to pay any more, or proposed to change the current of the business. A large portion of the goods in suit were ordered before the payments on the prior account were completed. We fail to see any defence on the ground of laches.

After the evidence before the referee was closed, and before the decision of the case, a motion, upon affidavits and notice to plaintiffs, was made, before the referee, to correct the minutes of the referee of the testimony of the defendant as to his answer to a particular question, or that the trial be opened. Affidavits were used by plaintiffs in opposition to the motion, and there was a conflict as to what the testimony in fact was. The motion to correct the minutes was denied, but, on motion of the counsel for defendant, leave was given to defendant to recall the witness upon certain terms as to the costs of the motion, and the further attendance before the referee, and the expenses of rebutting testimony. Nothing was further done, the terms, apparently, not being satisfactory. Whether the minutes were correct was for the referee to determine, and his decision on that is conclusive. Tweed *v.* Davis, 1 Hun. 252. The terms for opening the case were within his discretion, and no sufficient reason appears for this court to say that such discretion was abused.

HARDIN, P. J., and PARKER, J., concurred.

Judgment and order affirmed with costs.[1]

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[1] "But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Pickard *v.* Sears, 6 Ad. & E. 469, 474 (1837), *per* Lord DENMAN, C. J.

"By the term '*wilfully*,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect." Freeman *v.* Cooke, 2 Exch. 654, 663 (1848), *per* PARKE, B.

"The agency may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by showing that such a relation existed between the parties as by law would create the authority; as for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent, in making the contract, acts on that authority, the principal is bound by the contract, and the agent's contract is his contract, but not otherwise. This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff, that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound; he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is, *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly so that it may be inferred to have reached him, and may be made by words or conduct. Upon none of these propositions is there, we apprehend, the slightest doubt; and the proper decision of all these questions depends upon the proper application of these principles to the facts of each case, and the jury are to apply the rule with due assistance from the judge." *Per* POLLOCK, C. B., in Reynell *v.* Lewis, 15 M. & W. 517, 527–528 (1846).

"First, then, as to the constitution by the principal of another to act as his agent. No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only by the will of the employer that an agency can be created.

"This proposition, however, is not at variance with the doctrine that where one

SECTION V. (*continued*).

(*B*) APPOINTMENT TO EXECUTE AN INSTRUMENT WITHIN THE STATUTE OF FRAUDS.[1]

THE STATUTE OF FRAUDS, 29 Car. II. c. 3, §§ 1–5, 17 (1676–7): —[2]

SECT. 1. . . . All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

SECT. 2. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

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has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed. It is, however, necessary to bear in mind the difference between this agency by estoppel, if I may so designate it, and a real agency, however constituted.

"Another principle to be kept constantly in view is, that the burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.

"Unless this principle is strictly acted on, great injustice may be the consequence; for any one dealing with a person assuming to act as agent for another can always save himself from loss or difficulty by applying to the alleged principal to learn whether the agency does exist, and to what extent. The alleged principal has no similar mode of protecting his interest; he may be ignorant of the fact that any one is assuming to act for him, or that persons are proposing to deal with another under the notion that that other is his agent. It is, therefore, important to recollect constantly where the burden of proof lies." *Per* Lord CRANWORTH, dissenting, in Pole *v.* Leask, 33 L. J. N. S. Ch. 155, 161–162 (House of Lords, 1863).

Similar to the principal case are Fanning *v.* Cobb, 20 Mo. App. 577 (1886); and Mook *v.* Parker, 9 N. Y. Misc. 90 (1894), S. C. 29 N. Y. Supp. 32. — ED.

[1] "All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved." *Per* SKYNNER, C. B., delivering the opinion of the judges, in Rann *v.* Hughes, 7 T. R. 346, n. (*a*) (House of Lords, 1778).— ED.

[2] 1 Statutes Revised, 774; 8 Statutes of the Realm, Pickering's edition, 405. The text follows the spelling, punctuation, and numbering of Pickering's edition.—ED.

SECT. 3. . . . No leases, estates or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall . . . be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

SECT. 4. . . . No action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

SECT. 5. . . . All devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

SECT. 17. . . . No contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

EMMERSON *v.* HEELIS.

COMMON PLEAS. 1809.

[2 *Taunton*, 38.]

THIS was an action of assumpsit for not carrying off from the plaintiff's land certain lots, to wit, 27 different lots of turnips, alleged to have been bought by the defendant of the plaintiff, and for not bringing back and laying upon the land a certain quantity of manure; the declaration also contained a count for turnips bargained and sold, and the common money-counts. The defendant pleaded the general issue. Upon the trial at the Westmoreland Spring assizes, 1808, a verdict was taken for the plaintiff for the amount of damages stated in the declaration, subject to a reference as to the amount of the plaintiff's demand, for which sum only a verdict was to be entered, and also as to the fact whether one Moss, who attended at an auction on behalf of the defendant, and there purchased the turnips for him, had been duly authorized by the defendant to act as his agent on that occasion. Upon both these points the arbitrator afterwards duly made his award, thereby fixing the amount of the plaintiff's damages at £46 6*s.*, and declaring that Moss, a servant in husbandry, retained and employed by the defendant, was duly authorized by the defendant to attend as his agent at the sale. The verdict was also made subject to the opinion of the Court of Common Pleas upon the following case.

The plaintiff put up to sale by public auction, on the 25th of September, 1806, a crop of turnips, then growing upon his land, in separate lots, and under certain conditions of sale. The defendant, by his agent Anthony Moss, his farming servant, attended at the sale, and being the highest bidder for 27 different lots, containing in the whole 108 stiches or furrows, was declared to be the purchaser thereof; and the name of each purchaser, and amongst others, of the defendant was written in the third column of the sale bill by the auctioneer, opposite to each particular lot for which the other purchasers and the defendant were respectively declared the highest bidders, in the order in which the same were respectively knocked down. The defendant was not present at the auction; neither did he, or Moss, sign any agreement in writing, nor did the auctioneer, otherwise than as is before stated, by putting down the names of the different purchasers, amongst whom was Moss for the defendant. The lots were not purchased by the defendant's agent in succession, but other purchasers purchased several intermediate lots. No single lot was knocked down to the defendant at a larger sum than £1 11*s.*, although the amount of the 27 lots was £39 1*s.* The following was the form of the bill of sale prepared by the auctioneer, and by which the turnips were sold. It was divided into five columns.

> A bill of sale of turnips, by stiches, the property of George Emmerson, at Kirby, in the parish of Bongate, in the county of Westmoreland, that were sold the 25th of September, 1806, by John Wright, auctioneer. Time for payment till the 1st day of January, 1807, on giving satisfactory security before they depart the sale, or when demanded. Every four stiches one cart load of manure.

1 No. of Stiches.	2 No. of Lots.	3 Purchasers' Names.	4 Articles sold.	5 Price.
4	1	Edw. Heelis.	Lot 1.	£1 7*s.*

The bill of sale was proposed at the trial, as evidence of the contracts of sale of the 27 lots, but it was not proved; there was no stamp on it, but it did not in any manner appear that there was any fraud or intention to elude the stamp act in setting down each lot separately. The question for the opinion of the court was, whether the verdict should stand, or a nonsuit be entered.

Lens, Serjt., for the plaintiff.

Shepherd, Serjt., *contra*.

Lens, in reply. *Cur. adv. vult.*

On a following day in the same term, the court observed that the statute of frauds did not require that the agent for the buyer should be authorized by writing: and in the case of Coles *v.* Trecothick, and numerous other equity cases, a written authority had been held unnecessary, although the contrary had been once ruled; if the defendant had subscribed his own name in the third column opposite to each lot as it was knocked down to him, no doubt the contract would have been good; or if he had expressly said to the auctioneer, "Put down my name."

Mansfield, C. J., in this term delivered the opinion of the court. He observed, that some curious points had been agitated in this case, and recapitulated the facts. The questions are, whether the contract should be in writing, as being for a sale of goods amounting to £10. There is no ground for that objection, for the contract for each stich was a separate sale; for the same reason no stamp is necessary, because no one lot was worth £20. The third question is, whether it was an interest in land, and if so, whether a signing by the auctioneer is a signing by an agent for the purchaser; this depends on the 4th section of the statute, for this is an agreement to purchase. The words of the statute are, "that no action shall be brought to charge any person *upon any contract or sale of lands*, tenements, or hereditaments, *or any interest in or concerning them*," unless the agreement, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Now as to this being an interest in land, we do not see how it can be distinguished from the case of hops decided in this court; and if the auctioneer is an agent for the purchaser, then the statute of frauds is satisfied, because the memorandum in writing is signed by an agent for the party to be charged. Now this memorandum is more particular than most memorandums of sale are; and upon it the auctioneer writes down the purchaser's name. By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings, loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser; and it does seem, therefore, that this is a contract signed by an agent for the purchaser, and consequently is binding; and judgment must be entered for the plaintiff.[1]

JOHNSON *v.* DODGE.

SUPREME COURT OF ILLINOIS. 1856.

[17 *Ill.* 433.]

ERROR to Cook County Court of Common Pleas.[2]

The bill was dismissed by WILSON, Judge, at January term of the Common Pleas Court, and thereupon the complainant brought this writ of error.

B. S. Morris, and *Waller & Caulfield*, for plaintiff in error.

I. N. Arnold, and *H. G. Miller*, for defendant in error.

SKINNER, J. This was a bill in equity, for specific performance of a contract for the sale of land.

The bill and proofs show that one Iglehart, a general land agent, executed a contract in writing in the name of Dodge, the respondent, for the sale of certain land belonging to Dodge, to one Walters, and received a portion of the purchase money; that Walters afterwards assigned the contract to Johnson, the complainant; a tender of performance on the part of Walters, and on the part of Johnson, and a refusal of Dodge to perform the contract. The answer of Dodge, not under oath, denies the contract, and sets up the statute of frauds as a defence to any contract to be proved. The evidence, to our minds, establishes a parol authority from Dodge to Iglehart to sell the land, substantially according to the terms of the writing. It is urged against the relief prayed, that Iglehart, upon a parol authority to sell, could not make for Dodge a binding contract of sale, under the statute of frauds; that the proofs do not show an authority to Iglehart to sign the name of Dodge to the contract, and therefore that the writing is not the contract of Dodge; that the writing not being signed by the vendee is void for want of mutuality; that no sufficient tender of performance on the part of complainant is proved, and that the proof shows that the authority conferred was not pursued by the agent. Equity will not decree specific performance of a contract founded in fraud, but where the contract is for the sale of land, and the proof shows a fair transaction, and the case alleged is clearly established, it will decree such performance.

In this case, the contract, if Iglehart had authority to make it, is the contract of Dodge and in writing; and it is the settled construction of the statute of frauds, that the authority *to the agent* need not be in writing; and by this construction we feel bound. 1 Parsons on Con. 42, and cases cited; Doty *v.* Wilder, 15 Ill. 407; 2 Parsons on Con. 292, 293, and cases cited; Saunders' Pl. and Ev. 541, 542, and 551; Story on Agency, 50; 2 Kent's Com. 614. Authority from Dodge to Iglehart to sell the land included the necessary and usual means to make a binding contract in the name of the principal. If the authority to sell may be created by parol, from this authority may be implied the power to use the ordinary and usual means of effecting a valid sale; and to make such sale it was necessary to make a writing evidencing the same. If a party is present at the execution of a contract or deed, to bind him as a party to it, when his signature is affixed by another, it is necessary that the person so signing for him should have direct authority to do the particular thing, and then the signing is deemed his personal act. Story on Agency, 51. In such case the party acts without the intervention of an agent, and uses the third person only as an instrument to perform the mere act of signing. This is not such a case. The agent was authorized to negotiate and conclude the sale, and for that purpose authority was implied to do for his principal what would have been incumbent on the principal to do to accomplish the same thing in person. Hawkins *v.* Chance, 19 Pick. 502; 2 Parsons on Con. 291; Story on Agency, Chap. 6; Hunt *v.* Gregg, 8 Blackf. 105; Lawrence *v.* Taylor, 5 Hill, 107; 15 Ill. 411; Vanada *v.* Hopkins, 1 J. J. Marsh. 283; Kirby *v.* Grigsby, 9 Leigh, 387.

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[1] See Mews *v.* Carr, 1 H. & N. 484 (1856); Horton *v.* McCarty, 53 Me 394 (1866). — ED.

[2] The reporter's statement of the case is omitted. — ED.

The mode here adopted was to sign the name of Dodge "by" Iglehart, "his agent," and it is the usual and proper mode in carrying out an authority to contract conferred on an agent. But if the signing the name of the principal was not authorized by the authority to sell, yet the signature of the agent is a sufficient signing under the statute. The language of the statute is, "signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." If Iglehart had authority to sign Dodge's name, then the contract is to be treated as signed by Dodge; and if Iglehart had authority to sell, in any view his signature to the contract is a signing by "some other person thereto by him lawfully authorized," within the statute. Truman *v.* Loder, 11 Ad. and El. 589; 2 Parsons on Con. 291. It is true that authority to *convey* must be in writing and by deed; for land can only be conveyed by deed, and the power must be of as high dignity as the act to be performed under it. It was not necessary to the obligation of the contract that it should have been signed by the vendee. His acceptance and possession of the contract, and payment of money under it, are unequivocal evidences of his concurrence, and constitute him a party as fully and irrevocably as his signing the contract could. 2 Parsons on Con. 290; McCrea *v.* Purmort, 16 Wend. 160; Shirly *v.* Shirly, 7 Blackford, 452.

We cannot question the sufficiency of the tender in equity, to entitle the complainant to specific performance. Webster *et al.* *v.* French *et* *al.*, 11 Ill. 278. Nor do we find any substantial departure in the contract from the authority proved. While we hold that the authority to the agent who for his principal contracts for the sale of land, need not be in writing, yet we should feel bound to refuse a specific performance of a contract made with an agent upon parol authority, without full and satisfactory proof of the authority, or where it should seem at all doubtful whether the authority was not assumed and the transaction fraudulent.

Decree reversed and cause remanded. *Decree reversed.*

SECTION V. (*continued*).

(C) APPOINTMENT TO EXECUTE A SPECIALTY.

HIBBLEWHITE *v.* McMORINE.

EXCHEQUER. 1840.

[6 *M. & W.* 200.]

The judgment of the court[1] was delivered by

PARKE, B. In this case, which was argued last term, upon showing cause against a rule for a new trial, we are of opinion that the rule must be made absolute.

It was an action brought by the plaintiff to recover damages for not accepting and paying for fifty shares in the Brighton railroad; which, by the contract, were to be transferred, delivered, and paid for on or before the 1st of March, 1839, or at any intermediate date that the defendant might require them, by paying for them at par, together with all calls that might have been paid on the same, the plaintiff binding himself to *execute* to the defendant, or his nominee, a legal transfer of the shares, on or before the 1st of March.

The declaration avers that on the 1st of March the plaintiff was ready and willing to transfer the shares, if the defendant would have paid for the same; and offered to the defendant, or any nominee of the defendant, a legal transfer. This averment was traversed in one plea, and in another it was pleaded that at the time of the agreement, or on the 1st March, or between those times, the plaintiff was not the proprietor of the shares, nor had he good right or title to execute a legal transfer of such shares, according to the agreement.

The replication states that on the 1st March, the plaintiff was the proprietor of the shares, and then had good right and title to execute a legal transfer thereof.

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[1] The opinion states the case. The reporter's statement is omitted. — ED.

The question for consideration arises on those two pleas. Upon one or both, the title of the plaintiff to make the transfer may be questioned. It is not material upon which; but there seems no doubt but that it arises on the traverse of the readiness to convey, which must involve a capacity to do so, as there is no other averment in the declaration which expresses or implies that the plaintiff had a title to convey on the 1st of March. It appears on the trial that between the date of the agreement and the 1st of March, some instalments became due, which the plaintiff did not pay; and on the 1st of March (before which day the defendant had not desired any transfer) the plaintiff's broker, who had purchased fifty shares from one Pritchard, produced to the defendant a conveyance executed by Pritchard, of these shares, with a blank for the name of the transferee, and offered to fill it up with that of the defendant or his nominee, on the defendant's paying the price. The defendant refused to do so. The plaintiff sold the shares, and the action was brought for the difference.

The objections to the plaintiff's recovering were, 1st, that *he* was incapable of conveying on the 1st of March, because Pritchard was then the owner, and not the plaintiff; 2ndly, that the conveyance was invalid by the express provisions of the Brighton Railway Act, 1 Vict. c. cxix. sect. 157, as the calls due before that date were not paid; and 3rdly, that the conveyance tendered was void at common law, as there was a blank in it for the name of the transferee.

It is unnecessary for us to give any opinion, except upon the last of these objections; but it may not be improper to observe that there is great weight in the first, because the defendant has bargained for a conveyance from *the plaintiff*, which must be intended to be a conveyance in the statutory form; and, consequently, for the implied covenant *of the plaintiff* for title, and Pritchard's implied covenant is not the same thing. The last objection, however, we are all of opinion, must prevail.

The second objection, which would otherwise have been valid, has been waived, as it appears on the evidence at the trial that the defendant agreed that the plaintiff should not pay the intermediate instalments; and, as the contract with respect to shares of this description is not required by the Statute of Frauds to be in writing, since they are neither an interest in land, nor goods and merchandises, there might be a waiver by parol. As there was such a waiver, the only objection would be to the statement of the contract in the declaration, on the ground of variance, which ought to have been made at the trial.

The conveyance required by the statute must, we think, be by deed; and a deed, with the name of the vendee in blank at the time it was sealed and delivered is void.

The instrument of transfer, by the 155th section, must be under the *hands and seals* of both parties. It was argued that it did not follow, from the instrument being under seal, that it was a deed; for warrants of justices, subpœnas, and awards, are under seal, and are not deeds

But this is an instrument containing *a contract* of the parties; if a contract is required to be by instrument under seal, it must be intended that it should be *by deed:* and the context shows that the legislature so intended it, for it is afterwards called a deed *or* conveyance (probably a synonyme for the same thing), and a deed of sale or transfer, that is, a *deed* of sale or of transfer.

Assuming, then, the instrument to be a deed, it was wholly improper, if the name of the vendee was left out; and to allow it to be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal, as a deed, would be a violation of the principle that an attorney to execute and deliver a deed for another must himself be appointed by deed. The only case cited in favor of the validity of a deed in blank, afterwards filled in, is that of Texira *v.* Evans, cit. 1 Anst. 228, where Lord Mansfield held that a bond was valid which was given with the name of the obligee and sum in blank to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case is justly questioned by Mr. Preston, in his edition of Shepp. Touch. 68, "as it assumes there could be an attorney without deed;" and we think it cannot be considered to be law. On the other hand, there are several authorities that an instrument which has a blank in it, which prevents it from having any operation when it is sealed and delivered, cannot become a valid deed by being afterwards filled up.

In Com. Dig. Fait, A. 1, it is said, "If a deed be signed and sealed, and afterwards written, it is no deed." To the same effect is Shepp. Touch. 54. In Weeks *v.* Maillardet, 14 East, 568, the instrument had nothing to operate upon, as it referred to a schedule as annexed, which was not annexed at the time of execution; and it was held that the subsequent annexation, in the absence of one of the parties, did not give it operation as part of the deed. So, where a bail bond was executed, and a condition afterwards inserted, it was held bad as a bail bond. Powell *v.* Duff, 3 Camp. 181; and see Bull. N. P. 267. The cases cited on the other side were all of them distinguishable. In one, Hudson *v.* Revett, 5 Bing. 372, a blank in a part material was filled up; but, having been done in *the presence* of the party, and ratified by him, it was held that there was evidence of re-delivery. In another, Doe *v.* Bingham, 4 B. & Ald. 672, the blanks filled up were in no respect material to the operation of the deed, with respect to the party who executed before they were filled up, — as to him the deed was complete. In a third, Matson *v.* Booth, 5 M. & Sel. 233, the point decided was that a complete bond was not rendered void by the subsequent addition of another obligor with the assent of all parties.

It is unnecessary to go through the others which were cited on the argument. It is enough to say that there is none that shows that an instrument which when executed is incapable of having any operation, and is no deed, can afterwards become a deed by being completed and delivered by a stranger in the absence of the party who executed, and unauthorized by instrument under seal.

In truth, this is an attempt to make a deed transferable and negotiable like a bill of exchange or exchequer bill, which the law does not permit. *Rule absolute.*[1]

GARDNER *v.* GARDNER.

Supreme Judicial Court of Massachusetts. 1850.

[5 *Cush.* 483.]

This was a writ of entry to foreclose a mortgage of land in Nantucket, tried before Fletcher, J., in this court.

The demandant claimed as the assignee of Barker Burnell, whose title was derived from a deed purporting to be executed by Polly Gwinn and by the tenant.

The conditional judgment was entered for the demandant, subject to the opinion of the court upon the question, whether the last-mentioned deed was properly executed. The subscribing witness thereto testified that, at the request of the tenant, he went to the house of Polly Gwinn, and there saw all the parties sign the deed. When it was time for Polly Gwinn to sign, her daughter, Mary G. Gardner, offered to sign for her mother, who assented by a nod of the head, and the daughter then and there signed her mother's name thus: "Polly Gwinn by Mary G. Gardner," in the presence of her mother, and of the witness, who saw all the signatures made.

The case was argued in writing by *C. Bunker*, for the demandant, and *T. G. Coffin*, for the tenant.

Shaw, C. J. The only question is upon the sufficiency of the execution of a mortgage deed, as a good and valid deed of Polly Gwinn. The execution of the deed is objected to on the ground that when a deed is executed by an agent or attorney the authority to do so must be an authority of as high a nature, derived from an instrument under the seal of the grantor. This is a good rule of law, but it does not apply to the present case. The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his act; and therefore the power is to be strictly examined and construed, and the instrument conferring it is to be proved by evidence of as high a nature as the deed itself. To hold otherwise would be to decide that a person having a clear mind and full capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing a letter of attorney under seal.

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[1] *Acc.*: Williams *v.* Crutcher, 6 Miss. 71 (1840); Graham *v.* Holt, 3 Iredell's Law, 300 (1843); Preston *v.* Hull, 23 Gratt. 600 (1873).

According to Blood *v.* Goodrich, 12 Wend. 525 (1834), an admission that an agent had authority to execute a certain specialty is *prima facie* evidence of an authority under seal. Paine *v.* Tucker, 21 Me. 138 (1842), is *contra*. See Tupper *v.* Foulkes, 9 C. B. N. S. 797 (1861). — Ed.

It appears to us that the distinction between writing one's name in his presence and at his request, and executing a deed by attorney, is obvious, well founded, stands on satisfactory reasons, and is well sustained by authorities. Ball *v.* Dunsterville, 4 T. R. 313; The King *v.* Longnor, 1 Nev. & M. 576; s. c. 4 B. & Ad. 647; 2 Gr. Ev. § 295. We think the deed was well executed by Polly Gwinn; and judgment must therefore stand for the demandant.[1]

BLACKNALL *v.* PARISH.

SUPREME COURT OF NORTH CAROLINA. 1860.

[6 *Jones' Eq.* 70.]

CAUSE removed from the Court of Equity of Orange County.

This was a bill filed for the specific performance of a contract, by which the defendant bound himself to convey the plaintiff a tract of land, described by its metes and bounds, and lying in Orange county. The allegations in the bill (which are sustained by the evidence filed) are, that the defendant, being about to remove from the county of Orange, where he lived, to the western part of the State, authorized one Harrison Parker to sell for him the land in question, and to enable him to do so, he prepared a deed, describing the premises, and purporting to convey the same in fee, but leaving therein blanks as to the name of the bargainee and the price, with instructions, when he might make sale of the land, to fill up the blanks in the deed, and deliver it to the purchaser; that afterwards Parker made a sale to the plaintiff, at a reasonable price, and accordingly filled up the deed in the requisite particulars, with the name of the plaintiff and with the price; both supposing the instrument was thus made good as a deed; that Blacknall gave his bond for the money to the defendant's agent, who used the same in the purchase of a slave for the defendant, and it was subsequently paid to defendant's assignee.

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[1] See Hudson *v.* Revett, 5 Bing. 368 (1829); Vandruff *v.* Rinehart, 29 Pa. 232 (1857); Mutual Benefit Life Ins. Co. *v.* Brown, 30 N. J. Eq. 193 (1878). See also the discussion in Wallace *v.* McCullough, 1 Rich. Eq. 426, 438–439 (1845), and Inhabitants of South Berwick *v.* Huntress, 53 Me. 89, 95-96 (1865). — ED.

The prayer of the bill is for a specific performance of the contract, evidenced by the imperfect deed, and to stay, by an injunction, the proceedings of an action of ejectment, which the defendant had brought against the plaintiff, and which was then pending in the Superior Court of Orange County.

The defendant answered, denying the authority of Parker to sell to Blacknall, and alleging that he had special objections to plaintiff's having the land, which are stated; and that the deed in question was prepared for the purpose of consummating a sale to one Hopkins, with whom he was in treaty when he left the county, and that his agent had no authority to deliver it to any one else. He relied on the Statute of Frauds as a bar to the plaintiff's equity.

On the coming in of the answers, the injunction, which had issued in vacation, was dissolved, and the bill continued over as an original bill. Proofs were taken, which sustained the plaintiff's allegations and disproved those of the defendant. The cause, being set for hearing, was transmitted to this court by consent.

Norwood, for the plaintiff.

Graham, for the defendant.

BATTLE, J. Upon examination of the testimony taken in this cause, we are entirely satisfied that the land mentioned in the pleadings was contracted to be sold to the plaintiff by an authorized agent of the defendant; that the authority under which the agent acted was by parol, and that the contract was entered into by the agent's filling up certain blanks in an instrument, which the defendant had signed and sealed, and left with the agent to be by him made complete by filling up such blanks and delivering it as the deed of the defendant to the person who should become the purchaser. We are further satisfied that what was intended to be a sale was made fairly, and for a price which, at the time, was not inadequate, and further, that the price was subsequently received by the defendant.

It has been properly admitted by the plaintiff that the instrument which was delivered to him by the agent of the defendant as a deed for the land in question could not operate as such, because it was not complete when it was signed and sealed by the defendant. In the case of Davenport *v.* Sleight, 2 Dev. & B. L. 381, and again in Graham *v.* Holt, 3 Ired. L. 300, it was held that an instrument signed and sealed in blank, and handed to an agent only verbally authorized to fill up the blank and deliver it, was not the bond of the principal, and that after declarations of the principal approving of the delivery by the agent, made in the absence of the instrument, and without any act in relation to it, would not amount to an adoption and ratification of the delivery.

The case before us is one of a deed for land, instead of a bond for the payment of money, but the principle is the same. The instrument must be complete before it can be delivered by an agent, acting under a mere parol authority, as the act and deed of his principal.

The plaintiff, not being able to set up a legal title under the instrument in question, insists, nevertheless, that it is evidence of a contract, the specific performance of which he has a right to have enforced in a court of equity. The defendant objects to this, and relies, in support of his objection, upon the statute of frauds, which declares "that all contracts to sell or convey any lands, etc., shall be void and of no effect unless such contract, etc., or some memorandum or note thereof, shall be put in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized," etc. Rev. Code, c. 50, sec. 11. The question, then, is: 1. Whether the contract for the sale of the land was put in writing; and 2. Was it signed by the party to be charged therewith, or by any person by him thereto lawfully authorized? We think that there can be no doubt that the instrument, which for the reasons above stated could not operate as a deed, may be regarded as a contract put in writing. It is in truth a written contract more than ordinarily complete, both in form and substance, and the only question admitting of any sort of doubt is, whether it has been signed by the defendant, or by any legally authorized agent. We are of opinion that it cannot be considered as a contract with the plaintiff, signed by the defendant himself, independently of any act of his agent, because, when the defendant put his name and seal to it, no such contract had been made. But we think that, in legal effect, it was signed for him, and in his name, by his properly constituted agent. The failure of the agent to make the instrument operate as the deed of his principal, did not prevent him from causing it to operate as the simple contract of his principal; for nothing is more common than for an agent to fill up blanks in a promissory note signed by his principal, and nobody has ever doubted that the principal was bound by it. That the authority of the agent, in all such cases, may, under the statute of frauds, be by parol, is well settled. 1 Parsons on Cont. 42; 2 Kent's Com. 612; Coles *v.* Trecothic, 9 Ves. jun. 250.

The plaintiff is entitled to a decree for a specific performance, and also to recover back all the costs which he has been compelled to pay in the action of ejectment at law, and also the costs which he has had to pay upon the dissolution of the injunction in the court of equity below; to ascertain which an account may be ordered.

PER CURIAM, *Decree accordingly.*

VOSE *v.* DOLAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1871.

[108 *Mass.* 155.]

TORT for the conversion of a lot of earth, gravel, and stone. The case was referred by the Superior Court to an arbitrator, the material parts of whose report were as follows: —

The parties agreed in writing on March 14, 1861, that the defendant should make certain streets and remove the earth and gravel in certain mounds or knolls on the plaintiff's estate; and the defendant began the work, but had not finished removing all the earth and gravel on April 14, 1864. The plaintiff offered to prove that on that day the parties signed and sealed an instrument in duplicate, of which the following is all that is material: "Memorandum of an agreement made this fourteenth day of April, 1864, by and between Thomas Dolan and Francis Vose witnesseth, that on the fourteenth day of March, 1861, the said parties entered into an agreement in writing in reference to making certain streets and excavating and removing certain mounds or knolls on an estate of said Vose in Dorchester, according to certain specifications therein set out, and certain profiles made by Alexander Wadsworth, and therein referred to, which said agreement may be referred to in connection with this memorandum; and whereas said agreement has not been fully performed by said Dolan, and much earth and gravel contemplated by the parties to said agreement to have been removed according to said specifications and profiles still remain on the premises aforesaid, the said Vose, in consideration of   , paid by the said Dolan, hereby sells, transfers and conveys to the said Dolan all the remaining earth and gravel on said premises, which the parties under said agreement intended should be excavated and removed according to the aforesaid specifications and profiles, after completing and grading the streets named in said agreement as therein set forth, and being in quantity   . The said Dolan, in consideration of the said sale and transfer, hereby promises and agrees that he will faithfully and fully, and to the satisfaction of said Wadsworth, execute and complete all the filling, excavating, and grading, contemplated and agreed by him to be performed in the aforesaid agreement, and in the manner therein specified, on or before the first day of August, 1864, and will forfeit all right to all earth or gravel which shall remain on said premises on said first day of August, 1864, and which ought to have been removed by him in the due and proper execution of said agreement."

The plaintiff further offered to prove that the defendant then made his two promissory notes, each for the sum of $500, and delivered them to the plaintiff, in part payment for the earth, gravel, and stone, and signed another note, and handed it to Wadsworth, who was a surveyor, a blank being left therein for the amount; that the quantity of earth, gravel, and stone remaining had not then been ascertained; that it was agreed by the parties that Wadsworth should measure and ascertain the quantity, and should fill the blank in the note by inserting the total price of the earth, gravel, and stone, at $1.25 per square, less the sum of $1,000, the amount of the two notes of $500 each; that the said instrument of two parts was then executed by the parties, the one being taken by the defendant, and the other by Wadsworth; that blanks were left in each copy for the number of squares sold and the considerations; that these blanks were to be filled by Wadsworth, when he should ascertain the quantity; that Wadsworth did within a short time ascertain by measurement the quantity to be 1,808 squares, and the price thereof to be $2,260, and caused to be inserted in the note the words "twelve hundred and sixty" before the word "dollars," and in the copy of the instrument which he had retained, the words "eighteen hundred and eight squares," as the quantity sold, and the words "twenty two hundred and sixty dollars," as the consideration for the sale; and that the blanks in the copy taken by the defendant have not been filled. To the admission of this evidence, and to the introduction in proof of the instrument and of the note, the defendant objected. But the objection was overruled. It appeared that the defendant had no notice of Wadsworth's intention to fill the blanks, or of how he intended to fill them.

The referee found "that, by the instrument aforesaid, the defendant was bound to remove the earth, gravel, and stone, which he had purchased, by August 1, 1864; that he failed to remove 700 squares, through no default of the plaintiff; that he thereupon ceased to have any right of property in the 700 squares, and was a wrong-doer in afterwards removing and appropriating them to his use; that the 700 squares were of the value of $875; that the plaintiff was entitled to judgment for that sum, and interest, and his costs of court; but that if the court should be of opinion that the above evidence should not have been received, or that upon the evidence the instrument was not the deed of the defendant, the plaintiff should take nothing by his writ, and the defendant should recover his costs of court."

The Superior Court ruled that the evidence was properly received, and that the instrument was the deed of the defendant, and ordered judgment to be entered for the plaintiff for the amount found by the referee. The defendant alleged exceptions.

W. Colburn, for the defendant.

C. Allen, for the plaintiff.

COLT, J. Upon the question submitted by the report of the referee, we are clearly of opinion that evidence of the means taken to ascertain the quantity of earth, gravel, and stone which was to be removed under the contract of April 14, and of the subsequent filling of the blanks in the note and sealed instrument with the ascertained amounts, was properly received by him; and that the instrument containing the terms of the contract was binding upon the defendant as his deed, notwithstanding the subsequent filling of the blanks. It was a completed, intelligible contract when it was executed. The existence of the blanks did not impair its validity. The quantity of earth sold was definitely indicated by reference to specifications and profiles, and it was not necessary to state the number of squares sold or the price to be paid for them. This was a matter of computation from data given. If the blanks had been left, the rights of the parties would have been the same as if filled before delivery. The alleged alteration of the instrument was therefore an immaterial alteration, in no way changing its terms or enlarging the defendant's liability under it. There is no pretence that it was fraudulently made; on the contrary, the blanks were filled by the surveyor, in accordance with the agreement of the parties at the time the deed was executed.

It is now well settled that an immaterial alteration of a sealed instrument, not fraudulent, will not invalidate it, though made by the party claiming under it. Brown *v.* Pinkham, 18 Pick. 172; Commonwealth *v.* Emigrant Industrial Savings Bank, 98 Mass. 12; Chessman *v.* Whittemore, 23 Pick. 231; Adams *v.* Frye, 3 Met. 103. The case is not within those in which it is held that blanks in a deed constituting a material part of the instrument itself cannot, in the absence of the maker, be filled by parol authority, because authority to make a deed must be given by deed. Burns *v.* Lynde, 6 Allen, 305; Basford *v.* Pearson, 9 Allen, 387. *Exceptions overruled.*

DICKERMAN *v.* ASHTON.

SUPREME COURT OF MINNESOTA. 1875.

[21 *Minn.* 538.]

APPEAL by defendant from an order of the Court of Common Pleas for Ramsey County, HALL, J., presiding, refusing a new trial, after a trial by the court without a jury.

Lorenzo Allis, for appellant.

Bigelow, Flandrau, & Clark, for respondent.

GILFILLAN, C. J. This is an action to enforce specific performance of a contract to convey real estate. The contract was in writing, and purported to be under the seal of the defendant, the vendor, and was made on his part by an agent, with only oral authority to make it.

The defendant makes the point that the proof of the authority of the agent was not of that clear and satisfactory character which a court of equity will insist upon as to contracts the specific performance of which is sought. But the "statement of the case" does not show that it contains all the evidence on that point; and where such is the case, this court presumes that there was sufficient evidence to justify the finding of fact of the court below. Henry *v.* Hinman, 21 Minn. 378.

It was decided in Brown *v.* Eaton, 21 Minn. 409, that the authority of an agent to make such a contract need not be in writing.

The defendant objects that the contract is void, because it purports to be a specialty, and that the authority of an agent to bind his principal by contract under seal must also be under seal. The proposition is true, that an agent, not authorized by deed, cannot execute a contract which shall be valid, as a deed or specialty, against his principal. But in such case, if the contract need not be by deed, it will be valid as a simple contract, nothwithstanding a seal is attached to it. Minor *v.* Willoughby, 3 Minn. 225. The order denying a new trial is affirmed.[1]

JOSEPH E. CLOUGH AND OTHERS *v.* WILLIAM M. CLOUGH.

SUPREME JUDICIAL COURT OF MAINE. 1882.

[73 *Me.* 487.]

ON report.

Writ of entry, dated September 3, 1880.

Plea, general issue.

At the trial the defendant offered in evidence the deed of John Clough to him. The plaintiffs objected to the deed upon the ground that it was not properly executed. For the purposes of this trial it was admitted that the name of the grantor in the deed was signed by the grantee, at the grantor's request and in his presence, and that the grantor personally acknowledged the deed, and that it was duly delivered to the defendant. The case was then submitted to the law court. If such a deed is valid in law the case is to stand for trial; if not, default is to be entered.

A. P. Gould, for the plaintiffs, contended that when one person writes the name of another at his request, he does it as agent.

Thus if A. writes B.'s name to a deed, to assert that because B. is present, giving personal and verbal authority to A., A. becomes B., that it is B.'s own act precisely as if no person was acting but himself, and no act of agency is done, is too transparent a sophism to be adopted by a court of law.

The grantee cannot take the acknowledgment of the grantor. Beaman *v.* Whitney, 20 Maine, 413; Gibson *v.* Norway Savings Bank, 69 Maine, 579.

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[1] See Worrall *v.* Munn, 5 N. Y. 229, 238–243 (1851), Jones *v.* Horner, 60 Pa. 214 (1869), Long *v.* Hartwell, 34 N. J. L. 116, 121–122 (1870), *acc.;* and Wheeler *v.* Nevins, 34 Me. 54 (1852), *contra.* See also Russell *v.* Annable, 109 Mass. 72, 74, 77 (1871). — ED.

How vastly more important that the signature of the grantor should be affixed by a disinterested person. A deed is good without acknowledgment, that being required simply before recording. See Wash. Real Prop. (2 ed.) 601 (575).

To allow the grantee to act as agent of the grantor in executing the deed, would be a violation of one of the cardinal rules of the law of agency.

C. E. Littlefield, for the defendant, cited: Bird *v.* Decker, 64 Maine, 552; Lovejoy *v.* Richardson, 68 Maine, 386; Bartlett *v.* Drake, 100 Mass. 174; Holbrook *v.* Chamberlain, 116 Mass. 155; Wellington *v.* Jackson, 121 Mass. 159; Allum *v.* Perry, 68 Maine, 234; Wood *v.* Goodridge, 6 Cush. 117; 3 Wash. Real Prop. 120.

WALTON, J. The only question is whether a deed can be made valid by subsequent acknowledgment and delivery, when the name of the grantor has been signed to it by the grantee. We think it can.

If one acknowledges and delivers a deed which has his name and a seal affixed to it, the deed is valid. No matter by whom the name and seal were affixed. No matter whether with or without the grantor's consent. The acknowledgment and delivery are acts of recognition and adoption so distinct and emphatic that they will preclude the grantor from afterward denying that the signing and sealing were also his acts. They are his by adoption. Without delivery the instrument has no validity. By force of our statutes the instrument is incomplete without acknowledgment. Till one or both of these acts are performed the instrument has no more validity than a blank deed. By taking the instrument in this incomplete condition and completing it, the grantor makes it his deed in all its particulars. He adopts the signature and the seal the same as he does the habendum and the covenants which were inserted by the printer of the blank. The deed is not sustained on the ground of ratification, but adoption. Ratification applies to agency. No question of agency arises in this class of cases. The validity of the deed cannot rest upon the ground of agency or ratification. If such were the case the authority or the ratification would have to be by instrument under seal; for authority or ratification must be of as high a character as the act to be performed or ratified. If the act is the execution of a sealed instrument, it must be authorized or ratified by a sealed instrument. We therefore repeat that the validity of the instrument in this class of cases does not rest on agency or ratification, but on adoption. No matter by whom the signing and sealing were performed, nor whether with or without the grantor's consent. By completing the instrument, he adopts what had previously been done to it, and makes it his in all its particulars.

It is not often important to notice this distinction; but it is important in this case in order to avoid the apparent absurdity of holding that an agent can contract with himself, can be both grantor and grantee. An agent cannot contract with himself. He cannot as agent for the grantor execute a deed to himself. But he can prepare a deed running to himself, even to the signing and sealing, and if the grantor then adopts the deed by personally acknowledging and delivering it, it will be a legal and valid instrument. But its validity rests upon the ground of adoption, not agency or ratification. And when the word "ratified" or "ratification" is used in this class of cases, as it often is, it will be found on careful examination that it is used in the sense of "adopted" or "adoption," and not in the technical sense in which it is used in the law of agency. Bartlett *v.* Drake, 100 Mass. 174; Story on Agency, §§ 49 and 252; Lovejoy *v.* Richardson, 68 Maine, 386, and cases there cited.

Action to stand for trial.

WHITE, JUDGE OF PROBATE, v. DUGGAN AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[140 *Mass.* 18.]

HOLMES, J. This is an action on a probate bond. The following facts are relied on as a defence by the sureties. Having signed another bond which turned out to be wrong in form, they signed this one in blank at their principal's request, and upon his representation that the penal sum in the former bond ($2000) was satisfactory, and that the new bond was to be for the same amount. The principal filled out the blank with a larger penal sum, and delivered the bond, but subsequently told the sureties that it was in the penal sum of $2000, which they believed until after this action was brought.

It does not appear in terms that the representation that the penal sum of the former bond was satisfactory was false, or that the judge of probate did not require the larger sum for the first time when the second bond was offered. And if the bill of exceptions should be taken at all strictly against the defendants, it would seem that whatever expectations they may have entertained as to the action of the Probate Court when they handed the blank bond over to their principal, they handed it to him to be filled in as the Probate Court might require, being chargeable with knowledge that the time for final action upon the matter had not yet come. In this view of the facts, the only question is whether the case is governed by Burns *v.* Lynde, 6 Allen, 305, and, more especially, by Basford *v.* Pearson, 9 Allen, 387; and we are of opinion that it is not. In Burns *v.* Lynde, a deed had been delivered executed in blank, and a parol authority was relied on to make valid a subsequent filling in of the blanks in the absence of the grantor. The filling in of the blanks stood on the same footing as signing and sealing, and could be authorized only by a power under seal. Basford *v.* Pearson applied the same principle, without further discussion, where a deed was signed and sealed by husband and wife, and he subsequently filled in the blanks and made alterations, with the knowledge of the grantee, in the absence of the wife and by her parol authority, and then delivered the deed. It may be somewhat hard to reconcile the latter case with those decisions which sustain the filling in of blanks in the presence of a party who has previously signed and sealed, even after delivery, on the ground that this is equivalent to a new delivery. For the reason given imports that an authorized delivery will cure a defect of authority in the writing, which seems indisputable. 2 Bl. Com. 307. Perkins, pl. 130. But we do not understand that it was intended to deny this principle, as it is expressly recognized by the same judge in Burns *v.* Lynde, 6 Allen, 310. At all events, when the grantee or obligee is ignorant of the order in which the several parts of the instrument are written, and the delivery to him is duly authorized, he is entitled to assume that the instrument was so written as to bind the grantor or obligor from whose control it comes. We should add that, in this commonwealth at least, we cannot question for an instant that the authority to deliver merely may be given by parol. This does not seem to have been doubted in Basford *v.* Pearson. See Parker *v.* Hill, 8 Met. 447; Foster *v.* Mansfield, 3 Met. 412. To admit a doubt on this point would shake many titles.

If we are to interpret the bill of exceptions more favorably for the defendants than we have done thus far, and to take it that they only authorized the bond to be filled in with a penal sum of $2000, — and even if we take the further step of assuming that limitation to have carried with it the understanding between them and the principal that they only assented to a delivery if the bond was filled in as they expected it to be, — we are still of opinion that no defence is made out. We are aware that there are several cases more or less opposed to our conclusion. People *v.* Bostwick, 32 N. Y. 445; Ohio *v.* Boring, 15 Ohio, 507; United States *v.* Nelson, 2 Brock, 64; Preston *v.* Hull, 23 Grat. 600, and cases cited. But we think that the prevailing tendency, both in this State and elsewhere, has been in the direction we have taken. Thomas *v.* Bleakie, 136 Mass. 568; Butler *v.* United States, 21 Wall. 272; Dair *v.* United States, 16 Wall. 1; South Berwick *v.* Huntress, 53 Maine, 89; State *v.* Peck, 53 Maine, 284; State *v.* Pepper, 31 Ind. 76; Millett *v.* Parker, 2 Met. (Ky.) 608.

These decisions are generally put on the ground of estoppel. It has been debated in England whether, and under what circumstances, there could be an estoppel by negligence. Swan *v.* North British Australasian Co., 2 H. & C. 175. And it has been admitted that there might be, in a supposed case hardly as strong as this. Tayler *v.* Great Indian Peninsula Railway, 4 DeG. & J. 559, 574. A specialty deriving its validity from an estoppel *in pais* is perhaps somewhat like Nebuchadnezzar's image with a head of gold supported by feet of clay. But if the case is properly put on that ground, then, as was pointed out in Commonwealth *v.* Pierce, 138 Mass. 165, the difference between intent and negligence, in a legal sense, is ordinarily nothing but the difference in the probability, under the circumstances known to the actor and according to common experience, that a certain consequence, or class of consequences, will follow from a certain act; and it follows that the question when an estoppel will arise is simply one of degree. If, on the other hand, the true question is the scope of the principal's authority to deliver the bond, — bearing in mind that an authorized delivery will cure defects in the writing of the bond, that the authority to deliver may be by parol, and that the scope of authority may be greater than is wished by the obligor, ostensible authority being actual authority, —then the question is equally one of degree, depending on the particular circumstances, just as the same question is in tort. *Quacunque via*, then, all that we have to do is to deal with the case before us; and it will serve no useful purpose to consider whether, if the surety had intrusted the bond to the principal, with no authority to deliver it at all, or whether, if he had handed a blank sheet of paper, with his signature and seal at the bottom, to an agent, directing him to deliver it filled out one way, and he had filled it out in an entirely different way and delivered it, such cases would fall on one or the other side of the line. We are of opinion that, when a bond such as this is intrusted to the principal for his use, to fill it up and deliver it, the possibility of his being required by the probate judge to insert a penal sum larger than the surety directed, and of his doing so, is so obvious and so near, that the surety must be held to take the risk of his principal's conduct, and is bound by the instrument as delivered, although delivered in disobedience of orders, if, as here, the obligee has no notice, from the face of the bond or otherwise, of the breach of orders. To hold otherwise would be to disregard the habits of the community.

Exceptions overruled.[1]

J. L. Eldridge & J. E. Cotter, for one surety.
E. G. Pratt, for the other surety.
J. F. Wiggin & B. M. Fernald, for the plaintiff.

PHELPS *v.* SULLIVAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[140 *Mass.* 36.]

MORTON, C. J. This is a writ of entry to forclose a mortgage. The demandant claims under a mortgage from the tenant to Nathan P. Pratt and an assignment thereof by said Pratt. It appeared at the trial, that said Pratt executed and acknowledged the assignment in blank, and orally authorized his son, when he could find a person to purchase the mortgage, to write in the name of such person as the grantee, and to deliver the assignment. The son negotiated the mortgage to one Simonds, filled in his name as grantee, and then delivered to him the assignment. He afterwards reported what he had done to Nathan P. Pratt, who replied, "It is all right." The only question presented by the bill of exceptions is whether, upon these facts, there was a valid assignment to Simonds.

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[1] Compare Goodyear Dental Vulcanite Co. *v.* Bacon, 151 Mass. 460 (1890). — ED.

The tenant contends that the assignment was invalid, relying upon the rule of the common law that an authority to an agent to execute a deed or other specialty must be under seal. But we do not think the case is governed by this rule. Where a deed purports to be executed by an agent, or where the person with whom an agent is dealing knows that he is acting as agent, it may be that such person must see to it at his own peril that the agent has legal authority. But in this case the assignment did not disclose, and Simonds did not know, that the son was acting as agent in any respect except to deliver the assignment. It is settled that an authority to deliver a deed or other specialty may be by parol. Parker *v.* Hill, 8 Met. 447. A deed takes effect from its delivery; and it may well be held that the authority to deliver, which may be oral, is an authority to deliver the deed in the condition in which it is when delivered, if there are no circumstances of suspicion to put the grantee upon inquiry. When a grantor signs and seals a deed, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized, and delivers it to an innocent grantee without knowledge, we think the grantor is estopped to deny that the deed as delivered was his deed. Otherwise, he may by his voluntary act enable his agent to commit a fraud upon an innocent party. Whether, if the agent violates the instructions in filling the blanks, the grantor would not in like manner be bound, we do not discuss, as it is not involved in this case. To hold that such deeds are invalid, because the authority to fill the blanks is not under seal, would tend to unsettle titles, and would be mischievous in its results. Few deeds are written by the grantors. Most are written by scriveners, and a grantee to whom a deed is delivered has no means of determining whether the body of the deed was written before or after the signature was affixed. It would be very dangerous to allow titles to be defeated by parol proof that a deed, without suspicion on its face, duly signed and sealed by the grantor, which he authorized to be delivered, was in fact written in some part after he executed it, by an agent having only oral authority. We think a person taking such a deed in good faith has the right to rely upon it; and that the grantor cannot be permitted to aver that it is not his deed. White *v.* Duggan, *ante*, 18.

The cases of Burns *v.* Lynde, 6 Allen, 305, and Basford *v.* Pearson, 9 Allen, 387, are distinguishable from this case. In Burns *v.* Lynde, the deed had been delivered to the grantee signed in blank, and he himself, after the delivery, filled the blanks. In Basford *v.* Pearson, a deed had been signed by the defendant in which the name of the grantee was left blank. The deed contained the covenant against the claims of "all persons claiming by, through, or under us, but against none others." The grantor gave it to her husband to be delivered. He, by parol authority from his wife, but in her absence, and with the knowledge of the grantee, inserted the name of the grantee, and erased the words which limited the covenant, so as to make it a general covenant of warranty against all persons. He then delivered the deed. If he had made these material alterations by parol authority from his wife, and without the knowledge of the grantee, a different question would have been presented, more nearly resembling the question before us.

Upon the facts presented in the bill of exceptions, we are of opinion that the assignment to Simonds was valid; and therefore that the ruling ordering judgment for the tenant was erroneous.

Exceptions sustained.[1]

G. H. Stevens, for the demandant.

S. Bancroft, for the tenant.

CRIBBEN *v.* DEAL.

SUPREME COURT OF OREGON. 1891.

[21 *Ore.* 211.]

MULTNOMAH County. L. B. Stearns, Judge. Plaintiff appeals. Affirmed.

W. M. Gregory, for appellant.

Killin, *Starr*, *&* *Thomas* for respondent.

LORD, J. This is a suit in equity, brought by the plaintiffs to have a deed of general assignment set aside and declared void, and to have the attached property applied in payment of their judgment. The single proposition of law involved is, whether the name of the grantee can, by some one authorized upon parol authority of the grantor, be inserted in a blank left in a deed of general assignment, after the deed has been signed, sealed, and acknowledged, but before delivery. For the purposes of this case, the facts are these: that the deed of assignment was made on the 17th of November, 1888, by C. E. Deal, J. C. O'Reilly, and J. W. Brockett, partners doing business under the firm name of Deal, O'Reilly, & Co., to Thomas Connell for the benefit of creditors; that it was in all things completed and signed and sealed and acknowledged, except that a blank was left for the name of the grantee; that Mr. F. A. E. Starr was authorized to insert as the name of such grantee any person satisfactory to himself and the members of such firm; that on the following day, Mr. Starr, with the consent of the members of such firm, inserted the name of Thomas Connell as assignee in such deed, and the deed was delivered to Thomas Connell, and on the next day was recorded. Upon this state of facts, the contention is that such deed is void because the name of Thomas Connell was not inserted when the deed was signed and sealed.

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[1] *Acc.*: Nelson *v.* McDonald, 80 Wis. 605 (1891). — ED.

It is said in Sheppard's Touchstone, 54, that "every deed well made must be written, *i. e.*, the agreement must all be written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do therewithal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." This is founded upon that ancient and technical rule of the common law, that the authority to make a deed, or to alter or fill a blank in some substantial part of it, cannot be verbally conferred, but must be created by an instrument of equal dignity. As the deed was under seal, to alter or complete it by the insertion of the name of the grantee required the authority to be under seal. So firmly rooted was this principle that it mattered not with what solemnities a deed may have been signed and sealed, unless the grantee's name was inserted, and delivery was made by him, or some one legally authorized under seal, it was a nullity. It imposed no liability on the party making it, nor conferred any rights upon the party receiving it; it was, in fact, no deed. Hence, it was held that parol authority to fill a blank with the name of a grantee could not be conferred without violating established principles of law, and rendering the deed void. This doctrine still prevails in England.

It is true that in the case of Texira *v.* Evans, cited in Master *v.* Miller, 1 Anstr. 225, Lord Mansfield held otherwise; but this was in effect overruled in Hibblewhite *v.* McMorine, 6 Mees. & W. 200, on the ground that an authority to execute a sealed instrument could not be given by parol, but must be given by deed, although this latter case seems more or less trenched upon by the decision in Eggleston *v.* Gutteridge, 11 Mees. & W. 465, and by Davison *v.* Cooper, 11 Mees. & W. 778, and in West *v.* Steward, 11 Mees. & W. 47. But the rule has never been universally accepted in this country; and however the holding of some courts may be, still the better opinion and the prevailing current of authority is, that when a deed is regularly executed in other respects, with a blank left therein for the name of the grantee, parol authority is sufficient to authorize the insertion of the name of such grantee, and that when so filled out and delivered, it is a valid deed.

It is true that Chief Justice Marshall, in United States *v.* Nelson, 2 Brock. 74, felt bound to follow the ancient rule; but his opinion clearly indicates he felt that the authority to fill a blank in an instrument under seal should be held to be valid. He says: "The case of Speake *v.* United States, 9 Cranch, 28, in determining that parol evidence of such assent may be received, undoubtedly goes far toward deciding it, and it is probable that the same court may completely abolish the distinction in this particular between sealed and unsealed instruments." Again: "If this question depended on those moral rules of action which in the ordinary course of things are applied by courts to human transactions, there would not be much difficulty in saying that this paper ought to have the effect which the parties at the time of its execution intended it should have." And he concludes with this statement: "I say with much doubt, and with a strong belief that this judgment will be reversed, that the law on the verdict is, in my opinion, with the defendants."

The rule was purely technical, and the outgrowth of a state of affairs and condition of the law which does not now exist. The reason of the law is the life of it, and when the reason fails, the law itself should fail. At the present day the distinction between sealed and unsealed instruments is fast disappearing, and the courts are gradually doing away with them. As Judge Redfield said: "But it [the rule] seems to be rather technical than substantial, and to found itself either on the policy of the stamp duties, or the superior force and sacredness of contracts by deed, both of which have little importance in this country. And the prevailing current of American authority, and the practical instincts and business experience and sense of our people, are undoubtedly otherwise." 1 Redfield on Law of Railways, 124.

In Drury *v.* Foster, 2 Wall. 24, the court says: "Although it was at one time doubted whether parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion of this day is that the power is sufficient." Again, in Allen *v.* Withrow, 110 U. S. 119, the court says: "It may be and probably is the law in Iowa, as in several States, that the grantors in a deed conveying real property, signed and acknowledged with a blank for the name of a grantee, may authorize another party by parol to fill up the blank." "But," he continues, "there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it: the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." In the case at bar these conditions were fulfilled.

In Inhabitants, &c., *v.* Huntress, 53 Me. 89, 87 Am. Dec. 535, the court held that a party executing a deed, bond, or other instrument, and delivering the same to another as his deed, knowing there are blanks in it to be filled necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed it. In delivering the opinion of the court, Kent, J., said: "The rule invoked is purely technical. Practically there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange; both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz., that a sealed instrument cannot be executed by another, so far as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal." Likewise in Bridgeport Bank *v.* New York, &c. R. R. Co., 30 Conn. 274, Ellsworth, J., said: "Nor can any reason be assigned which is founded in good sense, and is not entirely technical, why a blank in an instrument under seal may not be filled up by the party receiving it after it is executed as well as any other contract in writing, where the parties have so agreed at the time. In either case the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view, derived from the ancient law of England, can justify the making of any distinctions between them."

It is to be noted that both of these adjudications were by courts of States where seals were not abolished. In Burnside *v.* Wayman, 49 Mo. 357, where the name of a grantee in a trust deed was left in blank, Wagner, J., said: "It is contended that no recovery could be had or relief granted on the first count, because no grantee was named in the deed of trust, and that in consequence thereof the instrument was void, and no title conveyed; but we think otherwise. Whatever may have been determined in some of the old books, the better doctrine is against such a position." And subsequently, in Field *v.* Stagg, 52 Mo. 534, 14 Am. Rep. 435, this doctrine was affirmed in all its breadth, the court saying: "A deed regularly executed in other respects, with a blank left therein for the name of the grantee, and placed in that condition in the hands of a third person with verbal authority, but no authority under seal from the person who executed it, to fill up the blank in his absence, and deliver the deed to the person whose name is inserted as grantee, when so filled out and delivered is a valid deed." In Duncan *v.* Hodges, 4 McCord, *239, 17 Am. Dec. 734, it is held that a deed executed with blanks, and afterwards filled up and delivered by the agent of the party, is good. So in Van Etta *v.* Evenson, 28 Wis. 33, 9 Am. Rep. 486, it was held that where a note and mortgage otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent who was to procure from whomsoever he could a loan of money thereon for the maker, this shows an intention that the agent should fill the blanks, and when so filled the instruments were valid without a new execution and delivery. And the same doctrine was expressly affirmed in Schintz *v.* McManamy, 33 Wis. 301, the court, by Lyon, J., saying: "It was doubtless competent for the grantors to authorize Emil by parol to insert the name of the grantee in the deed after they had signed and acknowledged the same." And in State *v.* Young, 23 Minn. 551, it was held that authority to fill a blank in a sealed instrument may be given by parol, and that such authority may be either express or implied from circumstances, and that it may be implied from circumstances whenever these, fairly considered, will justify the inference. So in Swartz *v.* Ballou, 47 Iowa, 188, 29 Am. Rep. 470, where the owner of land executed a deed in blank and placed it in the hands of another party under circumstances which raised an implied authority in the latter to insert the name of the grantee, it was held that the insertion of the grantee's name, either by the party receiving the deed or by some one authorized by him, made the instrument perfect as a conveyance.

Without referring to the authorities at greater length, there are numerous other cases supporting the same doctrine: Wiley *v.* Moor, 17 Serg. & R. 438; 17 Am. Dec. 696; Smith *v.* Crooker, 5 Mass. 538; Gibbs *v.* Frost, 4 Ala. 720; Wooley *v.* Constant, 4 Johns. 54; 4 Am. Dec. 246; *Ex parte* Decker, 6 Cow. 60; Richmond Mfg. Co. *v.* Davis, 7 Blackf. 412; Boardman *v.* Gore, 28 N. J. Eq. 517; 18 Am. Dec. 73; Camden Bank *v.* Hall, 14 N. J. L. 583; Ragsdale *v.* Robinson, 48 Tex. 379. The contrary rule was adopted in Upton *v.* Archer, 41 Cal. 85; 10 Am. Rep. 266; Preston *v.* Hull, 22 Gratt. 600; 14 Am. Dec. 153; Ingram *v.* Little, 14 Ga. 173; 58 Am. Dec. 549.

It seems to us that the weight of authority and better opinion is, that parol authority is sufficient to authorize the filling of a blank by the insertion of the name of the grantee in a deed after its execution but before delivery, as in the case at bar. There is no pretence of any mistake or fraud, or that the blank was not filled as authorized and directed. In a word, that it was filled by a party authorized to fill it, and was done after its execution and before its delivery to the grantee named. Nor is it questioned but what the deed faithfully expresses the intention of the parties, and was duly executed for the purposes specified; and in such case it seems to us complete effect ought to be [given] to that intention, notwithstanding the technical rule of the common law in respect to such instruments. As Mr. Justice Swayne said: "If a person competent to convey real estate sign and acknowledge a deed in blank, and deliver the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, its validity could not be well controverted." Drury *v.* Foster, 2 Wall. 24.

It results that the decree dismissing the bill must be sustained.[1]

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[1] For the doctrines, English and American, as to the power of a partner to bind by specialty copartners who have by parol given assent, see Steiglitz *v.* Egginton, Holt, N. P. 141 (1815); Gram *v.* Seton, 1 Hall, 262 (1828); Parsons on Partnership, § 122, n. (*i*).

As to granting to an officer or other agent of a corporation power to execute an instrument under the corporate seal, see Savings Bank *v.* Davis, 8 Conn. 191 (1830); Burrill *v.* Nahant Bank, 2 Met. 163 (1840); Hopkins *v.* Gallatin Turnpike Co., 4 Humph. 403 (1843); Angell & Ames on Corporations, §§ 282–283, 292; 4 Thompson on Corporations, §§ 5107–5108, 5177. — ED.

CHAPTER II.

THE AGENT'S POWER TO SUBJECT HIS PRINCIPAL TO LIABILITIES.

SECTION I.

The Rise of the Doctrine.

BEAULIEU *v.* FINGLAM.

COMMON PLEAS. 1401.

[*Y. B.* 2 *H. IV.* 18, *pl.* 6.]

ONE brought such a writ. *Si Willihelmus Beaulieu, etc. pone Rogerum Finglam, quare cum secundum legem et consuetudinem regni nostri Angliæ hactenus obtenta, quod quilibet de eodem regno ignem suum salvo et secure custodiat, et custodire teneatur, ne per ignem suum dampnum aliquod vicinis suis ullo modo eveniat: præd' Rogerus ignem suum apud Carlion tam negligenter custodivit, quod pro defectu debitæ custodiæ ignis prædicti, bona et cattalla ipsius Willihelmi ad valentiam quadraginta librarum in domibus ibidem existentia ac domus prædictæ ad tunc et ibidem per ignem illum cumbusta extiterunt, ad dampnum ipsius W. etc.* And counted accordingly.

Hornby. Judgment of the count, for he has counted on a common custom of the realm, and has not said that this custom has been used, etc.

To which the whole court said pass over, for common law of this realm is common custom of the realm, and then THIRNING [C. J.] said that a man shall answer for his fire which through misfortune burns another's goods.

And some were of opinion that the fire cannot be called his fire, for this reason, that a man cannot have property in fire; and that opinion is not agreed to.

MARKHAM [J.]. A man is held to answer for the act of his servant or of his hosteler in such case, for if my servant or my hosteler puts a candle on a wall, and the candle falls in the straw and burns all my house and the house of my neighbor also, in this case I shall answer to my neighbor for the damage that he has.

Which was conceded by the court.

Hornby. Then he ought to have had a writ *Quare domum suam ardebat vel exarsit.*

Hull. That will be contrary to all reason to put blame or fault on a man where he does not have any on him, for negligence of his servants cannot be called his feasance.

THIRNING [C. J.]. If a man kills or slays a man through misfortune, he shall forfeit his goods, and it is proper that he should have his charter of pardon of grace.

To which the court agrees.

MARKHAM [J.]. I shall answer to my neighbor for another who enters my house, with my leave or my knowledge, or is a guest through me or through my servant, if he does, or any one of them does, such a thing, as with a candle or other thing, by which feasance the house of my neighbor is burned; but if a man from outside my house, against my will, puts the fire in the straw of my house, or elsewhere, by which my house is burned, and also the houses of my neighbors are burned, for this I shall not be held to answer to them, etc., for this cannot be said to be through wrong on my part, but against my will.

Hornby. This defendant is ruined and impoverished forever if this action be maintained against him, for then twenty other such suits will be brought against him of like matter.

THIRNING [C. J.]. What is that to us? It is better that he should be wholly undone than that the law should be changed for him.

And afterwards they were at issue that the house of the plaintiff was not burned through the fire of the defendant, ready; and the other side said the contrary.

DOCTOR AND STUDENT, Dialogue I., Chapter IX. (1518):[1] —

The law of England is, that if a man command another to do a trespass, and he doth it, that the commander is a trespasser. And I am in doubt, whether that it be only by a maxim of the law, or that it be by the law of reason. . . .

DOCTOR AND STUDENT, Dialogue II., Chapter XLII. (1518):[2] —

. . . And now I intend to show thee some particular cases, where the master after the laws of the realm shall be charged by the act of his servant, bailiff, or deputy, and where not. . . .

First, for trespass of battery, or wrongful entry into lands or tenements, ne yet for felony or murther, the master shall not be charged for his servant, unless he did it by his commandment.

Also, if a servant borrow money in his master's name, the master shall not be charged with it unless it come to his use, and that by his assent. And the same law is, if a servant make a contract in his master's name, the contract shall not bind his master, unless it were by his master's commandment, or that it came to the master's use by his assent. But if a man sends his servant to a fair or market to buy for him certain things, though he command him not to buy them of no man in certain, and the servant doth according, the master shall be charged: but if the servant in that case buy them in his own name, not speaking of his master, the master shall not be charged, unless the things bought come to his use.

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[1] From the eighteenth edition, p. 32. — ED.

[2] From the eighteenth edition, pp. 236–238. The previous parts of the same chapter treat of a public officer's responsibility for the acts and defaults of his deputy. — ED.

Also, if a man send his servant to the market with a thing which he knoweth to be defective, to be sold to a certain man, and he selleth it to him, there an action lieth against the master: but if the master biddeth him not to sell it to any person in certain, but generally to whom he can, and he selleth it according, there lieth no action of disceit against the master.

Also, if the servant keep the master's fire negligently, whereby his master's house is burnt, and his neighbor's also, there an action lieth against the master. But if the servant bear fire negligently in the street, and thereby the house of another is burned, there lieth no action against the master. . . .

Also, if a man make another his general receiver, and that receiver receiveth money of a creditor of his master, and maketh him acquittance, and after payeth not his master; yet that payment dischargeth the creditor: but if the creditor hath taken an acquittance of him without paying him his money, that acquittance only were no bar to the master, unless he made him receiver by writing, and gave him authority to make acquittances, and then the authority must be shewed. And if the creditor in such case, by agreement between the receiver and him, delivered to the receiver an horse, or another thing in recompence of the debt, that delivery dischargeth not the creditor, unless it be delivered over unto the master, and he agree to it. For the receiver hath no such power to make no such commutation, but his master give him special commandment thereto.

Also, if a servant shew a creditor of his master, that his master sent him for his money, and he payeth it unto him; that payment dischargeth him not, if the master did not send him for it indeed, except that it came after unto the use of the master by his assent.[1] . . .

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[1] The early reports, statutes, and text-books afford ample material for testing the accuracy of Doctor and Student's presentation of the early law as to a principal's responsibility for his agent's acts. Authorities useful for this purpose are: Mortimer's Case, Bigelow's Placita Anglo-Normannica, 59 (*temp.* W. I.); Abbot of Abingdon *v.* Anskill, id. 62 (1088–1089); Jurnet *v.* Church of St. Edmund, id. 223 (1176); Bostard *v.* Duket, Bracton's Note Book, pl. 873 (1232); Statute of Westminster II., 13 Ed. I., Stat. 1, c. 11, § 10 (1285); Anonymous, Y. B. 35 Ed. I. (Rolls ed.) 567 (1307) Statute of the Staple, 27 Ed. III., Stat. 2, c. 19, § 1 (1353); W.'s Case, Y. B. 27 Ass. pl. 5, fo. 133 (1354); J. H.'s Case, Fitzherbert's Abridgment, *Dette*, pl. 3 (1378); s. c. Bellewe's Cas. *temp.* Rich. II. 136; Anonymous, Y. B. 9 H VI. 53 b, pl. 37 (1430);

MICHAEL *v.* ALESTREE.

KING'S BENCH. 1676.

[2 *Levinz*, 172.]

CASE, for that the defendants in Lincoln's-Inn-Fields, a place where people are always going to and fro about their business, brought a coach with two ungovernable horses, and *eux improvide incaute et absque debita consideratione ineptitudinis loci* there drove them to make them tractable and fit them for a coach; and the horses, because of their ferocity being not to be managed, ran upon the plaintiff, and hurt and grievously wounded him. The master was absent, yet the action was brought against him as well as his servant, and both found guilty. And now 't was moved in arrest of judgment, that no *sciens* is here laid of the horses being unruly, nor any negligence alleged, but *e contra*, that the horses were ungovernable: yet judgment was given for the plaintiff, for 't is alleged that it was *improvide et absque debita consideratione ineptitudinis loci;* and it shall be intended the master sent the servant to train the horses there.[1]

BOSON *v.* SANDFORD ET AL.

KING'S BENCH. 1690.

[2 *Salk.* 440.[2]]

CASE against A. and B., part-owners of a ship, for that he put goods on board, and the defendants undertook to carry them safely for hire,

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Pigot's argument in the Duchess of Suffolk's Case, Y. B. 8 Ed. IV. 11–11 b (1468); Anonymous, Y. B. 11 Ed. IV. 6, pl. 10 (1471); Anonymous, Y. B. 13 H. VII. 15 b, pl. 10 (1497–8); Fitzherbert's Natura Brevium, 120 G (1534); Seaman and Browning's Case, 4 Leon. 123 (1589); Waltham *v.* Mulger, Moore, 776 (1605); Southern *v.* How, Popham, 143 (1618); s. c. Cro. Jac. 468, 2 Rolle's Reports, 5, 26; Seignior *v.* Wolmer, Godbolt, 360 (1623); Kingston *v.* Booth, Skinner, 228 (1684–5). — ED.

[1] *Per curiam,* s. c. *sub nom.* Michell *v.* Allestry, 3 Keble, 650: "It 's at peril of the owner to take strength enough to order them, and the master is as liable as the servant if he gave order for it, and the action is generally for bringing them thither, which is intended personal."

Per curiam, s. c. *sub nom.* Michil *v.* Alestree, 1 Ventris, 295: "It was the defendant's fault, to bring a wild horse into such a place where mischief might probably be done, by reason of the concourse of people. Lately, in this court an action was brought against a butcher, who had made an ox run from his stall and gored the plaintiff; and this was alleged in the declaration to be in default of penning of him." And *per* WYLDE, J.: "If a man hath an unruly horse in his stable, and leaves open the stable door, whereby the horse goes forth and does mischief, an action lies against the master." — ED.

[2] s. c. Skinner, 278; Comberbach, 116; 1 Shower, 29; 3 Mod. 321; Carthew, 58; 3 Levinz, 258. — ED.

but yet were so negligent that the goods were spoiled. Upon not guilty pleaded, in evidence it appeared that C. and D. were also part-owners, and that the ship was under the care of a master, to whom the goods were delivered; and this being found specially, it was argued *pro quer.*, that the action is grounded on the wrong, and may be against all or any of the proprietors. There was also another doubt started, and that was, whether the owners were liable, when in truth they did not undertake, but in fact the master *super se suscepit?* EYRE, Justice, held there was no difference between a land-carrier and a water-carrier, and that the master of a ship was no more than a servant to the owners in the eye of the law; and that the power he has of hypothecation, etc., is by the civil law. *Et per* HOLT, C. J. The owners are liable in respect of the freight, and as employing the master; for whoever employs another is answerable for him, and undertakes for his care to all that make use of him. 2dly, the court held that all owners were liable, for they are charged, in point of contract, as employers, and are all equally entitled to the freight. Either master or owners may bring an action for the freight; but if the owners bring the action, they must all join; *ergo* they must all be joined; as the freight belongs to all, so all are equally undertaking; and a breach of trust in one is a breach of trust in all: as where two make one officer, the act of one is the act of the other. 3dly, the court held this was not an action *ex delicto*, but *ex quasi contractu*, and it was not the contract of one but of all; that there was no other tort but a breach of trust. Therefore the court gave judgment for the defendant, because all the owners were not joined.[1]

SIR ROBERT WAYLAND'S CASE.

NISI PRIUS. 1690.

[3 *Salk.* 234.[2]]

HE used to give his servant money every Saturday to defray the charges of the foregoing week, the servant kept the money, yet *per* HOLT, C. J., the master is chargeable, for the master at his peril ought to take care what servants he employs; and 't is more reasonable, that he should suffer for the cheats of his servant than strangers and tradesmen; so if a smith's man pricks my horse, the master is liable.

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[1] Compare Boucher *v.* Lawson, Lee's Cas. *temp.* Hardwicke, 85, 194 (1735-6). — ED

[2] S. C. 1 Shower, 95. — ED.

BOULTON *v.* ARLSDEN.

NISI PRIUS, HOLT, C. J. 1697.

[3 *Salk.* 234.]

IN this case it was held, that where a servant usually buys for his master upon tick, and takes up things in his master's name, but for his own use, that the master is liable, but 't is not so where the master usually gave him ready money.

That where the master gives the servant money to buy goods for him, and he converts the money to his own use, and buys the goods upon tick, yet the master is liable, so as the goods come to his use, otherwise not.

That a note under the hand of an apprentice shall bind his master, where he is allowed to deliver out notes, tho' the money is never applied to the master's use.

But where he is not allowed or accustomed to deliver out notes, there his note shall not bind the master, unless the money is applied to the master's use.

TURBERVILLE *v.* STAMPE.

KING'S BENCH. 1697.

[1 *Ld. Raym.* 264.[1]]

CASE grounded upon the common custom of the realm for negligently keeping his fire. The plaintiff declares that he was possessed of a close of heath, and that the defendant had another close of heath adjoining; that the defendant *tam improvide et negligenter custodivit ignem suum* that it consumed the heath of the plaintiff. Not guilty pleaded. Verdict for the plaintiff. And *Gould*, king's serjeant, moved in arrest of judgment that this action ought not to be grounded upon the common custom of the realm; for this fire in the field cannot be called *ignis suus*, for a man has no power over a fire in the field, as he has over a fire in his house. And therefore this resembles the case of an innkeeper, who must answer for any ill that happens to the goods of his guest, so long as they are in his house; but he is not answerable, if a horse be stolen out of his close. And in fact in this case the defendant's servant kindled this fire by way of husbandry, and a wind and tempest arose, and drove it into his neighbour's field; so that it was not any neglect in the defendant, but the act of God. *Sed non*

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[1] s. c. Comberbach, 459; Skinner, 681; Carthew, 425; Comyns, 32; 1 Salk. 13; 12 Mod. 151; Holt, 9. The pleadings are given in 3 Ld. Raym. 250. — ED.

allocatur. For, *per curiam*, as to the matter of the tempest, that appeared only upon the evidence, and not upon the record, and therefore the King's Bench cannot take notice of it, but it was good evidence to excuse the defendant at the trial. Then as to the other matter, *per* HOLT, Chief Justice, ROKEBY and EYRE, Justices, a man ought to keep the fire in his field as well from the doing of damage to his neighbour, as if it were in his house, and it may be as well called *suus*, the one as the other; for the property of the materials makes the property of the fire. And therefore this action is well grounded upon the common custom of the realm. But TURTON, Justice, said that these actions grounded upon the common custom had been extended very far. And therefore (by him) the plaintiff might have case for the special damage, but not grounded upon the general custom of the realm. But by the other justices judgment was given for the plaintiff. Note Mr. *Northey* for the plaintiff cited 40 Assis. pl. 9; Fitz. issue 88, double plea, 31; 28 Hen. 6, 37; 21 Hen. 6, 11, b. Rast. Entr. 8, and Old Entr. 219, where the declaration is general for negligently keeping his fire in such a parish, without specifying a particular house or ground. But HOLT, Chief Justice, answered that *that* was an antiquated entry. And (by him) if a stranger set fire to my house, and it burns my neighbour's house, no action will lie against me; which all the other justices agreed. But if my servant throws dirt into the highway, I am indictable. So in this case, if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended that the servant had authority from his master, it being for his master's benefit.[1]

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[1] Skinner, 681, s. c.: "It was moved in arrest of judgment, that it does not appear in this case to be done by the command of the master; and then it being out of his house, he is not responsible, 2 H. 4, 24, for if the servant does it without the command of the master, it is not the negligence of the master; but it was answered, that it being after a verdict, be it by negligence or by misfortune, it is all one; for now they are upon the record, and it may be his fire in a field, as well as in a house; and it was matter of evidence if it be his fire or not."

Comberbach, 459, s. c.: "HOLT, C. J. . . . And tho' I am not bound by the act of a stranger in any case, yet if my servant doth any thing prejudicial to another, it shall bind me, where it may be presumed that he acts by my authority, being about my business." — ED.

MIDDLETON *v.* FOWLER.

NISI PRIUS. 1698.

[1 *Salk.* 282.]

AN action upon the case upon the custom of the realm was brought against the defendants being masters of a stage-coach; and the plaintiff set forth that he took a place in the coach for such a town, and that in the journey the defendants by their negligence lost a trunk of the plaintiff's. Upon not guilty pleaded, upon the evidence it appeared that this trunk was delivered to the person that drove the coach, and he promised to take care of it, and that the trunk was lost out of the coachman's possession; and if the master was chargeable with this action, was the question. HOLT, C. J., was of opinion that this action did not lie against the master, and that a stage-coachman was not within the custom as a carrier is, unless such as take a distinct price for carriage of goods as well as persons, as wagons with coaches; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom; for no master is chargeable with the acts of his servant but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master; and the plaintiff was nonsuited.

JONES *v.* HART.

NISI PRIUS. 1698.

[2 *Salk.* 441.]

A PAWN-BROKER'S servant took a pawn; the pawner came and tendered the money to the servant; he said he had lost the goods. Upon this the pawner brought trover against the master, and it was held well, *per* HOLT, C. J.

The servants of A. with his cart run against another cart, wherein was a pipe of sack, and overturned the cart, and spoiled the sack; an action lies against A. So where a carter's servant run his cart over a boy, it was held the boy should have his action against the master for the damage he sustained by this negligence. So in Lane and Cotton,[1] a letter with bills in it was delivered at the post-office to a servant; it was held, case lay against the post-master and not against the servant, unless he stole them, for then he was a wrong-doer, as where a gaoler suffers an escape wilfully; otherwise, if negligently. Per HOLT, C. J.[2]

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[1] The contrary was ruled to what is here stated. *Vide* the case, 1 Salk. 17. — REP

[2] Holt, 646, S. C.: "HOLT, C. J. . . . And so it is if a smith's man pricks a horse

ANONYMOUS.

NISI PRIUS. 1701.

[12 *Mod.* 514.]

PER HOLT, C. J. Every factor of common right is to sell for ready money. But if he be a factor in a sort of dealing or trade where the usage is for factors to sell on trust, there, if he sell to a person of good credit at that time, and he afterwards becomes insolvent, the factor is discharged; but otherwise if it be to a man notoriously discredited at the time of the sale. But if there be no such usage, and he, upon the general authority to sell, sells upon trust, let the vendee be ever so able, the factor is only chargeable; for in that case, the factor having gone beyond his authority, there is no contract created between the vendee and the factor's principal; and such sale is a conversion in the factor; and if it be not in market-overt, no property is thereby altered, but trover will also lie against vendee: so likewise if it be in a market-overt, and the vendee knows the factor to sell as factor.

WARD *v.* EVANS.

QUEEN'S BENCH. 1702–3.

[2 *Salk.* 442.[1]]

WARD sent his servant to receive a note of £50 of B., who went with him to Sir Stephen Evans's shop, who indorsed off £50 from a note B. had upon him, and gave Ward's servant a note of £50 upon one Wallis, a goldsmith, to whom the note was carried the next day by Ward's servant; Wallis refused to pay, and that day broke; upon this the note was sent back to Sir Stephen Evans, who refused payment, whereupon the action was brought. *Et per Cur.* it was held, 1st, that this was money received by Sir Stephen Evans; 2dly, that the act of a servant shall not bind the master unless he acts by authority of his master; and therefore if a master sends his servant to receive money, and the servant, instead of money, takes a bill, and the master, as soon as told thereof, disagrees, he is not bound by this payment; but acquiescence, or any small matter, will be proof of the master's consent, and that will make the act of the servant the act of the master.

3dly, They held this was no payment; for a goldsmith's note is only paper, and received conditionally, if paid; and not otherwise, without an express agreement to be taken as cash.

in shoeing, the master is liable. For whoever employs another is answerable for him, and undertakes for his care to all that make use of him. The act of a servant is the act of his master, where he acts by authority of the master." — ED.

[1] S. C. 3 Salk. 118; 6 Mod. 36; 12 id. 521; 2 Ld. Raym. 928; Comyns, 138. — ED.

4thly, they held that the party receiving such note should have a reasonable time to receive the money, as in this case the next day, and is not obliged, as soon as he receives it, to go straight for his money.

THOROLD *v.* SMITH.

QUEEN'S BENCH. 1706.

[11 *Mod.* 71, 87.]

THE defendant being indebted to Sir Charles Thorold in a hundred pounds, Sir Charles sent his servant to receive the money. The servant took the goldsmith's note upon one Johnson, and thereupon gave a receipt to Smith. Johnson broke within a week after.

The question was, whether this was a good payment to Sir Charles; or, whether the servant had pursued his authority in taking a note in lieu of money, and had a power to give a receipt to discharge the debt without receiving the money.

HOLT, C. J. A bill is no payment;[1] but if a man will give a receipt, he by that accepts the bill as money and payment; and therefore upon the receipt this case turns.

The principal objection from the Bar was, that the defendant had not authority to receive anything but money, and consequently could not discharge the debt upon receiving the bill.

POWELL, J., said, Sir Charles Thorold should have sent his man back again the same day to have dissented, else it is a presumption that his master was acquainted with, and acquiesced in, what he had done; and this might have altered the case.

To which the court agreed; and said, Sir Stephen Evans's case differed from this case, for Sir Stephen Evans became a receiver to the use of Ward. If a man give a note to another upon a banker, and no receipt, it is usual to have three days as a convenient time to receive it; and if the banker break in that time, it will be no payment.

Adjournatur.

Darnell, Serjeant. A receipt shall not be a good discharge, where a servant had not a special authority to give a receipt.[2] Suppose a servant give a receipt, and do not receive the money, shall this bind the master? So if he take any collateral security, as a bond.

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[1] By 3 & 4 Anne, c. 9, § 7, "If any person accept a bill of exchange for and in satisfaction of any former debt or sum of money formerly due to him, it shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt do not take his due course to obtain payment of it, by endeavoring to get the same accepted and paid, and make his protest, according to the directions of the act, either for non-acceptance or non-payment." See Murdal *v.* Clarke, 1 Salk. 124; Kyd on Bills of Exchange, 111. — REP.

[2] Year-Book, 10 Hen. VII. pl. 9; 4 Hen. VI. pl. 1; 40 Assize, 38. — REP.

Mr. Eyres. The question is, if a servant is sent by his master for money, and receive anything else in lieu of money, whether this is a pursuance of his authority. It did not appear in this case that Sir Charles Thorold had any notice of the receipt of the bills, nor of Johnson's breaking; but the servant sent the note back upon hearing of Johnson's breaking. A servant sent by his master to receive money cannot release or discharge his master's debt without receiving the money; for a receiver has no power to make any commutation without a special authority.[1]

Sir James Mountague, contra. The authorities cited from the old books will not weigh much in this case; for the way of trade and commerce is of a quite different nature now.

Holt, C. J. A bill of exchange or goldsmith's note is not payment, unless the party omits receiving of it in a reasonable time, as three days, when he might have received it; but if he give a receipt and accept the note as payment, this shall bind him. In this case Sir Charles himself gave no receipt, but the servant. Where a man has authority to receive money, he cannot receive anything else. It is common practice, if a man receive a goldsmith's note, and give a receipt, it is purchasing the bill. In this case it must be understood, according to the course of the world and trade, that this servant had a general authority to do what his master would have done; this case differs much from the case of a servant or attorney to one particular purpose, but this is in nature of a factor, etc.

Powell, J. No modern practice will alter the old law. The party himself may give a receipt, but a general receiver cannot receive anything else. His own acquittance would stop him, but his servant's receipt will not. In this case the servant was sent to receive money: this servant, he supposed, had many times received bills for his master, and this is an authority to this purpose; but this indeed was proper matter of evidence, being the constant practice of the world; and had this not been, Sir Charles would have asked his servant what he had done; and when he had told him he had received such a note, it is a strong presumption his master approved of it, or else, it is to be presumed, he would have sent it back again.

Holt, C. J., thought this was more matter of evidence than law; and any jury at Guildhall would find payment by a bill to be a good payment, it being the common practice of the city. And he proposed a new trial, whether the servant had power to receive a bill, and give a receipt; which was agreed to.

Holt, C. J. In this case, the receipt of a servant that has power is the receipt of the master.

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[1] Doctor and Student, 138 b. — Rep.

HERN *v.* NICHOLS.

Nisi Prius. 1708.

[1 *Salk.* 289.]

In an action on the case for a deceit, the plaintiff set forth that he bought several parcels of silk for ——— silk, whereas it was another kind of silk; and that the defendant, well knowing this deceit, sold it him for ——— silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant who was the merchant, but that it was in his factor beyond sea; and the doubt was, if this deceit could charge the merchant? And Holt, C. J., was of opinion, that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter;* for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger. And upon this opinion the plaintiff had a verdict.

NICKSON *v.* BROHAN.

Queen's Bench. 1712.

[10 *Mod.* 109.]

A master sent his servant, who was used to transact affairs of that nature for him, on Saturday morning, with a note drawn upon Sir Stephen Evans, with orders to get from Sir Stephen either bank bills or money, and turn them into exchequer notes; but the servant having other business of his master's upon his hands, to save himself the time and trouble of going to Sir Stephen, went to B. and prevailed with him to give him a bank bill for the note upon Sir Stephen; and then, in pursuance of his master's orders, invested it in exchequer notes, which he brought to his master, not letting him know but that he had gone to Sir Stephen. Sir Stephen Evans failed upon the Monday following.

The question was, upon whom this loss should light, B. or the master.

Parker, Chief Justice, who tried the cause, was first of opinion that it should fall upon B., because the servant acted directly contrary to his master's orders, and B., by furnishing the servant with a bank bill, did the master no service at all; for if he had not done it, the servant must, in obedience to his master's orders, have gone and received himself the money from Sir Stephen; and cited the case of Ward *v.* Evans, where it was resolved that if a servant, sent to receive money, takes a bill in lieu of it, the master is not bound by the act of the servant, unless the bill is answered.

But one of the jury informing him that he took the practice to be otherwise (for that whether a servant, used to act upon the credit of his master, went against the orders of the master, was a fact that could not be known to a third person), he quitted his opinion; but directed the counsel to move the Court of King's Bench, which was accordingly done.

The substance of what was said upon the motion in favor of the master was, that the servant going contrary to his orders, and there being no subsequent consent of the master, who knew nothing of the matter, the act of the servant should not bind the master, according to the cases of Ward *v.* Evans, Hanky *v.* Watts, and Thorold *v.* Smith. A master commands his servant to sell his horse, the servant sells him as a good one, no action against the master.

But the court were all of opinion that the verdict was well given, and that the master was chargeable, and he only; for a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him; and if this general authority should be liable to be determined for a time by any particular instructions or orders, to which none but the master and servant are privy, there would be an end of all dealing but with the master. The master has put himself in the power of the servant by trusting him with the bill. The case of Monk *v.* Clayton[1] was where the act of a servant, though out of place, bound his master, by reason of the former credit given him by his master's service, the other not knowing that he was discharged. And as for the cases put, there was this main difference between them, that nothing came to the master's use; as here the notes did. In some of those cases there was a prior debt, but none here. It was agreed by the court that the property of the note was not transferred and vested in B., but was only in nature of a *depositum* or security to him, for there is no indorsement; nor could he have sued upon the bill; and though practice cannot alter the law, yet it may explain an agreement. They were likewise of opinion that the master could not recover it of the servant, the loss being occasioned by a mere accident, and not either folly or negligence. If a master frequently send a servant to market without ready money, so that the servant is trusted upon the master's account, — if, in such a case, the servant embezzles the money when he is sent with it, and buy upon trust, the master is chargeable; but not if he always is sent with ready money.

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[1] Molloy, *de Jure Maritimo* (ed. 1676) 270. — REP.

ARMORY *v.* DELAMIRIE.

NISI PRIUS, PRATT, C. J. 1721–2.

[1 *Str.* 505.]

THE plaintiff, being a chimney-sweeper's boy, found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know, it came to three halfpence; the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled: —

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.[1]

ANONYMOUS.

NISI PRIUS, PRATT, C. J. 1722.

[1 *Str.* 527.]

THE Chief Justice allowed the wife's declaration, that she agreed to pay 4*s*. per week for nursing a child, was good evidence to charge the husband; this being a matter usually transacted by the women.

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[1] *Acc.:* Mead *v.* Hamond, 1 Str. 505 (1721–2). And see Cary *v.* Webster, 1 Str. 480 (1721). — ED.

GRAMMAR *v.* NIXON.

NISI PRIUS, EYRE, C. J. 1725.

[1 *Str.* 653.]

A GOLDSMITH'S apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an essay then shown. Upon the evidence it appeared he had forged the essay, and that the ingot was made out of a lodger's plate, which he had stolen. And the Chief Justice held the master was answerable in this case.

Strange, pro def'.

BLACKSTONE'S COMMENTARIES, I., 425–427, 429–432 (1765): —

1. The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants;* so called from being *intra moenia,* or domestics. The contract between them and their masters arises upon the hiring. . . .

2. Another species of servants are called *apprentices* (from *apprendre,* to learn), and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and be maintained and instructed by them. . . .

3. A third species of servants are *labourers,* who are only hired by the day or the week, and do not live *intra moenia,* as part of the family. . . .

4. There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards, factors,* and *bailiffs:* whom, however, the law considers as servants *pro tempore,* with regard to such of their acts as affect their master's or employer's property. . . .

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam qui facit per alium, facit per se.* Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it: though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper's servants rob his guests, the master is bound to restitution: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam qui non prohibet, cum prohibere possit, jubet.* So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring action against the master: for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant; but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority.

If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant.[1] But in these cases the damage must be done while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehaviour. Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service; otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service; and must himself answer the damage personally. But now the common law is, in the former case, altered by statute 6 Ann. c. 3, which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness. . . .[2]

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[1] "This is, of course, not law to day, and probably was not law when written. Blackstone simply repeated the doctrine of the Year Books. The servant had not expressly assumed to shoe carefully. . . . This primitive notion of legal liability has, of course, entirely disappeared from the law. An *assumpsit* is no longer an essential allegation in these actions of tort, and there is, therefore, little or no semblance of analogy between these actions and actions of contract." Professor J. B. Ames, "The History of Assumpsit," 2 Harv. L. Rev. 1, 4. — Ed.

[2] "Blackstone . . . misunderstood 'accidentally' to include 'negligently' in these statutes. This was corrected by Philliter *v.* Phippard, 11 Q. B. 347 (1843)." Professor J. H. Wigmore, "Responsibility for Tortious Acts," 7 Harv. L. Rev. 441, 449, n. (6). — Ed.

We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.[1]

SECTION II.

Torts.[2]

BRUCKER *v.* FROMONT.

KING'S BENCH. 1796.

[6 *T. R.* 659.]

THE plaintiff declared against the defendant for that he on such a day was driving a cart and horse along the king's highway, and that he so carelessly, negligently, and improvidently guided, drove, and directed the same that the cart for want of due care and caution of the defendant in that behalf was violently forced and driven and run against the plaintiff's horse then passing and drawing the plaintiff's chariot along the said highway, whereby the shaft of the defendant's cart was forced into the body of the plaintiff's horse and killed it.

The fact was that the defendant's servant was driving the cart at the time when the accident happened, and the defendant himself was not present. Whereupon it was objected by the defendant's counsel at the trial that the action was misconceived, as it ought to have stated, not that the defendant himself had done the act, but that it had been done by the act of his servant; and Mr. Baron Thomson before whom it was tried at the last assizes for Berkshire, nonsuited the plaintiff. A rule having been obtained to show cause why the nonsuit should not be set aside, and a new trial granted,

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[1] For a full statement and discussion of the authorities that show the history of the principal's responsibility for his agent's torts, see Professor J. H. Wigmore's articles on Responsibility for Tortious Acts, in 7 Harv. L. Rev. 315, 383, 441. For historical matter as to both contracts and torts, see 2 Pollock and Maitland's History of English Law, 225–227, 526–532, and Mr. Justice Holmes' articles on Agency in 4 Harv. L. Rev. 345, and 5 id. 1. — ED.

[2] In addition to cases on the torts of persons who are confessedly servants, this section presents cases on the distinction between servants and independent contractors. Cases on fellow-servants are found in Chapter VI. — ED.

Plumer and *Milles* showed cause; contending that the master was not liable for the act of his servant under this general form of declaring, which was not conformable to the generality of precedents, nor warranted by any express decision. Mr. Justice Blackstone, 1 Com. 429, &c., states the liability of masters for the acts of their servants on three distinct grounds: first, where the servant acts by the master's express command, in which case the act of the servant is considered as the act of the master, on the principle of *qui facit per alium facit per se;* and the person injured may declare against the latter as for his own act. Secondly, where the servant is acting in the usual course of his master's business at the time of the act complained of; in which case the law implies that it was done by the master's consent; and he is liable in the same manner as in the former instance. Thirdly, where by his own negligence or wilfulness the servant does an injury to another while in his master's employment; here, although the master is still liable, yet that liability arises, not from any implied command or consent of the master to the wrongful act of his servant, but from the legal relation subsisting between them by virtue of which the former is answerable for the default of the latter. In such cases, therefore, the act itself not being imputable to the master, but only the consequences arising from the relation in which he stands, the party injured ought by his declaration to allege the fact truly, and refer the act to the servant who did it, deducing the master's liability from such relation; and the more so in order that the court may see upon the face of the record that the act imputed is such for which by law the master is answerable. For it is not every wrongful act of a servant for which the master is compellable to make satisfaction; but it must appear to be such as happened within the scope of his employ. But if this general mode of declaring be deemed sufficient, the master will be precluded from moving in arrest of judgment, or taking the opinion of a court of error. The only cases referred to in support of the action were, first, Michael *v.* Alestree and another, 2 Lev. 172, where an action was brought against the master and servant for an injury done to the plaintiff by the servant in exercising his master's horses, which were unruly, in Lincoln's-Inn-Fields. The act there is indeed laid to have been done by both, though the master was absent; yet the ground of the judgment was, that it should be intended that the master sent the servant there to train the horses. The injury is stated to have arisen from the ferocity and ungovernable nature of the horses, which were driven there to be rendered tractable. And if the master directed the servant to train the horses in an improper place, and in so doing the injury happened, the declaration was well adapted to the truth of the case on the principles before laid down. The other case is that of Turberville *v.* Stampe, 1 Ld. Raym. 264; 3 Ld. Raym. 375; Skin. 681 Carth. 425; Salk. 13 S. C., where the plaintiff declared upon the custom of the realm against the defendant for so negligently keeping his fire that it consumed the plaintiff's heath; it only appears *arguendo* that the fire was made by the defendant's servant. But that case is distinguishable from the present in many respects. The question arose upon a motion in arrest of judgment, and not upon a new trial; and therefore it was not in dispute how far the evidence tallied with the declaration; and the declaration was good on the face of it. Next, it was an action founded on the custom of the realm; and therefore by law the act was specially imputable to the defendant. Again, it is stated to have been a fire lighted in the course of husbandry, which must necessarily have been either by the express or implied command of the owner; in which case the objection could not have arisen even at Nisi Prius. And the court are made to say that if the servant kindled the fire by way of husbandry, and proper for his employment, though he had no express command, his master shall be liable; for it shall be intended that the servant had authority from his master, it being for his master's benefit. Both these cases therefore fall within the former rules, and do not apply to the present, where the liability of the master arises from the culpable conduct of the servant in an instance which cannot be imputed either to an express or implied command.

Williams, Serjt., and *Russell*, after mentioning the case of Turberville *v.* Stampe to show that this mode of declaring was considered in Lord Holt's time as the proper form, where an action is brought against the master for the negligence of the servant, upon the principle that it is sufficient to declare upon the legal effect of any act, were stopped by the court.

Lord KENYON, C. J. On reason and on principle I should have been inclined to support the decision at Nisi Prius, because it is most convenient to state the real cause of action on the record. But I cannot distinguish this case from that cited from Lord Raymond's Report; nor am I equal to the task of overturning a precedent that was considered by Lord Holt and the court as a good one.

ASHHURST, J. I think it may be stated in the declaration either way, though it is certainly most convenient to state the fact as it really happened.

GROSE, J. The use of a declaration is to inform the defendant of everything that the plaintiff intends to prove, and that the defendant is called upon to answer; and on looking at this declaration the defendant could not know that the action was brought against him for the act of his servant; but I cannot get rid of the authority of the case that has been mentioned.

LAWRENCE, J., of the same opinion.

On the next day *Plumer* mentioned this case again; observing that the case of Turberville *v.* Stampe, on the authority of which alone he understood the court had granted a new trial, did not apply to this case, because there the question was not, whether the facts proved supported the declaration, but whether the declaration itself was good, it being an action on the custom of the realm against the defendant for negligently keeping his fire, and it was stated in the declaration that the fire was on a close of heath and not in the defendant's house. But

Lord KENYON, C. J., said, the ground on which that case influenced my opinion was, that that precedent was at that time considered as a good one. *Rule absolute.*[1]

BUSH *v.* STEINMAN.

IDEM ET UX. *v.* EUNDEM.

COMMON PLEAS. 1799.

[1 *B. & P.* 404.]

THESE were two actions on the case against the defendant for causing a quantity of lime to be placed on the high-road, by means of which the plaintiff and his wife were overturned and much hurt, and the chaise in which they then were was considerably damaged.

The two actions came on together to be tried before EYRE, Ch. J., at the Guildhall Sittings after last Hilary term, when the following circumstances appeared in evidence. The defendant having purchased a house by the road-side (but which he had never occupied), contracted with a surveyor to put it in repair for a stipulated sum; a carpenter having a contract under the surveyor to do the whole business employed a bricklayer under him, and he again contracted for a quantity of lime with a lime-burner, by whose servant the lime in question was laid in the road. The Lord Chief Justice was of opinion that the defendant was not answerable for the injury sustained by the plaintiff under the above circumstances; but in order to save expense, a verdict was taken for the plaintiff for £12 12*s.*, with liberty to the defendant to move to have a nonsuit entered.

Accordingly a rule *nisi* for that purpose having been obtained on a former day,

Cockell and *Shepherd*, Serjts., now showed cause.

Le Blanc and *Marshall*, Serjts., *contra.*

EYRE, C. J. At the trial I entertained great doubts with respect to the defendant's liability in this action. He appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate author in the relation of master, that to allow him to be charged for the injury sustained by the plaintiff seemed to render a circuity of action necessary. Upon the plaintiff's recovery, the defendant would be entitled to an action against the surveyor, the surveyor and each of the subcontracting parties in succession to actions against the persons with whom they immediately contracted, and last of all the lime-burner would be entitled to the common action against his own servant. I hesitated therefore in carrying the responsibility beyond the immediate master of the person who committed the injury, and I retained my doubts upon the subject, till I had heard the argument on the part of the plaintiff, and had an opportunity of conferring with my brothers. They, including Mr. Justice BULLER, are satisfied that the action will lie, and upon reflection, I am disposed to concur with them; though I am ready to confess that I find great difficulty in stating with accuracy the grounds on which it is to be supported. The relation between master and servant as commonly exemplified in actions brought against the master is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seems to be too large and loose. The principle of Stone *v.* Cartwright, 6 T. R. 411, with the decision of which I am well satisfied, is certainly applicable to this case; but that of Littledale *v.* Lord Lonsdale, 2 H. Bl. 267, 299, comes much nearer. Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference) that an injury was done to the plaintiff's house, and his Lordship was held responsible. Why? Because the injury was done in the course of *his* working the colliery; whether he worked it by agents, by servants, or by contractors, still it was his work; and though another person might have contracted with him for the management of the whole concern without his interference, yet the work being carried on for his benefit, and on his property, all the persons employed must have been considered as his agents and servants notwithstanding any such arrangement; and he must have been responsible to all the world, on the principle of *sic utere tuo ut alienum non lædas.* Lord Lonsdale having empowered the contractor to appoint such persons under him as he should think fit, the persons appointed would in contemplation of law have been the agents and servants of Lord Lonsdale. Nor can I think that it would have made any difference, if the injury complained of had arisen from his Lordship's coals having been placed by the workmen, on the premises of Mr. Littledale, since it would have been impossible to distinguish such an act from the general course of business in which they were engaged, the whole of which business was carried on either by the express direction of Lord Lonsdale, or under a presumed authority from him. The principle of this case therefore seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point. According to the doctrine cited from Blackstone's Commentaries if one of a family "layeth or "casteth" anything out of the house which constitutes a nuisance the owner is chargeable. Suppose then that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a hoard in the street (which being for the benefit of the public they may lawfully do) and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner would be guilty of a nuisance; and I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose; for in contemplation of law the erection of the hord would equally be his act. If that be established we come one step nearer to this case. Here the defendant by a contractor, and by agents under him, was repairing his house; the repairs were done at his expense, and the repairing was his act. If then the injury complained of by the plaintiff was committed in the course of making those repairs, I am unable to distinguish the case from that of erecting the hord, or from Littledale *v.* Lord Lonsdale, unless indeed a distinction could be maintained (which however I do not think possible) on the ground of the lime not having been delivered *on* the defendant's premises, but only at a place close to them, with a view to being carried on to the premises, and consumed there. My brother Buller recollects a case which he would have stated more particularly, had he been able to attend. It was this; a master having employed his servant to do some act, the servant out of idleness employed another to do it, and that person in carrying into execution the orders which had been given to the servant committed an injury to the plaintiff, for which the master was held liable. The responsibility was thrown on the principal from whom the authority originally moved. This determination is certainly highly convenient, and beneficial to the public. Where a civil injury of the kind now complained of has been sustained the remedy ought to be obvious, and the person injured should have only to discover the owner of the house which was the occasion of the mischief; not be compelled to enter into the concerns between that owner and other persons, the inconvenience of which would be more heavily felt than any which can arise from a circuity of action. Upon the whole case, therefore, though I still feel difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my brothers.

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[1] Compare Anonymous, Y. B. 32 Ed. I. (Rolls ed.) 331, 333 (1304). — ED.

Heath, J. I found my opinion on this single point, *viz.:* that all the subcontracting parties were in the employ of the defendant. It has been strongly argued that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further. Thus a factor is not a servant; but being employed and trusted by the merchant, the latter, according to the case in Salkeld, is responsible for his acts. There are besides this other cases. As where a person hires a coach upon a job, and a job-coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant. We all remember an action for defamation brought against Tattersall who was the proprietor of a newspaper, with sixteen others; the libel was inserted by the persons whom the proprietors had employed by contract to collect news, and compose the paper, yet the defendant was held liable. Now this is a strong case to show that it makes no difference whether the persons employed by the defendant were employed on a *quantum meruit*, or were to be paid a stipulated sum. In Rosewell *v.* Prior, Salk. 460, an action for the continuance of a nuisance was held to lie against the defendant though he had underlet the building which was the subject of it, and though the plaintiff had recovered against him in a former action for the erection of the nuisance; for the court said "he affirmed the continuance by his demise, and received rent as a consideration for it." That case is analogous to the present; the ground of the decision having been, that the defendant was benefited by the nuisance complained of. It is not possible to conceive a case in which more mischief might arise than in the present, if the various subcontracts should be held sufficient to defeat the plaintiff of his action. Probably he would not be able to trace them all, since none of the parties could give him any information, and consequently he might be turned round every time he came to trial.

ROOKE, J. I am of the same opinion. He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. According to the principle of the case in 2 Lev. it shall be intended by the court, that he has a control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own. He ought to reserve such control, and if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. The case which has been supposed of the lime having been deposited at a distance from the defendant's house, and the accident having happened there, does not apply; for here a person acting under the general employment of the defendant brought a quantity of lime to the premises and deposited it without any objection being made by any person there, whereas it was the duty of the defendant to have provided a person to superintend those employed in his work. The person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise. There is such a variety of sub-contracts in this case as rarely occurs, but this serves only to illustrate more strongly the mischief which would ensue should we depart from the doctrine in Stone *v.* Cartwright. In that case, and in Littledale *v.* Lord Lonsdale, the safest rule was adopted. The plaintiff may bring his action either against the person from whom the authority flows, and for whose benefit the work is carried on, or against the person by whom the injury was actually committed. If the employer suffer by the acts of those with whom he has contracted he must seek his remedy against them. *Rule discharged.*

McMANUS *v.* CRICKETT.

KING'S BENCH. 1800.

[1 *East*, 106.]

THIS case was very much discussed at the bar, upon a motion to set aside a verdict for the plaintiff, and enter a nonsuit, by *Gibbs* and *Wood* against the rule, and *Garrow* and *Giles* in support of it. The court took time to consider of their judgment; and afterwards entered so fully into the cases cited and the arguments urged at the bar that it is unnecessary to detail them in the usual form.

Lord KENYON, C. J., now delivered the unanimous opinion of the court.

This is an action of trespass, in which the declaration charges that the defendant with force and arms drove a certain chariot against a chaise in which the plaintiff was riding in the king's highway, by which the plaintiff was thrown from his chaise and greatly hurt. At the trial it appeared in evidence that one Brown, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present,[1] nor did he in any manner direct or assent to the act of the servant; and the question is, if for this wilful and designed act of the servant an action of trespass lies against the defendant, his master. As this is a question of very general extent, and as cases were cited at the bar, where verdicts had been obtained against masters for the misconduct of their servants under similar circumstances, we were desirous of looking into the authorities on the subject, before we gave our opinion; and after an examination of all that we could find as to this point, we think that this action cannot be maintained. It is a question of very general concern, and has been often canvassed; but I hope at last it will be at rest. It is said in Bro. Abr. tit. Trespass, pl. 435, "If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished." And in 2 Roll. Abr. 553, "If my servant, without my notice, put my beasts into another's land, my servant is the trespasser, and not I; because by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts." I have looked into the correspondent part in Vin. Abr. and as he has not produced any case contrary to this, I am satisfied with the authority of it. And in Noy's Maxims, ch. 44, "If I command my servant to distrain, and he ride on the distress, he shall be punished, not I." And it is laid down by HOLT, C. J., in Middleton *v.* Fowler, Salk. 282, as a general position, "that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him." Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord HOLT, his master will not be anwerable for such act. Such upon the evidence was the present case; and the technical reason in 2 Roll. Abr. with respect to the sheep applies here; and it may be said that the servant, by wilfully driving the chariot against the plaintiff's chaise, without his master's assent, gained a special property for the time, and so to that purpose the chariot was the servant's. This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant, who had no purpose but the execution of his master's orders; but the form of those actions proves that this action of trespass cannot be maintained: for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of those actions shows that where the servant is in point of law a trespasser, the master is not chargeable as such; though liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant. If this were otherwise, the plaintiffs in the cases mentioned in 1 Lord Raym. 739 (one where the servants of a carman through negligence ran over a boy in the streets and maimed him; and the other, where the servants of A. with his cart ran against the cart of B. and overturned it, by which a pipe of wine was spilt) must have been nonsuited from their mistaking the proper form of action, in bringing an action upon the case, instead of an action of trespass; for there is no doubt of the servants, in those cases, being liable as trespassers, even though they intended no mischief; for which, if it were necessary, Weaver *v.* Ward, in Hobart 134, and Dickinson *v.* Watson, in Sir Thomas Jones, 205, are authorities. But it must not be inferred from this that in all cases where an action is brought against the servant for improperly conducting his master's carriage, by which mischief happens to another, the action must be trespass. Michael *v.* Allestree, in 2 Levinz, 172, where an action on the case was brought against a man and his servant for breaking a pair of horses in Lincoln's Inn Fields, where, being unmanageable, they ran away with the carriage and hurt the plaintiff's wife, is an instance to show that trespass on the case may be the proper form of action. And upon a distinction between those cases where the mischief immediately proceeds from something in which the defendant is himself active, and where it may arise from the neglect or other misconduct of the party, but not immediately, and which perhaps may amount only to a nonfeasance, we held in Ogle *v.* Barnes, 8 Term Rep. 188, that the plaintiff was entitled to recover. The case of Savignac and Roome, 6 Term Rep. 125, which was much pressed as supporting this action, came before the court on a motion in arrest of judgment; and the only question decided by the court was, that the plaintiff could not have judgment, as it appeared that he had brought an action on the case for that which in law was a trespass; for the declaration there stated that *the defendant* by his servant *wilfully* drove his coach against the plaintiff's chaise. Day *v.* Edwards, 5 Term Rep. 648, was also mentioned; which was an action on the case, in which the declaration charged the defendant personally with furiously and negligently driving his cart; that by and through the furious, negligent, and improper conduct of the defendant the said cart was driven and struck against the plaintiff's carriage; and on demurrer, the court were of opinion that the fact complained of was a trespass. And in the last case that was mentioned, of Brucker *v.* Fromont, 6 Term Rep. 659, the only point agitated was, whether evidence of the defendant's servant having negligently managed a cart supported the declaration, which imputed that negligence to the defendant; and the court with reluctance held that it did, on the authority of a precedent in Lord Raymond's Reports, 264, of Turberville and Stamp. In none of these cases was the point now in question decided; and those determinations do not contradict the opinion we now entertain, which is, that the plaintiff cannot recover, and that a nonsuit must be entered.

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[1] No person was in the carriage: the act was done by the servant either in going for or after he had set down his master. — REP.

PER CURIAM, *Rule absolute for entering a nonsuit.*

WEYLAND *v.* ELKINS.

NISI PRIUS. 1816.

[*Holt N. P.* 227.[1]]

THIS was an action against the defendant, the proprietor of a wagon, for the negligence and misconduct of his servant, the driver; who had driven the wagon against a cart which stood in the public street, in Kensington, and had forced the cart against the plaintiff's shop window, which was thereby broken. The wagon belonged to the defendant; but the horses were the property of another partner, of the name of Dyson. The business of a public carrier was divided between them: the defendant provided the wagon, and Dyson found the horses and drivers, from London to Farnham; but from Farnham to Gosport, which was the conclusion of the stage, the defendant provided horses and drivers. He had, however, no actual control over the wagoner at the time of the accident; on the contrary, Dyson hired him, and paid him his wages.

Best, Serjeant, for the defendant. Elkins is not responsible: it is his wagon, but it is neither drawn by his horses nor driven by his servant. The principle of the law is, to hold the master responsible for the injury done by his servant in the course of his employ; the relation of master and servant must therefore subsist, or the law can raise no responsibility. It would be unjust to make one man liable for the act of another, whom he has not placed in his employment, and over whom he has no control. If I lend a friend my carriage, and he hires a coachman to drive it, am I responsible, as the owner of the carriage, for an injury done by the driver? The action is a hard one at best, and ought not to be extended. He cited Barton *v.* Hanson, 2 Taunt. 49.

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[1] s. c. 1 Starkie, 272. — ED

Gibbs, C. J. The action is maintainable on this principle: the wagon belongs to Elkins; he has the profit of the carriage. On what terms he engages with other persons to horse the wagon, we cannot tell. It is sufficient that he is found to be a partner in a common concern, and jointly interested with Dyson in the profits. It is of no importance how Elkins and Dyson apportion the carrying business between them. The servant is engaged to drive the wagon for Elkins, as well as for his immediate employer Dyson. Though, by the subordinate contract between the partners he is the servant of one, yet in the contemplation of the law, and for all purposes of legal responsibility, he is in the employ of both. The case cited has no application. There may be an inferior contract, regulating the rights of the parties, and binding them to each other, which will not extinguish or alter the general obligation which they all owe to the public.

Verdict for the plaintiff.

Pell, Serjeant, and *Espinasse*, for the plaintiff.
Best, Serjeant, for the defendant.

LAUGHER *v.* POINTER.

King's Bench. 1826.

[5 *B. & C.* 547.[1]]

Case. The first count of the declaration alleged that the plaintiff was possessed of a horse, and defendant was possessed of a carriage and two horses harnessed to and drawing the same, and which carriage and horses were under the care, government, and direction of a person, being the servant of the defendant in that behalf, who was driving the same, yet that the defendant, by his said servant, so negligently and improperly drove and directed his said carriage and horses that by the negligence and improper conduct of the defendant, by his said servant, the carriage ran and struck against the plaintiff's horse, &c. The second count differed from the first, only, by omitting to state that the defendant was possessed of the horses. The third and last count alleged that the defendant was possessed of a carriage drawn by two horses under the care, government, and direction of the defendant, yet that the defendant so negligently and improperly drove, governed, and directed the carriage and horses that, by the negligence and improper conduct of the defendant, the carriage ran and struck against the plaintiff's horse, &c. At the trial before ABBOTT, C. J., at the London sittings after Michaelmas term, 1823, it appeared in evidence that the defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage, sent in the usual way to a stable-keeper for a pair of horses for a day. The stable-keeper accordingly sent the pair of horses and a person to drive the same. The defendant did not select the driver, nor had any previous knowledge of him. The stable-keeper sent such person as he chose for this purpose. The driver had no wages from his master, but depended upon receiving a gratuity from the persons whose carriages he drove; the defendant gave him 5*s.* as a gratuity for his day's work, but the driver had no power to demand anything. The Lord Chief Justice thought that the evidence did not support the declaration, and directed a nonsuit. A rule *nisi* for a new trial was afterwards granted, and upon the argument, there being a difference of opinion on the bench, the case was directed to be argued before the twelve judges, all of whom (except the Lord Chief Baron) met for that purpose in Serjeant's Inn Hall, on the 2d of February 1825, when

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[1] s. c. 8 D. & R. 556. — Ed.

Tindal showed case against the rule.

Abraham, *contra.*

Tindal, in reply. *Cur. adv. vult.*

And now the Judges not being agreed in opinion proceeded to give judgment seriatim.

LITTLEDALE, J.[1] In the course of driving the carriage, the coachman by his negligent conduct occasioned the injury; and the question for the consideration of the court is, whether the defendant be liable. According to the rules of law, every man is answerable for injuries occasioned by his own personal negligence; and he is also answerable for acts done by the negligence of those whom the law denominates his servants, because such servants represent the master himself, and their acts stand upon the same footing as his own. And in the present case the question is, whether the coachman, by whose negligence the injury was occasioned, is to be considered a servant of the defendant.

For the acts of a man's own domestic servants there is no doubt but the law makes him responsible, and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master either personally or by those who are entrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him.

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[1] After stating the case. — ED.

This rule applies not only to domestic servants who may have the care of carriages, horses, and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself or by a person specially deputed by him, if any damage happen through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under workmen, and he pays them on behalf of the owner. These under workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer. This, however, is not the case of a man employing his own immediate servants, either domestic servants or others, engaged by him to conduct any business, or employment, or occupation carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to employ him. This coachman was not hired to the defendant; he had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman. It is true the master paid him no wages, and the whole which he got was from the person who hired the horses, but that was only a gratuity. It is the case with servants at inns and hotels. Where there is a great deal of business they frequently receive no wages from the owner of the inn or hotel, and trust entirely to what they receive from the persons who resort to the inn or hotel, and yet they are not the less the servants of the innkeeper; they are not servants upon wages, but servants upon expectation of gratuities. And, therefore, if the defendant is in this case to be answerable for the acts of the driver provided by the jobman, it must be upon this principle, that if a man either for his benefit or pleasure employs an agent to conduct any business, such agent is to be looked upon in the same light as if he was the immediate servant of the employer, and that the owner of the property by employing such an agent to transact his business, confides to him the choice of the under workmen, and then the principle must go on to this, that such agent and under workmen are to be considered in the same light as the foreman or manager of a person in conducting his business, and as the workmen selected by such foreman or manager; and that it makes no difference to persons who receive an injury in what light the offending party stands to the principal, whether as an under workman employed by an agent, or an under workman employed by the foreman of the principal. And that the only thing to be looked to is, whether in the end the principal pays for the employment in the course of which the injury is occasioned.

But I think that, upon principle, this rule cannot be carried so far. In Bush *v.* Steinman, 1 Bos. & Pul. 407, indeed, Mr. Justice HEATH expresses it as his opinion that if a person hires a coach upon a job, and a job coachman is sent with it and does any injury, the hirer of the carriage is answerable. That is certainly entitled to great weight, as being the opinion of a very able judge. It was, however, only an obiter dictum, and in a case where, like the present, there is a difference of opinion amongst the judges, the question must, if possible, be determined upon principle and decided cases. If a man charters a ship for a voyage or for time, and the master and mariners are appointed by the owner, this ship is employed for the benefit and for transacting the business of the charterer, just the same as if he had a ship of his own employed in the same service, and it might be said that he deputes to the owner the selection of the master and mariners; but in such a case the law has never considered the charterer liable to third persons for the negligence of the master and mariners. In Fletcher *v.* Braddick, 2 N. R. 182, the owners had chartered the vessel to the commissioners of the navy, who were to put an officer on board, under whose direction the master was to act, and though there was a king's pilot on board, yet the owners were nevertheless held liable for running down the plaintiff's ship. In Nicholson *v.* Mounsey, 15 East, 384, a captain of a man of war was held not liable for the default of the lieutenant whose watch it was when an injury was committed. Suppose a man has a ship or a carriage or other thing to repair, and he, instead of having the repairs done on his own premises and by his own servants, sends it out to be repaired by a person who exercises the public employment under which it would be repaired, and any damage happens in the course of the repair by the negligence of the persons employed; these are employed by a person who may be considered the agent of the principal, and yet the law would not hold the principal liable. If a man hires a carriage and horses to travel from stage to stage, the carriage and horses are employed for the benefit or pleasure of the traveller, instead of using his own, which he may not do either from inability to keep horses or a desire of expedition, and yet the law has never considered the traveller liable. There is no difference in principle between a man's travelling by the stage or travelling by the day. In one case and the other the traveller is using the carriage and horses for his benefit; he pays so much by the day instead of so much by the mile; he pays the coachman a gratuity in one case, and the postilion in the other case, and yet the traveller has never been held liable. As to this latter point, there are some decisions in point: Sammell *v.* Wright, 5 Esp. 263, where the horses were hired to go to Windsor, and the owner of the horses was held liable, because they were under the care and direction of his servants. The carriage belonged to the traveller, who was the marchioness of Bath. The case of Dean *v.* Branthwaite, 5 Esp. 35, arose on a dispute between the owner of the carriage and the owner of the horses, which were hired to go to Epsom. Lord Ellenborough says, a person who hires horses under such circumstances has not the entire management and power over them, but that they continue under the control and power of the stable-keeper's servants who were entrusted with the driving; and that he would be answerable for any accident occasioned by the postboy's misconduct on the road, and then he mentioned a case which had occurred of that kind. In this case, also, the party travelling had his own carriage. The same rule would apply to a hackney-coach; a man instead of hiring his own carriage and servants, employs a hackneyman to drive him; there it is for the profit or convenience of the person riding in the coach, and yet the person so riding is not liable.

The cases referred to before Lord Ellenborough only show, indeed, the owner of the horses to be liable, but it may be said the traveller is liable also. I think not. The coachman or postilion cannot be the servant of both. He is the servant of one *or* the other, but not the servant of one *and* the other; the law does not recognize a several liability in two principals who are unconnected. If they are jointly liable you may sue either, but you cannot have two separately liable; you must bring your action either against the principal, or the person who commits the injury, Stone *v.* Cartwright, 6 T. R. 411. There it was held that an action for an injury sustained through the improper working of a mine, must be brought against the owner of the mine, or against the workmen who did the injury, but that it could not be brought against an agent who hired the workmen. The allowing two principals to be severally liable would tend to a multiplicity of actions, because if the traveller was liable, he might have an action against the stable-keeper for supplying improper drivers and horses, and then the stable-keeper might have an action against his own drivers. If, indeed, several persons are concerned in a trespass, or other tortious act, they are liable jointly or severally, at the election of the party injured, but the several liability arises from the joint liability, and from the rule of law that a party injured need not sue all who are guilty of the wrongful act; but what I say is, that two persons cannot be made separately liable at the election of the party suing, unless in cases where they would be jointly liable; and there cannot be any ground for saying that the hirer of the horses and the jobman would be jointly liable. There are, however, cases which have been determined upon principles not altogether consonant to what I have before considered are those upon which the liabilities of parties should be determined, where persons have been held liable for the negligence of individuals who were not their own immediate servants, but the servants of agents whom they had employed to do their work.[1] . . .

But supposing these cases to be rightly decided, there is this material distinction, that there the injury was done upon or near and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others.[2] . . . . It may be said that the defendant in the present case was owner of the carriage, and that therefore the principles of these latter cases apply; but, admitting these cases, the same principle does not apply to personal movable chattels as to the permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employments, and the mere possession of that, where the care and direction of it is entrusted to such persons, who exercise public employments, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable. Movable property is sent out into the world by the owner to be conducted by other persons: the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it. And in the instances of various kinds of carriages, they are frequently, in the common intercourse of the world, confided to the care of persons who provide the drivers and horses, and it is not considered that the drivers necessarily belong to the owner of the carriage. And I think that there cannot be any difference, in point of law, as to the liabilities of these persons arising from the mere ownership of the carriage, and that the ownership of the carriage makes him no more responsible than it would do if it had been sent to be repaired by a coachmaker who, in the course of repair, had occasioned any damage to other persons; but if the injury arises from the driver, it is he, or the person who appoints him, that is to be responsible. It may be said that, according to this doctrine, a person who hired job-horses and a coachman for a year would not be answerable for the negligence of the coachman; if the coachman remain the mere servant of the jobman, not otherwise employed in the service of the hirer, I think the hirer would not be liable for whatever time he hired the coachman and horses; but where the coachman is hired for a year, it will very often happen that he is employed in other services besides the mere attention to the coach and horses; and if, by such circumstances, he becomes the servant of the hirer, besides being the servant of the jobman, the case might then admit of a different consideration. In Chilcot *v.* Bromley, 12 Ves. 114, testator bequeathed to all his servants £500 each; and it was held, that a coachman supplied by a jobmaster, together with a carriage and horses which were hired by the year, was not entitled to be considered a servant.

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[1] Here Bush *v.* Steinman, *ante*, p. 98, and Sly *v.* Edgley, 6 Esp. 6, were stated. — Ed.

[2] Here Littledale *v.* Lord Lonsdale, 2 H. Bl. 299, and Leslie *v.* Pounds, 4 Taunt. 649, were stated. — Ed.

This, however, is not the case of a servant employed for a year or a month, and upon the whole of the circumstances of this case, I am of opinion that this defendant is not liable for the damage that has occurred, and that the rule for setting aside the nonsuit should be discharged.

There are many cases where questions have arisen upon the liabilities of postmasters, of captains of ships of war, and of owners of ships who have taken pilots, and of factors who have acted for their principals, and others, as to what degree of possession is kept by the owner. These I have not thought it necessary to notice, because I think the sole question here is, whether if a man employs another to do work respecting personal movable property, and that other furnishes a servant, that servant is to be considered in the same light as a servant appointed by the person himself.

Holroyd, J.[1] It was contended in the argument, not only that the defendant was not responsible for the driver, but that the plaintiff could not recover on this declaration, each count of which contained as a material allegation that the act was done by the defendant's servant, whereas the driver could not be considered as his servant. But my mind has come to the conclusion, that the defendant is responsible for the driver's negligence, and responsible too upon this declaration, the driver being to be considered, in my opinion, for this purpose, as, in law, his servant. It appears to me that the defendant stands in the same situation of responsibility as if the horses had been driven by Bryant himself, or as if they had been driven by a person chosen by the defendant himself, for the driving is equally under the authority and orders of the defendant, and equally for his profit, benefit, or pleasure, and the driver is, I think, equally the defendant's servant for that purpose, whether the driver be Bryant himself, the person directly hired and employed by the defendant, or be another person selected and appointed by the defendant himself, or a person selected and appointed by Bryant under the authority or permission of the defendant. The question is not whether Bryant, as the owner of the horses and the immediate master of the driver, might or might not have been made responsible for the driver's negligence, nor is this the case of a letting for a particular purpose only, such as going to a particular place, as in Dean *v.* Branthwaite, 5 Esp. 35, and Sammell *v.* Wright, 5 Esp. 263, where the hirer was considered not to have the entire management and control over the things so hired; from which cases the present is distinguishable, because the present hiring was for no such particular purpose, but to go with the carriage where the defendant chose, and to be under his general authority and orders in that respect for a certain time By such a letting for a certain time the defendant became possessed in law of the horses so let to him while he was using them under such letting. It would be so clearly, if they had not been retained in the custody of a driver provided by Bryant, according to the doctrine of Lord Ellenborough in Lotan *v.* Cross, 2 Camp. 464, where he says, "show a letting" (sc. of the chaise) "for a certain time to Brown, and the possession would be in him;" and in Hall *v.* Pickard, 3 Camp. 187, where by the horses being let to hire to Dr. Carey for a certain term, he, and not the owner, was deemed to be the person in possession of them, as he, Dr. Carey, had a right to retain them till that time was expired, though in that case indeed Dr. Carey is stated to have been driving them by his own servants when the mischief was done. But in the present case, although the horses were continued in the custody of a driver provided by Bryant, yet as the horses and the driver were to be for the use and subject to the general directions of the defendant, and as the defendant had a right to retain them till the time for which they were hired was expired, and as they were at the time the mischief was done in the use and under the directions of the defendant, I think that the driver was for this purpose in the employ, and in law, the servant of the defendant, and that the defendant was in law answerable for the driver's negligence in the execution of the defendant's orders in such employ, in whatever situation the driver might also stand with respect to Bryant, with regard to Bryant's responsibility for him, at the election of the plaintiff. A person may stand in the relation of servant to two different persons as his masters in two different respects with regard to the same thing, and this even though the service done, or to be done, be special and limited to a single act, as appears in 2 Rolle's Abr. 556, pl. 14. . . . So in the present case, I think the horses were to be considered in law as in the possession of the defendant, and the driver as the defendant's servant, for the purpose for which he was sent to the defendant; and I think that a taking of the horses or driver away from the defendant's service during the time for which he had hired them, would have been a taking them away from him, for which he might have maintained an action of trespass, as for a taking them out of his possesssion and service; and, consequently, that he was answerable for the driver's negligence in driving him, the defendant, while under his, the defendant's, orders, and it is to be considered, I think, as the defendant's driving of the carriage and horses by his servant.[1] . . .

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[1] After stating the case. — Ed.

Bayley, J. The question in this case is, whether the owner of the carriage is answerable for the negligence of the driver. This is not the case of a driver, where, according to established usage, carriage and horses and driver belong, not to the person driven, but to another master, who may easily be discovered, as in the case of a hackney-coach; nor is it the case of a driver, where, according to established usage, neither horses or driver belong to or are commonly in the service of the person driven, but belong to another master, who is either known or may easily be discovered, as in the case of post horses; but it is the case of a person who hires a pair of horses for the day to draw his own carriage, and leaves it to the owner of the horses to send such person to drive them as such owner may think fit. There is nothing from usage or otherwise to imply that the horses are not the defendant's and the driver his regular servant; nothing to designate or to make it easy to discover to whom the horses and driver belong. The general rule in the case of master and servant, as laid down in Boson *v.* Sandford, 2 Salk. 440, is, that the man who employs another is answerable for him. Had the defendant hired the driver, can there be a doubt but that he would have been defendant's servant? If he leaves it to the owner of the horses to hire him, is he not, in substance, hired by the defendant? If I hire horses of A. and hire B. to drive, B. is undoubtedly, for the time, my servant. Is the driver less my servant for the time, because I hire him and the horses under one bargain, and allow the owner of the horses to select him? He is employed for me; that cannot be disputed. He drives where I direct, and so as I require nothing contrary to my contract with the owner of the horses, he must obey my reasonable commands. He must go where I order; must stop where I require; must go the pace I specify. Though the owner of the horses is, to a certain extent, his master, I am, to a certain extent, his master also. Though the former is his master in general, he has, for a time, let him out to me; and a master is liable for the acts of one who is in his service or employ, though the master who is to be charged is not his immediate employer, but employs him through the medium of another. If I hire the driver, I am answerable for him; if I employ J. S. to hire him, am I not still answerable? I exercise my own judgment in the one case, I leave it to J. S. to exercise a judgment for me in the other, but still it is for me that the judgment is exercised. The service is performed for me. It is my work the driver does. In Bush *v.* Steinman, 1 Bos. & P. 404, the man who did the wrong was not selected by the defendant, was not immediately employed by him, he was only employed through the medium of one who contracted to do the work for the defendant, but he was doing the defendant's work. He was (through the medium of the contractor indeed, but still he was) working for the defendant, and on that account the defendant was held liable. "If a deputy has power to make servants, the principal will be chargeable for their misfeasance, for the act of the servant is the act of the deputy, and the act of the deputy is the act of the principal." Per HOLT, C. J. in Lane *v.* Cotton, 1 Ld. Raym. 656. The owner of a ship is answerable for the misfeasance of mariners, though he leaves it to the master to select the crew. The owners of a coach will be liable, though they leave it to J. S. to select the driver and horses, or though they employ as driver the man who owns the horses. In many instances one proprietor horses a coach for one stage, another for a second, and so on, and in some instances the man who finds the horses finds the coachman also. Shall this take away the liability of all the proprietors? Shall it be said, if the coach does an injury upon a given stage, that the proprietor who finds the horses and driver for that stage shall alone be answerable? The horses and driver are found by the one to do the work of all, they are employed upon the work and for the benefit of all, and therefore all are responsible. Nor does it appear to me to make any distinction whether the driver and horses are hired for a single day only, or for a longer period. Had they been hired by the year, can there be a doubt but that the hirer would have been answerable? What if they had been hired for a month, or for a week? Would the difference of period for which they were hired make a difference in the responsibility? Can any legal principle be adduced to make the period the criterion of being answerable or not? The driver is equally employed on account of the hirer, to do the work of the hirer, to obey the lawful commands of the hirer, and to be the temporary servant of the hirer, whether he is engaged for the day, the week, the month, or the year, and the hirer bears the appearance for the time of standing in the relation of master to the driver, and these are circumstances which in my judgment make the hirer responsible. Upon these grounds, therefore, that the driver in this case was in the temporary employ and service of the defendant, and that this is not a case in which according to the known and established course of proceeding, it is notorious that the person driven does not stand in relation of master to the driver, and it is matter of easy discovery who does stand in that relation, as in the case of hackney-coaches and post horses; and that there was nothing in this case to rebut the *primâ facie* presumption that the horses were the defendant's, and the driver his servant, I am of opinion that this defendant was liable to the action, and that the nonsuit was wrong.

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[1] Here Bush *v.* Steinman, *ante*, p. 98, was stated. — Ed.

ABBOTT, C. J.[1] Having made these remarks upon the former cases.

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[1] After reviewing the decisions. — ED.

I will now proceed to make some observations upon the case as it might stand independent of prior decisions. I admit the principle that a man is answerable for the conduct of his servants in matters done by them in the exercise of the authority that he has given to them, and also (which is the same thing in other words) that whatever is done by his authority is to be considered as done by him. I am sensible of the difficulty of drawing any precise or definite line as to time or distance. But I must own that I cannot perceive any substantial difference between hiring a pair of horses to draw my carriage about London for a day, and hiring them to draw it for a stage on the road I am travelling, the driver being in both cases furnished by the owner of the horses in the usual way; nor can I feel any substantial difference between hiring the horses to draw my own carriage on these occasions, and hiring a carriage with them of their owner. If the hirer be answerable in the present case, I would ask on what principle can it be said that he shall not be answerable if he hires for an hour or for a mile? He has the use and benefit pro tempore, not less in the one case than in the other. If the hirer is to be answerable when he hires the horses only, why should he not be answerable if he hires the carriage with them? He has the equal use and benefit of the horses in both cases, and has not the conduct or management of them more in the one case than in the other. If the temporary use and benefit of the horses will make the hirer answerable, and there be no reasonable distinction between hiring them with or without a carriage, must not the person who hires a hackney-coach to take him for a mile, or other greater or less distance, or for an hour, or longer time, be answerable for the conduct of the coachman? Must not the person who hires a wherry on the Thames be answerable for the conduct of the waterman? I believe the common sense of all men would be shocked if any one should affirm the hirer to be answerable in either of these cases. Will it be said that the hirer is not answerable in either of these cases because the coachman and the wherryman are ready to attend to the call of any person who will employ them? I answer, so, also, is the stable-keeper. If it be said that they are obliged to obey the call of any person when they are on the stand, or at the stairs, I would ask, Will there be any difference if they are spoken to beforehand, and desired to attend at a particular hour? which is not an unusual occurrence where persons have an engagement to go out at an early hour in the morning. If the personal presence of the hirer will render him responsible, why should he not be equally so if he is absent, and has hired the horses or carriage for his family or servants? Does his presence give him any means of superintending or controlling the driver? Can any legal obligation depend upon such minute distinctions? If the case of a wherry on the Thames does not furnish an analogy to this subject, let me put the case of a ship hired and chartered for a voyage on the ocean to carry such goods as the charterer may think fit to load, and such only. Many accidents have occurred from the negligent management of such vessels, and many actions have been brought against their owners, but I am not aware that any has ever been brought against the charterer, though he is to some purposes the dominus pro tempore, and the voyage is made not less under his employment, and for his benefit, whether he be on board or not, than the journey is made under the employment, and for the benefit of the hirer of the horses. Why, then, has the charterer of the ship, or the hirer of the wherry, or the hackney-coach, never been thought answerable? I answer, Because the shipmaster, the wherryman, and the hackney-coachman have never been deemed the servants of the hirer, although the hirer does contract with the wherryman and the coachman, and is bound to pay them, and the pay is not for the use of the boat, or horses, or carriage only, but also for the personal service of the man. In the case now before the court, the hirer makes no contract with the coachman; he does not select him; he has no privity with him; he usually gives him a gratuity, but he is not by law obliged to give him anything; and from thence I conclude that the coachman is not the servant of the hirer. And if the coachman is not the servant of the hirer on such an occasion, but is chosen and entrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in law, what he certainly has not in fact, the conduct and management of the horses. If the coachman is in such a case the servant of the hirer, he may, at any moment, require him to quit the charge of the horses, and deliver them over to another, and must be obeyed; but I think it cannot be said that the coachman may not lawfully refuse, and ought not in most cases to do so. It does not seem to be doubted that the injured party may sue the owner of the horses; is there, then, any rule of law, or any principle of convenience, requiring that he should have his choice of suing either the stable-keeper or the hirer at his election. Generally speaking, the one is as well able to pay damages as the other, and may be as easily found out and known, and more easily if the carriage and horses are hired together. Should the hirer be held responsible in the first instance, he must certainly have his remedy over against the letter, so that the letter will in the end be answerable, and there will be a circuity of action, which is inconvenient, and to be avoided if possible.

I have acknowledged the difficulty of drawing a line with reference to time or distance; and I think we must look to other circumstances in order to ascertain the obligation of the hirer. Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice of the coachman. The payment of board wages and the furnishing a livery may also be circumstances worthy of attention, because they also may in some cases be considered as evidence of a choice and a contract. I do not pronounce upon any case of this kind. I speak only of the present case, and of the evidence given at the trial; and not being able to find any reason satisfactory to my own mind, by which the defendant in this cause can be made answerable in the present action, I think myself bound to say that, in my opinion, the rule for setting aside the nonsuit ought to be discharged.

Rule discharged.

JOEL *v.* MORISON.

NISI PRIUS. 1834.

[6 *C. & P.* 501.]

THE declaration stated, that, on the 18th of April, 1833, the plaintiff was proceeding on foot across a certain public and common highway, and that the defendant was possessed of a cart and horse, which were under the care, government, and direction of a servant of his, who was driving the same along the said highway, and that the defendant by his said servant so carelessly, negligently, and improperly drove, governed, and directed the said horse and cart, that, by the carelessness, negligence, and improper conduct of the defendant by his servant, the cart and horse were driven against the plaintiff, and struck him, whereby he was thrown down and the bone of one of his legs was fractured, and he was ill in consequence, and prevented from transacting his business, and obliged to incur a great expense in and about the setting the said bone, &c., and a further great expense in retaining and employing divers persons to superintend and look after his business for six calendar months. Plea — Not guilty.

From the evidence on the part of the plaintiff it appeared that he was in Bishopsgate Street, when he was knocked down by a cart and horse coming in the direction from Shoreditch, which were sworn to have been driven at the time by a person who was the servant of the defendant, another of his servants being in the cart with him. The injury was a fracture of the fibula.

On the part of the defendant, witnesses were called who swore that his cart was, for weeks before and after the time sworn to by the plaintiff's witnesses, only in the habit of being driven between Burton Crescent Mews and Finchley, and did not go into the city at all.

Thesiger, for the plaintiff, in reply, suggested that either the defendant's servants might in coming from Finchley have gone out of their way for their own purposes, or might have taken the cart at a time when it was not wanted for the purpose of business, and have gone to pay a visit to some friend. He was observing that, under these circumstances, the defendant was liable for the acts of his servants.

PARKE, B. He is not liable if, as you suggest, these young men took the cart without leave; he is liable if they were going *extra viam* in going from Burton Crescent Mews to Finchley; but if they chose to go of their own accord to see a friend, when they were not on their master's business, he is not liable.

His Lordship afterwards, in summing up, said: This is an action to recover damages for an injury sustained by the plaintiff, in consequence of the negligence of the defendant's servant. There is no doubt that the plaintiff has suffered the injury, and there is no doubt that the driver of the cart was guilty of negligence, and there is no doubt also that the master, if that person was driving the cart on his master's business, is responsible. If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable. As to damages, the master is not guilty of any offence, he is only responsible in law, therefore the amount should be reasonable.

Verdict for the plaintiff — damages, £30.[1]

Thesiger and *S. Martin*, for the plaintiff.

Platt, for the defendant.

WRIGHT *v.* J. AND S. WILCOX.

SUPREME COURT OF NEW YORK. 1838.

[19 *Wend.* 343.]

THIS was an action on the case, tried at the Cayuga circuit, in October, 1836, before the Hon. DANIEL MOSELEY, one of the circuit judges.

The suit was brought for an injury sustained by the son of the plaintiff, who was a minor, in being run over by a wagon driven by S. Wilcox, the son of J. Wilcox, whilst in the employment of the father. The plaintiff's son was a very young lad, and on his way to school asked S. Wilcox to permit him to ride; who answered that he might do so when he got up a hill which he was then ascending. When the hill was ascended, the lad took hold of the side of the wagon between the front and hind wheels. S. Wilcox did not stop his team. He was cautioned by a bystander that if he did not stop he would kill the boy. He looked behind him; the horses were then walking; and seeing the plaintiff's son and other boys attempting to get on the wagon, he cracked his whip and put the horses upon a trot. The plaintiff's son fell, and one of the hind wheels passed over him, and greatly injured him. A joint action was brought against the defendants. A motion was made for a nonsuit, which was denied. The judge charged the jury that both defendants were answerable, whether the injury was wilful, or only attributable to negligence. The jury found a verdict for the plaintiff against both defendants, with one hundred and nine dollars damages. A motion was made for a new trial.

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[1] Compare Rayner *v.* Mitchell, 2 C. P. D. 357 (1877). — ED.

J. Williams and *S. Stevens*, for the defendants.

M. T. Reynolds, for the plaintiff.

By the Court, COWEN, J. In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence at the same time, and under the same circumstances; the servant in fact, and the master constructively, by the servant, his agent. Mr. Hammond lays down the rule in this way: "Whether the principal and inferior may be charged jointly depends on whether the inferior is liable as a trespasser *vi et armis*, or in case only. If the latter, they may be sued together, but otherwise if the former; it being held, how justly may be questioned, that a principal is liable for his agent's misconduct only in case." Ham. on Part. to Actions, 85, 86. The rule is in the main doubtless right, but seems to be shaken by Moreton *v.* Hardern, 6 Dowl. and Ryl. 275, in respect to the quality of the servant's act. There were, in that case, three proprietors of a coach; one was driving, and ran against the plaintiff's cart. All three were sued in case; and several judges thought either trespass or case would lie against the driver, though the mischief arose from mere negligence; but all agreed that case only would lie against the other two who were absent; yet the action was maintained against all three.

But it is impossible to sustain this verdict against the father. It is difficult to infer from the evidence anything short of a design in Stephen the servant to throw the plaintiff's boy from the wagon; and the judge, as I understand the charge, told the jury that the defendants were jointly liable in that view. If Stephen, in whipping the horses, acted with the wilful intention to throw the plaintiff's boy off, it was a plain trespass, and nothing but a trespass, for which the master of Stephen is no more liable than if his servant had committed any other assault and battery. All the cases agree that a master is not liable for the wilful mischief of his servant, though he be at the time, in other respects, engaged in the service of the former. 1 Chit. Pl. 69, ed. of 1828; M'Manus *v.* Crickett, 1 East, 106; Ham. on Part. to Actions, 83; Croft *v.* Alison, 4 Barn. and Ald. 590; 1 Chit. Gen. Pr. 80. Browcher *v.* Noidstrom, 1 Taunt. 568. Why is the master chargeable for the act of his servant? Because what a man does by another he does by himself. The act is within the scope of the agency. Reeve's Dom. Rel. 357. "A master is not answerable," says Mr. Hammond, "for every act of his servant's life, but only for those done in his relative capacity. To charge the master, it must always be shown or presumed, that the relation of master and servant subsisted between them in the particular affair. If the master is liable under other circumstances, he is so, not *quatenus* master, but as any one would be who instigates an injury." The dividing line is the wilfulness of the act. If the servant make a careless mistake of commission or omission, the law holds it to be the master's business negligently done. It is of the very nature of business that it may be well or ill done. We frequently speak of a cautious or careless driver in another's employment. Either may be in the pursuit of his master's business, and negligence in servants is so common that the law will hold the master to the consequences as a thing that he is bound to foresee, and provide against. But it is different with a wilful act of mischief. To subject the master in such a case, it must be proved that he actually assented, for the law will not imply assent. In the particular affair there is, then, no longer the presumed relation of master and servant. The distinction seems to resolve itself into a question of evidence. A man shall be presumed to intend the ordinary consequences of his own acts; and especially so far as such consequences may be innocent of all evil intention; for these he may be safely held accountable. But for those which are remote or barely possible, he is not accountable; and if they be at the same time criminal, it would be violating one of the plainest principles of presumptive evidence to say that he intended them. "The master's liability has never been questioned," says Judge Reeve, "when a servant does an act injurious to another, through negligence or want of skill, on the principle that the master should at his peril employ servants who are skilful or careful." Reeve's Dom. Rel. 357, 358. He admits that the English cases deny the master's liability where the servant's act is wilful; but questions the soundness of the distinction if the wilful act be done in the immediate performance of his master's business; in which I understand the learned judge at the circuit to have followed him in the case at bar. The answer is, that the law holds such wilful act a departure from the master's business. Judge Reeve remarks that one of two innocent persons must suffer, and that should be the man who put it in the power of the servant to do the injury; and the reason is as strong that the master should run the risk of his servant's unruly passions, as his want of care. Clearly the argument proves too much. It would make the master accountable for every mischievous act of the servant which he is enabled to commit in consequence of the general relation; for aught I see, including the credit which the servant may obtain with his merchant. The learned writer puts a distinction involving the very question we are considering. A servant, driving a wagon, leaves it and commits an assault and battery; for that he admits the master is not liable; otherwise, if he should drive it violently over a man with intent to injure him. "In the first place" (he says), "the servant had abandoned his master's business; in the latter he was in the immediate pursuit of it; in the first he was not driving his master's wagon, in the last he was."

Now the authorities deny that when the servant wilfully drives over the man, he is in his master's business. They hold it a departure, and a going into the servant's own independent business. It is true, he is still driving his master's wagon, and so he would be though he should use it to run away from service. It will hardly be contended, that after he has completed his escape, the master would be liable for his running over a man; and why? Because he has taken up a new and distinct object of his own, and is engaged in executing that; and has he not, to every material purpose, done the same whenever he commits a wilful injury to another? In M'Manus *v.* Crickett, the servant, while driving a chariot on the road as authorized by his master, wilfully drove against the plaintiff's chaise. Lord KENYON said that the act being wilful, the chariot might be considered for that purpose in the possession of the servant as his special property, and not the master's. He said: "When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him." He puts the master's liability on the ground of negligence or unskilfulness, with no purpose but the execution of his orders. Judge Reeve says it is difficult to reconcile such a doctrine with the cases which hold a sheriff liable for the wilful misfeasance of his deputy. But such cases are clearly, as stated by Mr. Hammond, exceptions to the general rule for reasons of policy. Hamm. on Part. to Actions, 83, 84. The master is liable in case only; but the action against the sheriff is trespass, and lies against him for every act of his officer done *colore officii,* even the execution of process after the return day, and the seizing of the goods of a third person. Id. Ackworth *v.* Kempe, 1 Doug. 40; Parrot *v.* Mumford, 2 Esp. N. P. Cas. 585. So for arresting under color of process without having any in his hands. Smart *v.* Hutton, 2 Nev. and Mann. 426.

The line where the master's liability shall terminate must be placed somewhere; and the acquiescence of Westminster Hall for many years in the rule we have cited as laid down by Lord Kenyon, is an evidence of the common law not to be resisted, especially as it will not be found, I imagine, to conflict with any general principle of that law.

The statute 1 R. S. 693, § 6, has altered the rule in respect to carriages for the conveyance of passengers. The owners are here liable, whether the injury done to another by the driver be wilful or negligent. It is not contended, however, that this statute applies to the case at bar.

The objection to the judge's charge goes to the very foundation of the action against Joseph Wilcox, the father. It should have been put to the jury that, if they were satisfied from the evidence of Stephen's design to throw the plaintiff's son from the wagon, they should have acquitted his father. It is true that by the 2 R. S. 456, § 16, 2d ed., this act of Stephen, though wilful, and formerly, therefore, the subject of an action of trespass only, is, by the statute, made the subject of an action on the case. The only consequence is that he might have been convicted and his father acquitted. But the statute, though it mitigates the consequence of misjoinder, never intended to alter the effect of the relation between master and servant. It neither adds to the right of the plaintiff nor the liability of the defendant. It goes only to the form of the remedy, by giving case in almost all instances of personal injuries redressible formerly by trespass only.

A new trial must be granted, the costs to abide the event.[1]

SLEATH *v.* WILSON.

NISI PRIUS. 1839.

[9 *C. & P.* 607.]

CASE to recover damages for an injury occasioned to the plaintiff by the negligent driving of a servant of the defendant. Pleas — 1st, that the horse and carriage were not the defendant's; 2nd, that the person driving was not the defendant's servant; 3rd, that, at the time when the injury was sustained, the horse and carriage were not in the employ of the defendant, but were improperly used by the person driving them for purposes of his own.

Wilde, Serjt., in stating the plaintiff's case, referred to the case of Joel *v.* Morison.

The witnesses on the part of the plaintiff stated that the defendant's servant was driving a four-wheeled phaeton, drawn by one horse, along the Old Street Road, at a quick pace; some described it as very fast, others as not so fast; but they all agreed in the fact that the plaintiff, who was an old woman nearly seventy years of age, and was crossing the road, was knocked down by one of the shafts of the carriage, and much bruised, and had some of her teeth knocked out.

Slade, for the defendant. The plaintiff's counsel must make out two things to entitle him to a verdict: 1st, that the servant was acting within the due scope of his authority; and, 2ndly, that he was driving carelessly. The case cited for the plaintiff is not all fours with the present. I rely on the case of M'Manus *v.* Crickett, 1 East, 106.

I shall show that the servant, on the present occasion, was acting contrary to the directions of his master. He had no business in Old Street Road at all; it was four miles out of his way. My learned friend admits that, if a servant take his master's carriage without his knowledge, the master will not be liable for his acts. I do not see any difference between that state of facts and this, so far as the conduct of the servant is concerned. I see no difference between the servant in the present case driving out of his way, and the servant in the case admitted taking the carriage out of the coach-house, and using it for his own purposes. As to the question of negligence, driving on the wrong side of the road is not proof of negligence; there is no obligation to keep on any particular side of the road, if there is room enough on the road, and no other carriages are in the way.

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[1] *Acc.:* De Camp *v.* Mississippi & Missouri Railroad Co., 12 Iowa, 348 (1861); Wood *v.* Detroit City Street Ry. Co., 52 Mich. 402 (1884); Galbrielson *v.* Waydell 135 N. Y. 1 (1892). Compare Dwinelle *v.* N. Y. C. & H. R. Railroad Co., 120 N. Y 117, 125-126 (1890). — ED.

The servant who was driving the carriage was called as a witness, and said: "I drove my master to Great Stamford Street; my orders were, to put up at the Red Lion in Castle Street, Leicester Square, and meet my master at the Olympic Theatre; I went into Old Street Road on business for myself; I took a parcel for my wife to her father and mother; I was driving at a slow pace in Old Street Road, — at a pace not exceeding four miles an hour; I called to the woman three times distinctly, as loud as I could; she took no notice; I pulled up immediately when I found she took no notice; the horse was walking then; her back was turned, and I suppose the shaft of the vehicle struck her on the shoulder; somebody seized the horse by the bit, and he reared on his hind legs, and backed; I was sitting low at the time; I went to the old woman, and offered her a recompense of £5; she said she could do nothing with it, I must speak to the gentleman; I went to him, and he said he would speak to the party, and I heard nothing more of it; a friend gave me the money." On his cross-examination he said: "I do not know that that money came from my master; it was a friend at Turnham Green; I did not go to the old woman by my master's desire; the only conversation I had with my master before I went was being scolded for going out of my way; the name of the person I got the money from was Barnett; he is a gentleman, a lawyer; as far as I know, he is my master's lawyer. When I came back, I gave the money back to Mr. Barnett; it was dusk when I was in the Old Street Road; I saw an object as I was driving; it had a cloak on; I was quite pretty nearly at a stand-still, when she ran herself against the shaft; she came in contact with the shaft; I was pulling up at the time; her back was towards the horse; she was looking a contrary way, and then she fell down; I suppose she fell down from fright; I got to the Red Lion about half-past seven; I went there the direct road from Old Street Road; I had lived with the defendant about a year and a half at the time, and lived with him about nine months after." In answer to questions from the judge, he said: "My master did not know anything about my having the parcel to deliver; I left the carriage in a yard at the corner of Old Street Road, by Shoreditch, while I went to Bateman's Row with the parcel; this was about 200 yards from the place where the accident happened."

The gentleman at whose house in Stamford Street the defendant was set down, was also called as a witness for the defence, and stated that the carriage arrived at his house about four in the afternoon, that he heard the defendant direct the servant to drive to some stables, the name of which he did not remember, and to meet him afterwards with the carriage at the Olympic Theatre, and that the servant turned round and drove the carriage in a direction which would lead towards Leicester Square.

Wilde, Serjt., in reply. First, as to the law: The rule of law I take to be this, — if you give your servant the care and control of your carriage and horses, and tell him to take the carriage to a given place, you place the carriage under his control as to the mode in which he is to arrive at that place, and for his conduct in the course of the execution of that order you will be responsible. We shall have next the case of a stage coach, and it will be said that if the coach does not go by the usual and direct road, the proprietors will not be liable. The case cited of M'Manus *v.* Crickett is quite a different case, — there the servant had a spite against the officer, and drove against him.

Erskine, J. It is quite a different case.

Wilde, Serjt. It is an improper mode; but is a mode of conducting the employment — the man was out of his road — his object was the Red Lion Stables, and he went out of his way for purposes of his own, but still it was an improper act while under his master's orders. It may be said next, that if the servant turns out of his road to get something to drink, the master will not be liable for any injury done by him. It is enough that it is in the course of his employ, though he acts improperly in carrying his master's orders into execution. The question is, was he when the act occurred in the course of the master's employ? If he was, the master will be liable. After some observations by the learned serjeant on the question of negligence,

Erskine, J., in summing up, said: This is an action brought by the plaintiff to recover damages for an injury which she alleges she has sustained by the negligent conduct of the defendant's servant. The law has said that whenever an injury has been occasioned by the negligent conduct of a person in the service of another, the master is answerable for it; and this is for the purpose of inducing those who employ others to take care that they employ proper persons. The defendant pleads, first, that the horse and carriage were not his, and, secondly, that the servant was not his servant; but it has been clearly proved by the witnesses on the part of the defendant, that the carriage was the defendant's, and that the person driving it was his servant. But in addition to these he has pleaded, thirdly, that the horse and carriage at the time of the injury were not in the employ of the defendant, but were improperly used by the servant for purposes of his own; and evidence has been given that the master directed the servant to drive to the Red Lion, in Castle Street, Leicester Square, but that the servant improperly drove to the Old Street Road, to deliver a parcel of his own; and the point has been put to the court, that inasmuch as it is clear that the servant was not at that time engaged in his master's business, this action cannot be maintained. But I am of opinion that this action may be maintained. I think the law has been most properly laid down by Mr. Baron Parke, in the case which has been cited. It is quite clear that, if a servant without his master's knowledge takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not entrusted the servant with the carriage. But whenever the master has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders, and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law: the master in such a case will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage, by entrusting him with it. And in this case, I am of opinion that the servant was acting in the course of his employment, and till he had deposited the carriage in the Red Lion Stables, in Castle Street, in Leicester Square, the defendant was liable for any injury which might be committed through his negligence. After reading the evidence and observing on the question of negligence, His Lordship left the case to the jury, who found a

Verdict for the plaintiff — damages, £25.

Wilde, Serjt., and *Channell*, for the plaintiff.

Slade, for the defendant.

QUARMAN *v.* BURNETT.

EXCHEQUER. 1840.

[6 *M. & W.* 499.]

CASE. The declaration stated, that the plaintiff, on the 21st December, 1838, was possessed of a carriage, to wit, a chaise of great value, &c., and of a horse then drawing the same, in which said carriage the plaintiff was then riding: and that the defendants were also possessed of a carriage, to wit, a chariot, to which said carriage of the defendants were harnessed two horses, and which said carriage and horses *were then under the care of the defendants.* Nevertheless the defendants so carelessly &c. conducted themselves in the premises, that by and through the mere carelessness, negligence, want of proper caution, and improper conduct of the defendants in that behalf, the said horses so harnessed to the carriage of the defendants started off with the said carriage, *without a driver or other person to manage, govern, or direct the same*, whereby the said carriage of the defendants then ran and struck with great force against the said carriage of the plaintiff, and thereby greatly crushed and injured the same, and the plaintiff was thrown with great force and violence out of his carriage upon the ground, &c., &c.

Pleas, first, not guilty; secondly, that the said carriage and horses in the declaration mentioned, or either of them, were not under the care of the defendants, or either of them, in manner and form, &c.; upon which issues were joined.

At the trial before MAULE, B., at the Middlesex Sittings in last Michaelmas Term, the following appeared to be the material facts of the case: —

The defendants are elderly ladies resident in Moore Place, Lambeth, keeping a carriage of their own, but hiring horses and a coachman from a job-mistress of the name of Mortlock. They generally had the same horses, and always the same coachman, a man of the name of Kemp (the only regular coachman in Miss Mortlock's employ), to whom they paid 2*s.* for each drive, having told him when they first set up their own carriage, three years ago, that they would pay him that sum. He received regular weekly wages from Miss Mortlock. The defendants sometimes took the coachman and horses into the country for several weeks, when they paid him a certain sum per week. They had a plain coachman's coat and a livery hat, for which Kemp was measured, and which he wore when driving the defendants, and took off on his return to their house, where the coat and hat were hung up in the passage. On the 21st December, 1838, he went into the defendants' house to pull off the hat (he did not wear the coat that day, having his own box coat on), and left no one in the charge of the horses: they started off, ran against the plaintiff's chaise, which was drawn up on the side of the footpath, threw him out, and seriously injured him, and damaged the chaise.

This being the state of facts, it was contended for the defendants that Kemp was, under the circumstances, the servant not of the defendants, but of the job-mistress, and that the defendants were not responsible. The following cases were referred to: Laugher *v.* Pointer, 5 B. & C. 547; Smith *v.* Lawrence, 2 Man. & R. I.; Brady *v.* Giles, 1 M. & Rob. 494; Fenton *v.* Dublin Steam Packet Co., 8 Ad. & E. 835; 1 P. & D. 103; Randleson *v.* Murray, 8 Ad. & E. 109; 3 N. & P. 239. The learned Judge thought there was evidence to go to the jury, but gave the defendants' counsel leave to move to enter a nonsuit: it appearing to him that there was some evidence that the carriage was under the defendants' care, both in respect of their choosing this particular coachman, and also in respect of his having gone to put back their hat, and left the carriage unattended to. And he told the jury that if the coachman was, at the time the horses ran away, acting as the servant of the defendants, they were liable: and that he thought he was acting as such servant, if the job-mistress appointed him specially at the defendants' desire, or if in putting back his hat he acted for the defendants. The jury found a verdict for the plaintiff, damages 198*l.* 9*s.*

Kelly having obtained a rule *nisi* for entering a nonsuit, pursuant to the leave reserved,

Thomas (Sir *F. Pollock* with him) showed cause.

Channell, Serjt. (*Kelly* with him), in support of the rule.

PARKE, B.[1] On the argument, in the course of which the principal authorities were referred to, we intimated our opinion that we should be called upon to decide the point which arose in the case of Laugher *v.* Pointer, and upon which not only the Court of King's Bench, but the twelve Judges differed; as the special circumstances above mentioned did not seem to us to make any difference; and we are still of opinion that they did not. It is undoubtedly true that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like. As to the supposed choice of a particular servant, my Brother Maule thought there was *some* evidence to go to the jury, of the horses being under the defendants' care, in respect of their choosing this particular coachman. We feel a difficulty in saying that there was any evidence of choice, for the servant was the *only* regular coachman of the job-mistress's yard; when he was not at home, the defendants had occasionally been driven by another man, and it did not appear that at any time since they had their own carriage, the regular coachman was engaged, and they had refused to be driven by another; and the circumstance of their having a livery, for which he was measured, is at once explained by the fact, that he was the only servant of Miss Mortlock ever likely to drive them. Without, however, pronouncing any opinion upon a point of so much nicety, and so little defined, as the question whether there is *some* evidence to go to a jury, of any fact, it seems to us that if the defendants had asked for this particular servant, amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglects. If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference. Nor do we think that there is any distinction in this case, occasioned by the fact that the coachman went into the house to leave his hat, and might therefore be considered as acting by their directions, and in their service. There is no evidence of any special order in this case, or of any general order to do so, at all times, *without leaving any one at the horses' heads.* If there had been any evidence of that kind, the defendants might have been well considered as having taken the care of the horses upon themselves in the meantime.

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[1] After stating the case.— ED.

Besides these two circumstances, the fact of the coachman wearing the defendants' livery, with their consent, whereby they were the means of inducing third persons to believe that he was their servant, was mentioned in the course of the argument as a ground of liability, but cannot affect our decision. If the defendants had told the plaintiff that he might sell goods to their livery servant, and had induced him to contract with the coachman, on the footing of his really being such servant, they would have been liable on such contract: but this representation can only conclude the defendants with respect to those who have altered their condition on the faith of its being true. In the present case, it is matter of evidence only of the man being their servant, which the fact at once answers.

We are therefore compelled to decide upon the question left unsettled by the case of Laugher *v.* Pointer, in which the able judgments on both sides have, as is observed by Mr. Justice Story in his Book on Agency, page 406, "exhausted the whole learning of the subject, and should on that account attentively be studied." We have considered them fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord Tenterden and Mr. Justice Littledale.

The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care. The question of law is, whether any one but the coachman is liable to the party injured; for the coachman certainly is.

Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference.

But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice Eyre says in the case of Bush *v.* Steinman, 1 Bos. & P. 404, and cannot be maintained to its full extent without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, "shock the common sense of all men;" not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles, if they had the management of them, or their servants, if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street. It is true that there are cases—for instance, that of Bush *v.* Steinman, Sly *v.* Edgley, 6 Esp. 6, and others, and perhaps amongst them may be classed the recent case of Randleson *v.* Murray — in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But these cases are well distinguished by my Brother Littledale in his very able judgment in Laugher *v.* Pointer. . . .

It is unnecessary to repeat at length the reasons given by my Brother Littledale for this distinction, which appear to us to be quite satisfactory; and the general proposition referred to, upon which only can the defendants be liable for the acts of persons who are not their servants, seems to us to be untenable. We are therefore of opinion that the defendants were not liable in this case, and the rule must be made absolute to enter a verdict for the defendants on the second issue.

Rule absolute.

MARTIN *v.* TEMPERLEY.

QUEEN'S BENCH. 1843.

[4 *Q. B.* 298.]

THE declaration stated that, whereas plaintiff, on etc., before and at the time of the grievance hereinafter mentioned, was lawfully possessed of a certain boat of great value, to wit, etc., then lawfully being in the River Thames; and defendant was also then possessed of two barges in the same river, and then had the care, direction and management of the same; yet defendant, not regarding his duty in that behalf, whilst the said boat of plaintiff so was in the River Thames aforesaid, to wit on etc., took so little and such bad care of, and so carelessly, negligently and improperly managed, governed and directed his said barges, that one of them, by and through the carelessness, misdirection and mismanagement, negligence and improper conduct of defendant and his servants in that behalf, then with great force and violence ran foul of and struck against the said boat or vessel of plaintiff, and thereby then greatly broke, damaged and injured the same; and by means of the premises the said boat of plaintiff then became and was filled with water, and sunk in the said river; and thereby divers goods and chattels, to wit etc. (special damage from the loss of goods on board, expense of repairs and deprivation of the use of the vessel, and other expenses in respect of goods on board, and of the vessel).

Pleas. 1. Not guilty. 2. That defendant had not, at the time of the committing, etc., the care, direction, or management of the two vessels or barges, or either of them; conclusion to the country. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the London sittings after Hilary term, 1842, it appeared that the defendant had hired by the year two barges mentioned in the declaration from one Covington, who was the owner of the barges and a freeman of the Company of Watermen and Lightermen, incorporated by Stat. 7 & 8 G. 4, c. 75, § 4, that it was usual to hire barges in this manner; and that the barges so hired were entirely under the control of the persons hiring them. The accident occurred within the limits named in the title of the act, and was occasioned by the two barges, which at the time were lashed together, coming into collision with the plaintiff's boat. The barges were at that time under the management of two men named Wickings and Martin. Martin was a freeman of the Company of Watermen and Lightermen, and Wickings was an apprentice to his own brother, Joseph Richard Wickings. J. R. Wickings was a freeman of the company, and foreman to the defendant; he was paid by the defendant weekly; and he had let out himself and his apprentice by the week. He hired Martin for the particular job, and was also paid by the defendant for what Wickings the apprentice did, by the job. The defendant's counsel contended that the defendant was not liable for the damage, inasmuch as he was bound to employ only persons authorized to navigate, under Stat. 7 & 8 G. 4. c. 75, § 37. A copy of the by-laws, made under § 57 of the statute, was put in; by the 25th of which it was ordained that, during all the time that any barge, &c., should be navigating or passing along the river within the limits, one able and skilful man, authorized by law, should be constantly on board the same, for the navigation and management thereof; and, if the owner or owners of any such barge, &c., should permit or suffer the same to pass along any part of the limits aforesaid without having at least one such able or skilful man or other person, authorized as aforesaid, to navigate the same, he or they, or any of them, should forfeit for every such offence 40*s.*; and, if the person or persons on board should quit or leave the barge, &c., at any time during the navigation or passage through the limits, he or they should forfeit and pay for every such offence 40*s.*; and it should be lawful for any harbor-master and his assistants to remove the said barge, &c.; and the charges and expenses thereof respectively should be paid by the owner or owners or master thereof. It appeared that there were about six thousand freemen and apprentices. The jury being of opinion that negligence was proved, the Lord Chief

Justice directed a verdict for the plaintiff, giving leave to move for a nonsuit, or a verdict for the defendant on the second plea. In Easter term, 1842, Richards obtained a rule *nisi* for a nonsuit or verdict for defendant, or for a new trial.

Thesiger and *Bovill* now showed cause.

R. V. Richards and *Peacock, contra.*

Lord DENMAN, C. J. It is quite clear that the defendant is the party liable. In the first place, every man is liable for the misconduct of his servants; and, in the second, the men here undoubtedly were the servants of the defendant; and men so employed are even called servants in Stat. 7 & 8 G. 4. c. 75, § 102. But a question is made, whether the limitation of the defendant's power of choice deprived the party injured of the remedy against him. I cannot think it can be reasonably contended that it does: the inconvenience would be enormous. Mr. Bovill's argument on the statute respecting apprentices bears very strongly on the point. Before the repeal on that statute, persons could not be employed in trades without having been apprenticed; the selection therefore was limited just as much as here. Sect. 89, of Stat. 7 & 8 G. 4. c. 75 makes an unskilful navigator liable, to the amount of £5, for the mischief he may do; but he is not touched in this respect by any other provision of the act. The decision of Dr. Lushington in The Maria, 1 W. Rob. Adm. R. 95, cannot be applied to this case. Dr. Lushington must be understood as assuming that the master was there bound to take the first licensed pilot who offered himself. He clearly considers that, under § 6 of the Newcastle Pilot Act, 41 G. 3. (U. K.) c. 86, the master of the ship, being foreign, was bound to take the pilot on board, without any power of selection; and indeed in the case of a foreign vessel in a strange port there could seldom be any ground for preferring one pilot to another, and therefore little practical power of selection, even if two or three offered themselves at the same time. The rule of *respondeat superior* is not impeached: the only question is who is the superior. Under Stat. 6 G. 4. c. 125, the authority of the master is absolutely superseded by that of the pilot. Milligan *v.* Wedge, 12 A. & E. 737, has been fairly pressed upon us; but the distinction between that case and the present is clear. The drover there was pursuing a separate trade: to drive the bullocks was no part of the butcher's business: he had only to select the licensed drover, who was the person that set in motion the servant whose negligent driving did the mischief; and the owner of the bullock had no longer any control over it. In the present case it was otherwise; and therefore our decision here is not inconsistent with that in Milligan *v.* Wedge.

PATTESON, J. I am of the same opinion. The first question is, whether the relation of master and servant existed between the defendant and those managing his barges; and next, if it did, whether there be anything in Stat. 7 & 8 G. 4, c. 75 that prevents the legal consequences following from such a relation. On the part of the defendant it is argued, without reference to the statute, that this is the case not of master and servant, but of an independent contract to perform the work, as in Milligan *v.* Wedge and Quarman *v.* Burnett, 6 M. & W. 499. But that is clearly erroneous. Independently of the act, the men navigating the barges would clearly be the defendant's servants. If the defendant, being at liberty to employ whom he pleased, engaged persons to manage his barges on the Thames, I cannot see how it is possible to contend that they were not his servants as much as a man whom he might employ to drive his carriage. Where, indeed, a man hires another man's servant from him, though such servant be employed to drive where the person hiring pleases, it has been held in Quarman *v.* Burnett, that the servant so hired is not the servant of the person so hiring. That case certainly carried the exception a great way; but there the servant hired was ordinarily in the employment of the person from whom he was hired, and who let horses along with the driver. That case is not like the present. The second question, then, is as to the effect of Stat. 7 & 8 G. 4. c. 75. That indeed confined the defendant to employing as his servants only individuals of a particular class. It narrowed the number of persons from whom he could select. But that is very different from the state of things created by the Pilot Act, where a party must take the first pilot who offers himself. Here the defendant had the power of selection, though from a limited number, and no case has gone so far as to decide that the person hired ceases to be the servant of the person hiring if he is necessarily selected from a number, though limited. I was much struck with the argument deduced from the old Statute of Apprenticeship. According to the doctrine contended for on the part of the defendant, it would hardly have been possible, while that act was in force, to employ a man as a servant. I do not put the case on the largeness of the number from which the selection may here be made; the principle seems to me the same whether the number be five hundred or five thousand. If there be a power of selection, and not, as in the Pilot Act, a provision preventing any choice, the person hired is the servant of the person hiring. At first I felt the difficulty raised by Lucey *v.* Ingram, 6 M. & W. 302. That case, however, was decided on the words of the Pilot Act, 6 G. 4. c. 125. It is true that the defendant there came within the exemption of § 63 of the Act, and was not obliged to take a pilot. But the pilot, under § 72, was compelled to act when called upon; and the court rested their decision on the precise words of § 55, which "exempts the owner from responsibility in respect of accidents happening by reason of the default of any pilot, acting under or in pursuance of the provisions of the Act" (6 M. & W. 316); and they held that the pilot was so acting, whether the owner was compelled to employ him or not. And they conclude as follows. "The case before us is clearly within the words of the exempting clause; and we must therefore hold it to be within its spirit and meaning, unless (which is not the case) some manifest inconvenience or inconsistency should result from our so doing." The decision, so explained, is inapplicable to the present question.

COLERIDGE, J. Though this case has been argued at some length and with much ingenuity, the point is not difficult. The question is, were the defendant and the persons employed by him master and servants? If they were, the general principle applies. And the tests leave no doubt that they were. First, the men were selected by the defendant; secondly, they were paid by him; thirdly, they were doing his work; fourthly, they were under his control, that is, in doing the work in the ordinary way. It is said that a difference arises where the workman is paid so much for doing the whole job. But the defendant might pay either for a given time or a given work; and the men here were as much under the defendant's control as a gentleman's coachman is under that of his master. The master cannot order the coachman to do an illegal act, as to drive furiously, or on the wrong side. But, subject to that, the master has the control over the coachman. So here the defendant had the control over the persons navigating the barge, subject to the rules of the river. They are, principally, selected by him. Suppose the owner of a barge, seeing a number of watermen on the side of the river, chose to hire one who was incompetent, would not he have made the selection? Then, if the men here were the defendant's servants, on what grounds is the defence put? On two only. First, that the defendant was bound to select from a particular class; secondly, that he was not allowed to do the work for himself. But neither of these grounds is sufficient. As to the first, it is true that the defendant was bound to select from a class; and so we all practically are limited by the necessity of choosing persons of skill and fitness; but, if we can choose from a class, whether large or small, our contract places us in the situation of a party responsible for the acts of those whom he does choose. And, as to the defendant not being able to do the work for himself, the law, for the public safety, imposes a qualification, and makes the apprenticeship a test of fitness. Though the defendant was obliged to employ one qualified person, he still made those whom he did employ his servants by the contract. Both grounds of defence therefore fail. *Rule discharged.*

REEDIE *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

HOBBIT *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

EXCHEQUER. 1849.

[4 *Exch.* 244.]

THIS was an action by the widow and administratrix of a person who was killed while passing under a viaduct in course of construction, as part of a railway from Leeds to Dewsbury. The action was brought to recover compensation, for the benefit of herself and her children under the provisions of the 9 & 10 Vict. c. 93. The declaration stated that the defendants were possessed of a viaduct over the Gomersall and Dewsbury turnpike-road, such viaduct being part of a railway then in course of construction between Dewsbury and Leeds; yet the defendants conducted themselves in making the said archway over the said turnpike road so negligently that, by reason thereof, a large stone, parcel of the materials used in the construction of the said archway, fell on the plaintiff's husband as he was passing along the road, whereby he was killed.

The pleas were first, not guilty; secondly, that the defendants were not making the said archway in manner and form, &c. Upon which pleas issues were joined. At the trial, before CRESSWELL, J., at the last York Summer Assizes, the material facts proved were as follows: On the 30th of June, 1845, an Act of Parliament, intituled "The Leeds, Dewsbury, and Manchester Railway Act, 1845," received the Royal assent. By the provisions of that Act, a company was incorporated in the usual way, for the purpose, among other objects, of forming the railway in question. By an indenture, dated the 29th of September, 1846, made between the company of the one part, and Joseph Crawshaw and Richard Crawshaw of the other part, the Messrs. Crawshaw covenanted with the company that they would, in consideration of a sum of £55,000, to be paid as therein mentioned, make and complete a portion of the railway described in the indenture, of the length of 3830 yards, or thereabouts, with all excavations, embankments, bridges, tunnels, viaducts, roads, fences, and other works connected therewith, according to the specification referred to. Amongst other stipulations in the deed, it was provided that the works were to be done by the contractors; but the company had a general right of watching the progress, and, if the contractors employed incompetent workmen, the company had the power of dismissing them. Under this contract, Messrs. Crawshaw proceeded to execute the works, and, while they were in progress, viz. on the 9th July, 1847, another Act received the Royal assent, whereby it was enacted, that the said Leeds, Dewsbury, and Manchester Railway, with all and singular the undertakings thereof, as well those which had been commenced as those which had not, and all the real and personal estate of the said company, should (subject to the existing debts, liabilities, and contracts of the same company) be vested in the London and North Western Railway Company, and might be lawfully executed, completed, held, and enjoyed by them, in the same way as they might have been executed, completed, held, and enjoyed by the said Leeds, Dewsbury, and Manchester Company if that Act had not passed. After the passing of this second Act, Messrs. Crawshaw continued to proceed with their work, and in the course of it, by the negligence of some of the contractor's workmen, a heavy stone fell from a travelling truck upon the plaintiff's husband, who was passing along the road underneath, and occasioned his death. Upon these facts, a verdict was found for the plaintiff, leave being reserved for the defendants to move to enter a nonsuit, if the court should be of opinion that the action would not lie.

A rule *nisi* having been obtained accordingly, against this rule, in Hilary Vacation last (February 13 and 14), cause was shown by

Martin, Pickering, and *H. Hill.*

Knowles, and *Hall*, in support of the rule. *Cur adv. vult.*

The judgment of the court in the preceding cases was now given by

ROLFE, B. (His Lordship after stating the pleadings and facts in Reedie *v.* The North Western Railway Company, as above set forth, proceeded): — It appears to us quite clear, that after the passing of the second act, the contract with Messrs. Crawshaw was transferred to the present defendants, so as to make them liable to the same extent precisely, as the original Leeds, Dewsbury, and Manchester Company would have been liable, if the second act had not passed. But, after full consideration of the subject, we are of opinion that neither the defendants nor the original company are liable.

In the case of Quarman *v.* Burnett, this court decided (adopting the opinion of Lord Tenterden and Mr. Justice Littledale, in Laugher *v.* Pointer), that the liability to make compensation for an injury arising from the neglect of a person driving a carriage, attaches only on the driver, or on the person employing him. The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, "Qui facit per alium facit per se." The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned.

The doctrine of Quarman *v.* Burnett has since been acted on in this court, in the case of Rapson *v.* Cubitt, and in the court of Queen's Bench, in Milligan *v.* Wedge, and again in Allen *v.* Hayward.

By these authorities we must consider the law to have been settled; and the only question is, whether the law, so settled, is applicable to the facts of this case.

To show it was not, it was argued by the counsel for the plaintiff, that there is a recognized distinction on this subject between injuries arising from the careless or unskilful management of an animal, or other personal chattel, and an injury resulting from the negligent management of fixed real property. In the latter case, it was contended, the owner is responsible for all injuries to passers-by or others, howsoever they may have been occasioned; and here it was said the defendants were, at the time of the accident, the owners of the railway, and so are the parties responsible.

This distinction as to fixed real property is adverted to by Mr. Justice Littledale, in his very able judgment in Laugher *v.* Pointer, 5 B. & C., at pages 559 and 560; and it is also noticed in the judgment of this court, in Quarman *v.* Burnett. But in neither of these cases was it necessary to decide whether such a distinction did or did not exist. The case of Bush *v.* Steinman, where the owner of a house was held liable for the act of a servant of a sub-contractor, acting under a builder employed by the owner, was a case of fixed real property. That case was strongly pressed in argument in support of the liability of the defendants, both in Laugher *v.* Pointer and Quarman *v.* Burnett; and as the circumstances of those two cases were such as not to make it necessary to overrule Bush *v.* Steinman, if any distinction in point of law did exist, in cases like the present, between fixed property and ordinary movable chattels, it was right to notice the point. But, on full consideration, we have come to the conclusion, that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and in fact, that, according to the modern decision, Bush *v.* Steinman must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded.

It is not necessary to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law, "Sic utere tuo ut alienum non laedas." This is referred to by Mr. Justice Cresswell, in delivering the judgment of the Court of Common Bench, in Rich *v.* Basterfield, 4 C. B. Rep. 802, as the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which the property is enjoyed. And, possibly, on some such principle as this, the case of Bush *v.* Steinman may be supported. But certainly that doctrine cannot be applied to the case now before us. The wrongful act here could not in any possible sense be treated as a nuisance. It was one single act of negligence; and, in such a case, there is no principle for taking any distinction by reason of the negligence having arisen in reference to real and not to personal property.

If the defendants had employed a contractor, carrying on an independent business, to repair their engines or carriages, and the contractor's workmen had negligently caused a heavy piece of iron to fall on a bystander, it would appear a strange doctrine to hold that the defendants were responsible. Mr. Justice Littledale, in his very able judgment in Laugher *v.* Pointer, observed (5 B. & C. 558) that the law does not recognize a several liability in two principals who are unconnected; if they are jointly liable, you may sue either, but you cannot have two separately liable. This doctrine is one of general application, irrespective of the nature of the employment; and, applying the principle to the present case, it would be impossible to hold the present defendants liable, without the same time deciding that the contractors are not liable, which it would be impossible to be contended.

It remains only to be observed that in none of the more modern cases has the alleged distinction between real and personal property been admitted. In Milligan *v.* Wedge, Lord Denman expresses doubt as to the existence of such a distinction in any case; and, in the more recent case of Allen *v.* Hayward, the judgment of the court proceeded expressly on the ground that the contractor, in a case like the present, is the only party responsible. The last case so closely resembles the present that, even if we had not considered the decision right, we should probably have felt bound by it. But we see no reason to doubt its perfect correctness. It seems to follow as a necessary corollary from the principles of the preceding cases, and entirely to govern this.

Our attention was directed during the argument to the provisions of the contract, whereby the defendants had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal. But this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal if they thought him careless or unskilful did not make him their servant. In Quarman *v.* Burnett the particular driver was selected by the defendants; but this was held not to affect the liability of the driver's master, or to create any responsibility in the defendants; and the same principle applies here. On these grounds we are of opinion that this rule must be made absolute.

Rule absolute.

MAY *v.* BLISS AND EVERETT.

SUPREME COURT OF VERMONT. 1850.

[22 *Vt.* 477.]

TRESPASS for taking a quantity of boards. The defendant Everett being an infant, under the age of twenty-one years, a guardian *ad litem* was appointed, at whose request judgment was rendered against him, as by default. The defendant Bliss pleaded the general issue. Trial by the court, December Term, 1849, REDFIELD, J., presiding. It appeared that one Homer, who occupied a saw mill, sawed boards for Bliss, which were afterwards piled in the mill yard. The plaintiff also owned boards, which were piled near the boards of Bliss. Bliss sent Everett, who was his hired man, with a team, to draw away his boards, and directed him to call upon Homer, and he would inform him which boards belonged to Bliss. Everett called upon Homer, who gave such directions to him that he took away all the boards of Bliss and also the boards of the plaintiff, supposing he was following the directions of Homer, and that he was taking the boards of Bliss and none other. Subsequently, upon inquiry being made by the plaintiff, Bliss became satisfied that he had the plaintiff's boards, and he sent word to the plaintiff that he had found an excess among his boards of 980 feet, which he would draw back to the plaintiff, or pay him for them the price of poor hemlock. The number of feet of the plaintiff's boards which were taken was nearly 2,000, of a poor quality of pine, but much more valuable than hemlock. Bliss, also, at some time, told the plaintiff that if he would examine the boards drawn by Everett, and find those belonging to him among them, he would draw them back, or account for them; but the plaintiff declined making the examination, upon the ground, as the court inferred, that he did not suppose that either he or Bliss could determine which boards had belonged to the plaintiff. There was testimony tending to prove that Bliss had kept on hand about 1,200 feet of the boards drawn by Everett, and which he supposed were those which had belonged to the plaintiff, and that they were still ready to be delivered to the plaintiff. The testimony was not entirely satisfactory as to whether there were not more of the plaintiff's boards taken by Everett. The court decided that Bliss, having sent his hired man to follow such instructions as he might receive from Homer, and he having received such instructions as induced him to take away the plaintiff's boards, it was the same as if Bliss had given the instructions himself, and that Bliss was responsible, whether the fault were in Homer, in not giving sufficiently specific instructions, or in Everett, in not properly apprehending or not following them, the same as if Bliss had done the whole himself and taken the plaintiff's boards by mistake. Judgment was accordingly rendered for the plaintiff for the value of the boards taken. Exceptions by Bliss. Damages were assessed against Everett equal to the amount of the damages for which judgment was rendered against Bliss.

Ormsby, for defendant.

Parker, for plaintiff.

BY THE COURT. We think the decision of the court below upon the main question of the liability of Bliss, and the reasons assigned in the bill of exceptions, are correct. Indeed the question as to the participation of Bliss in the act of Everett is chiefly matter of fact; and the case having been tried by the court, and they having found his participation, it is difficult to revise that decision in the matter of law, without reversing also the finding of the facts. But to the extent of the reasons stated by the County Court, this court see no reason to doubt their perfect soundness.[1] *Judgment affirmed.*[2]

PHILADELPHIA & READING RAILROAD COMPANY, PLAINTIFF IN ERROR, v. DERBY.

SUPREME COURT OF THE UNITED STATES. 1852.

[14 *How.* 468.]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Pennsylvania.

It was an action on the case brought by Derby for an injury suffered upon the railroad of the plaintiff in error.

The declaration, in ten counts, was, in substance, that on the 15th day of June, 1848, the defendants, being the owners of the railroad, and of a certain car engine called the Ariel, received the plaintiff into the said car, to be safely carried therein, upon, and over the said railroad, whereby it became the duty of the defendants to use proper care and diligence that the plaintiff should be safely and securely carried, yet, that the defendants not regarding their duty in that behalf, conducted themselves so negligently by their servants, that, by reason of such negligence, while the car engine Ariel was upon the road, and the plaintiff therein, he was precipitated therefrom upon the ground, and greatly injured. Defendants pleaded not guilty.

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[1] A passage as to procedure is omitted. — ED.

[2] See Andrus v. Howard, 36 Vt. 248 (1863). — ED.

On the 22d of April, 1851, the cause came on to be tried, and the evidence was, in substance, as follows: —

In the month of June, 1848, the plaintiff, being a stockholder in the said railroad company, came to the city of Philadelphia, for the purpose of inquiring into its affairs, on his own account and as the representative of other stockholders. On the 15th of June, 1848, the plaintiff accompanied John Tucker, Esq., the president of the said company, over the railroad, for the purpose of viewing it and the works of the company.

They proceeded in the ordinary passenger train of the company from the city of Philadelphia (the plaintiff paying no fare for his passage) as far as the city of Reading.

On arriving at Reading, the plaintiff inspected the machine-shops of the defendants there situate, and remained for that purpose about half an hour after the departure of the passenger train towards Pottsville, which latter place is about the distance of ninety-two miles from Philadelphia.

By order of Mr. Tucker, a small locomotive car engine called the Ariel was prepared for the purpose of carrying the plaintiff and Mr. Tucker further up the road. This engine was not constructed or used for the business of the said defendants, but was kept for the use of the president and other officers of the company, their friends and guests.

On this engine, the plaintiff and Mr. Tucker, accompanied by the engineer and fireman, and a paymaster of defendants, proceeded, following the passenger train, until they reached Port Clinton, a station on the line of the railroad.

After leaving Port Clinton, when about three miles distant from it, going round a curve, the passengers on the Ariel saw another engine, called the Lycoming, of which S. P. Jones was the conductor, approaching on the same track. The engineer of the Ariel immediately reversed his engine, and put down the brake. Mr. Tucker, the plaintiff, and the fireman, jumped from the Ariel to avoid the impending collision. After they had jumped the engineer also left the Ariel, having done all he could do to stop it. The plaintiff, in attempting to jump, fell, and received the injury of which he complains.

The engineer of the Lycoming, when he saw the approach of the Ariel, reversed his engine and put down the brake. He did not leave the Lycoming till after the collision. At the time of the collision, the Lycoming was backing. The engines were but slightly injured by it.

On the night of the 14th or the morning of the 15th of June, a bridge on the line of the railroad above Port Clinton was burnt. In consequence of this, one of the tracks of the railroad was blocked up by empty cars returning to the mines, and stopped by the destruction of the bridge. For this reason a single track only could be used for the business of the road between Port Clinton and the burnt bridge.

Lewis Kirk, an officer of the said company (master machinist and foreman), went on in the passenger cars from Reading towards Pottsville, informing the plaintiff and Mr. Tucker that he would give the proper orders to have the track kept clear for the Ariel. On arriving at Port Clinton he did give an order to Edward Burns, despatcher at Port Clinton (an officer of said company, charged with the duty of controlling the starting of engines), that no car should be allowed to go over the road until he the said Kirk returned.

This order was communicated in express terms by Burns to Jones, the conductor of the Lycoming. Jones replied that he would go, and would take the responsibility, and, contrary to his orders, did go up the road towards the burnt bridge, and on his return met the Ariel, and the collision ensued, as above stated. Jones had the reputation of being a careful and competent person, no previous disobedience of orders by him had ever occurred, and he was discharged by the defendants immediately after the accident, and because of it.

On the trial the plaintiff below requested the court to charge the jury: —

I. That if the plaintiff was lawfully upon the railroad of the defendants at the time of the collision, by the license of the defendants, and was then and there injured by the negligence or disobedience of orders of the company's servants, then and there employed on the said railroad, the defendants are liable for the injury done to the plaintiff by such collision.

II. That if the defendants, by their servants, undertook to convey the plaintiff along the Reading Railroad, in the car Ariel, and while so conveying him, through the gross negligence of the servants of the company then and there employed on the said railroad, the collision occurred by which the plaintiff was injured, that the defendants are liable for the injury done to the plaintiff by such collision, although no compensation was to be paid to the company for such conveyance of the plaintiff.

III. That if the collision, by which the plaintiff was injured, was occasioned by the locomotive Lycoming, then driven negligently or in disobedience of orders upon the said road by J. P. Jones, one of the company's servants, then having control or command of the said locomotive, that the defendants are liable for the injury to the plaintiffs, caused by such collision.

And the counsel for the defendants below requested the court to charge the jury: —

1. That the damages, if any are recoverable, are to be confined to the direct and immediate consequences of the injury sustained.

2. That if the jury believe the plaintiff had paid no fare, and was passing upon the railroad of the defendant as an invited guest, in order to entitle him to recover damages he must prove gross negligence, which is the omission of that care which even the most thoughtless take of their own concerns.

3. That the defendants would be liable in damages to a passenger who had paid passage-money upon their contract to deliver him safely,

for slight negligence, but to an invited guest, who paid no fare or passage-money, they will not be responsible unless the jury believe that there was not even slight diligence on the part of the agents of the defendants.

4. That the employer is not responsible for the wilful act of his servant.

5. That if the jury believe that the conductor of the engine Lycoming wilfully, and against the express orders of the officer of the company communicated to him, by running his engine upon the track above Port Clinton, caused the collision, the defendants are not responsible for any injury or loss resulting from such wilful disobedience.

6. That if the jury believe that every reasonable and proper precaution was taken to have the track of the railroad clear for the passage of the Ariel, and collision ensued solely by reason of the wilful disobedience of the conductor of the Lycoming, and of the express orders duly given by an agent of the company, the plaintiff cannot recover.

7. That if the jury believe that the conductor of the Lycoming, and all the officers of the company in any wise connected with the collision, were carefully and prudently selected, and that the collision ensued and the injury resulted to the plaintiff, an invited guest, by the wilful disobedience of one of them to an order duly communicated, then the plaintiff cannot recover.

The learned judge charged the jury as requested, on all the points offered by the plaintiff.

And the learned judge charged on the first and second points offered by the defendants, as requested, and also on the third point of the defendants, with the explanation, that though all the other agents of the defendants acted with diligence, yet if one of the agents used no diligence at all, then the defendants could not be said to have shown slight diligence.

As to the fourth point, the learned judge charged as requested by the defendants, with this explanation, that though the master is not liable for the wilful act of his servant, not done in the course of his employment as servant, yet if the servant disobeys an order relating to his business, and injury results from that disobedience, the master is liable, for it is his duty to select servants who will obey. The disobedience in this case is the *ipsa negligentia*, for it is not pretended by the defendants that the Lycoming was intentionally driven against the Ariel.

On the fifth, sixth, and seventh points of the defendants, the learned judge refused to charge as requested.

The learned judge further said, that it is admitted that the plaintiff was injured through the act of Jones, the conductor of the Lycoming, that the plaintiff was lawfully on the road by the license of the defendants; then, in this view of the case, whether he paid fare or not, or was the guest of the defendants, made no difference as to the law of the case.

The jury found a verdict for the plaintiff, and assessed the damages at three thousand dollars.

A writ of error brought the case up to this court.

It was argued by Mr. *Campbell* and Mr. *Fisher*, for the plaintiff in error, and Mr. *Binney* and Mr. *Wharton*, for the defendant in error.

Mr. Justice GRIER delivered the opinion of the court.[1]

The rule of *respondeat superior*, or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. See Story on Agency, § 452; Smith on Master and Servant, 152.

There may be found, in some of the numerous cases reported on this subject, dicta which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depended on the question whether the servant, at the time he did the act complained of, was acting in the course of his employment, or, in other words, whether he was or was not at the time in the relation of servant to the defendant.

The case of Sleath *v.* Wilson, 9 Car. & Payne, 607, states the law in such cases distinctly and correctly. . . .[2]

Although, among the numerous cases on this subject, some may be found (such as the case of Lamb *v.* Palk, 9 C. & P. 629) in which the court have made some distinctions which are rather subtile and astute as to when the servant may be said to be acting in the employ of his master; yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim *respondeat superior* would, in a measure, nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the "*causa causans*" of the mischief; while the proximate cause, or the *ipsa negligentia* which produces it, may truly be said, in most cases, to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defence when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveller greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety.

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[1] After stating the case and discussing the fact that the person injured was a stockholder riding at the invitation of the company's president and as the company's guest. — ED.

[2] Here Sleath *v.* Wilson, *ante*, p. 122, was stated, and the opinion of Erskine, J., *ante*, pp. 124-125, was quoted. — ED.

The judgment of the Circuit Court is therefore affirmed.[1]

Mr. Justice DANIEL dissents from the decision of this court in this cause, upon the ground that the said railroad company being a corporation, created by the State of Pennsylvania, is not capable of pleading or being impleaded, under the 2d section of the 3d article of the Constitution, in any of the courts of the United States; and that therefore the Circuit Court could not take cognizance of the controversy between that corporation and the plaintiff in that court.

MITCHELL *v.* CRASSWELLER.

COMMON PLEAS, 1853.

[13 *C. B.* 237.]

THIS was an action by husband and wife, to recover a compensation in damages for injuries sustained by them through the alleged negligent driving of the defendants' servant.

The first count of the declaration stated that, on the 8th of September, 1852, the defendants were possessed of a certain cart and horse, which was being driven by and under the care and direction of the defendants' servant; and that, whilst the plaintiff Dorothy was crossing a certain street in London, called Grafton Street, the defendants, by their said servant, so negligently and improperly drove and directed the said cart and horse along the said street, that the said cart and horse ran against and struck the plaintiff Dorothy with great violence, and threw her down, and the wheel of the said cart passed over her; by reason whereof, the said last-mentioned plaintiff was very much hurt and injured, and was confined to her bed several weeks, and during that time underwent, and still continued to undergo, a great deal of pain and suffering; and the plaintiff in right of the said plaintiff Dorothy claimed £100.

The second count was for the injury sustained by the plaintiff Richard Mitchell.

The defendants pleaded, — first, not guilty, — secondly, that they were not possessed of the said horse and cart in the declaration mentioned; whereupon issue was joined.

The case was tried before JERVIS, C. J., at the sittings at Westminster, after the last term. The facts appeared to be as follows: The defendants are ironmongers, carrying on an extensive business in Welbeck Street, and were possessed of a horse and cart, with which their carman had on the day mentioned in the declaration been out to deliver goods. Returning home at a late hour in the evening, the carman drove up to the shop-door to get the keys of the stable, for the purpose of putting up the horse and cart. Having got the keys, the carman was about to proceed to the stable, which was in an adjoining street, and within five hundred yards of the shop, when the defendants' foreman, who was unwell, asked him to drive him a part of his way home; whereupon the carman went to the house for the purpose of asking the permission of one of his employers, but, not finding either of them at home, returned to the foreman, and, observing that "he would chance it," he drove him as far as Euston Square. In returning thence to the stable, he accidentally ran over the plaintiffs.

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[1] *Acc.*: Garretzen *v.* Duenckel, 50 Mo. 104 (1872). — ED.

Upon this state of facts, it was contended on the part of the defendants that they were not responsible, the accident having happened whilst the carman was doing something out of the scope of his duty.

The Lord Chief Justice intimating a doubt whether this defence was open to them under not guilty and not possessed, the counsel for the defendants asked his lordship to amend, under the 222d section of the common law procedure act, 15 & 16 Vict. c. 76,[1] by adding a plea, that, at the time when the injury was sustained by the plaintiffs, the said cart and horse were not being used in the employ of the defendants, but were being improperly used and driven by certain persons driving themselves for other and different purposes. His lordship allowed the amendment.

On the part of the plaintiffs it was insisted that, inasmuch as the carman was in charge of the cart and horse of the defendants when the accident happened, though he might have exceeded his duty in what he did, they still were responsible for the consequences.

His lordship directed the jury to find for the [defendants], telling them at the same time to assess the damages they considered the plaintiffs entitled to. The jury accordingly assessed the damages at £30 for the injury done to the plaintiff Thomas Mitchell, and at £10 for the injury to his wife. And leave was reserved to the plaintiffs to move to enter the verdict for them, if the court should think that the defence raised by the added plea was not admissible under the pleas originally pleaded, and that the Chief Justice had no power under the statute to allow such additional plea; or that the defendants were under the circumstances responsible for the negligence of their carman.

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[1] "Whereas, the power of amendment now vested in the courts and the judges thereof is insufficient to enable them to prevent the failure of justice by reason of mistakes and objections of form," — be it enacted as follows, — "It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made." — REP.

Shee, Serjt., on a former day in this term, obtained a rule *nisi* accordingly.

Byles, Serjt., now showed cause.

Shee, Serjt., *Petersdorff*, and *Garth* (in support of the rule).

JERVIS, C. J. I am of opinion that the rule should be discharged.[1] . . . The declaration alleges that, on a certain day, the defendants were possessed of a certain cart and horse, which was being driven (not stating it to be so being driven at the time of the accident) by and under the care and direction of the defendants' servant. If this allegation were traversed, it would be established by proof of any driving by their servant at any time: it is therefore an immaterial allegation. Then, because they have not already fixed the time, the plaintiffs do in some sort ascertain it in the charging part, — "and that, whilst the plaintiff Dorothy was crossing a certain street in London, called Grafton Street, the defendants, by their said servant, so negligently and improperly drove and directed the said cart and horse along the said street, that the said cart and horse ran against and struck the plaintiff Dorothy," etc. I think "not guilty" puts in issue whether at the time of the accident the driver of the cart was the servant of the defendants. That brings us to the principal point, whether, under the circumstances disclosed by the evidence, the defendants are responsible for the injury which the plaintiffs have sustained. Each case must depend upon its own particular circumstances. No doubt a master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him. But here it cannot be denied that, though it was the duty of the carman, on his arrival with the horse and cart at Welbeck Street, immediately to take them to the stable, he, in violation of that duty, and without the sanction or knowledge of his employers, instead of going to the stable, started on a new journey, wholly unconnected with his masters' business, — as my Brother Parke expresses it in Joel *v.* Morrison, "on a frolic of his own." I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be *in the employ* of his master at the time of committing the grievance. I think that was not the case here, and therefore I think the defendants are not liable to this action.

MAULE, J. I am of the same opinion. . . . The facts were these: The defendants' carman, having finished his business, had nothing further to do but to drive the horse to the stable. At the time of the accident, he was not going a roundabout way to the stable, or, as one of the cases express it, making a *detour*. He was not engaged in the business of his employers. But, in violation of his duty, so far from doing what he was employed to do, he did something totally inconsistent with his duty, a thing having no connexion whatever with his employers' service. The servant only is liable, and not the employers. All the cases are reconcilable with that. The master is liable even though the servant, in the performance of his duty, is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But, where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it.

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[1] The passages omitted from the opinions deal with pleading and procedure. — ED.

CRESSWELL, J. I am of the same opinion. For the reasons given by my Lord and my Brother Maule, I think the defence was admissible under not guilty. . . . As to the main point of the case, I agree, that, under the circumstances, the carman cannot be said to have been acting in the employ of the defendants at the time the injury complained of was done, so as to make them responsible in damages for his negligence. No doubt, if a servant, in executing the orders, express or implied, of his master, does it in a negligent, improper, and roundabout manner, the master may be liable. But, here, the man was doing something which he knew to be contrary to his duty, and a violation of the trust reposed in him. The expression used by him at the time he started upon the unauthorized journey showed that he was aware that he was doing that which was inconsistent with his duty. I think it would be a great hardship upon the employers to hold them to be responsible under such circumstances.

WILLIAMS, J. I am entirely of the same opinion: and I must say I should have been extremely sorry if any authority could have been found which would compel us to hold that this man was, at the time of the accident which occurred through his breach of duty and his negligence, acting in the employ of the defendants. If the allegation that the defendants were possessed of the cart and horse which was being driven by their servant, had pointed to the particular time of the committing of the injury, the defendants might have traversed the inducement. But, here, the introductory averment is so framed as not to involve the question whether at the time of the accident the cart and horse were under the care and management of the defendants by their servant. . . . *Rule discharged.*[1]

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[1] *Acc.*: Stone *v.* Hills, 45 Conn. 44 (1877). Compare Quinn *v.* Power, 87 N Y 535 (1882). — ED.

ELLIS *v.* SHEFFIELD GAS CONSUMERS CO.

QUEEN'S BENCH. 1853.

[2 *E. & B.* 767.]

COUNT for unlawfully digging a trench in a public street and highway, and heaping up stones and earth, excavated from the said trench, upon the said street and highway, so as to obstruct it, and to be a common public nuisance; whereby plaintiff, lawfully passing along the said public street and highway, fell over the said stones and earth, so heaped up as aforesaid, and broke her arm.

Plea: Not guilty. Issue thereon.

On the trial, before WIGHTMAN, J., at the last York Assizes, it appeared that the defendants had made a contract with persons trading under the firm of Watson, Brothers, of Sheffield, by which Watson, Brothers, contracted to open trenches along the streets of Sheffield in order that the defendants might lay gas pipes there, and afterwards to fill up the trenches and make good the surface and flagging. Watson, Brothers, did accordingly, by their servants, open the trenches along one of the streets in question, and, after the pipes were laid, proceeded to fill up the trench and restore the flagging. In doing so, the servants of Watson, Brothers, carelessly left a heap of stones and earth upon the footway; and the plaintiff, passing along the street, fell over them and broke her arm. Neither the defendants nor Watson, Brothers, had any legal excuse for breaking open the street in the manner described, which was a public nuisance. It was objected, for the defendants, that the cause of the accident was the negligence of the servants of the contractors, Watson, Brothers, for which the defendants were not responsible. It was answered that the contract was to do an illegal act, viz. to commit a nuisance; and, that being so, that the defendants were responsible. The learned Judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendants.

T. Jones now moved accordingly.

Lord CAMPBELL, C. J. I am of opinion that there should be no rule in this case. Mr. *Jones* argues for a proposition absolutely untenable, namely, that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. I perfectly approve of the cases which have been cited. In those cases the contractor was employed to do a thing perfectly lawful: the relation of master and servant did not subsist between the employer and those actually doing the work: and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do, and, that being lawful, he was not liable at all. But in the present case the defendants had no right to break up the streets at all; they employed Watson, Brothers, to break up the streets, and in so doing to heap up earth and stones so as to be a public nuisance: and it was in consequence of this being done by their orders that the plaintiff sustained damage. It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done.

Coleridge, J., concurred.

Wightman, J. It seems to me, as it did at the trial, that the fact of the defendants having employed the contractors to do a thing illegal in itself made a distinction between this and the cases which have been cited. But for the direction to break up the streets, the accident could not have happened: and, though it may be that if the workmen employed had been careful in the way in which they heaped up the earth and stones the plaintiff would have avoided them, still I think the nuisance which the defendants employed the contractors to commit was the primary cause of the accident.

Erle, J. I agree that there should be no rule, on this specific ground that, as I understand the facts, the cause of the accident was the very thing done in pursuance of the specific directions of the defendants contained in their contract; and that in my opinion makes the distinction between the present case, and those cited, in which the cause of the accident was the negligence of those doing the thing, not the thing itself. *Rule refused.*

HILL *v.* MOREY.

Supreme Court of Vermont. 1854.

[26 *Vt.* 178.]

This was an action of trespass founded on the statute entitled, "An act more effectually to prevent trespass in certain cases," passed in 1849. Plea not guilty, and trial by jury. After the jury were empanelled, the defendant made a motion, in writing, that the cause be dismissed, on the ground, "that the plaintiff, when he prayed out his writ, did not cause a true minute of the day, month, and year when said writ was signed, or any minute whatever to be made on said writ." The court decided, that if such certificate was necessary, the defendant was too late in making his motion; and overruled the same. It appeared on trial, that the plaintiff and defendant were adjoining landowners, the plaintiff owning upon the east, and the defendant upon the west; and that originally, the line between them was marked upon the land, and corners made at the north and south ends of the line; but the marked trees towards the north part of the line had been mostly cut down, and the fence (a brush fence) was not on the line, some parts being on the one side and some on the other. That the parties went upon the ground for the purpose of ascertaining where the line was, and of dividing and repairing the fence between them; and that one Sturdevant was also there at the time. They went to the north part of the line where the marked trees were gone, and where the trespass was said to have been committed, and the plaintiff went to a certain point in the woods, either at or near the north end of the line, and told the defendant, who was some fifteen rods distant, that it was the corner. Whether the plaintiff went to the true corner or not, did not distinctly appear; the testimony of the plaintiff tending to show that he did go to the true corner; and the testimony of defendant tending to show that he did not, but that plaintiff was a short distance east of it. The parties made, at this time, a division of their fence, the defendant taking the said north part for his share of the fence; and he then began to repair the brush fence. The defendant also offered testimony tending to show, that the said Sturdevant, who was a neighbor, and happened to be present, without any request from the defendant, began to assist the defendant in repairing the said brush fench. That in so doing, said Sturdevant cut a few small trees and poles east of the division fence and east of the line between plaintiff and defendant; and this cutting by said Sturdevant, was the trespass complained of. It also appeared from defendant's testimony, that at the time said Sturdevant began to cut, the defendant told him, that he must be careful and not cut over the line. The line, a portion of the way, was in dispute on the trial. It appeared that the defendant in repairing the fence, went on the west side, and said Sturdevant on the east side, and in this way passed over the whole of that part of the division, which defendant was to repair, each cutting on his side of the fence small trees and poles, and putting the same on the fence, and thus repairing it. The defendant claimed, and so said Sturdevant testified, that Sturdevant in what he did, in cutting and repairing the fence, was a mere volunteer, and that he did not act at the request of the defendant, and that he was not in the employ of the defendant. The defendant therefore claimed that he was not liable for Sturdevant's act; and that as he requested Sturdevant not to cut over the line on plaintiff's land, Sturdevant in so doing, acted against the wishes and without the authority of defendant, and that no assent could be inferred or implied from the defendant's presence and knowledge of the acts being done. Defendant also claimed, that if the jury found that the plaintiff, when he pointed out the north corner, pointed it out as further east than the true corner, it amounted to a license; and that if defendant or Sturdevant did not cut further east than the line would have been, assuming the corner thus pointed out by plaintiff to be the true corner, it amounted to a license, and that defendant would not be liable. Plaintiff's testimony tended to prove, that he, the plaintiff, told them before they began to mend said fence, not to cut on his side of the fence. It also appeared, that, where said fence run it was wood land, but that the land east of the fence was enclosed with the plaintiff's cleared land, and occupied by plaintiff; and that the land west of said fence was enclosed with defendant's cleared land, and occupied by and in defendant's possession. On the points above stated, and made by defendant, the court, — PECK, J., presiding, — charged the jury as follows: —

That in order to entitle the plaintiff to recover, the jury must find, that some cutting was done or trespass committed east of the division fence and east of the division line between the plaintiff's and defendant's land; that for any cutting or trespass west of the true line, although east of the division fence, the plaintiff could not recover for want of title to the premises where such trespass was committed; and that for any cutting done or trespass committed east of the true line, if west of the division fence, the plaintiff could not recover, for want of possession, and by reason of the defendant being in possession of the land west of and up to the division fence; but for any cutting done, or trespass committed by defendant, which was both east of the division fence, and east of the division line between plaintiff and defendant, if done on plaintiff's land, or land in plaintiff's possession, the defendant would be liable. On the point made in relation to defendant's liability for the acts done by Sturdevant, the court charged the jury, that if Sturdevant was cutting for defendant's benefit and in his presence, and with his knowledge and consent, the act of Sturdevant would be the act of defendant, for which defendant would be liable, even if Sturdevant had not been employed by defendant, and defendant did not advise or direct such act to be done; or if defendant knew at the time when Sturdevant was cutting and did not object, but assented to it, and it was an act beneficial to defendant, and done for defendant's benefit, the defendant would be liable for such act of Sturdevant; and that the question, whether what was done by Sturdevant was done by the consent of defendant or not, was a question of fact for the jury to find; and that they might or might not find such consent of the defendant, as they might think the evidence warranted; that if they did not find such assent, or that the cutting or trespass by Sturdevant, was not done by defendant's assent, the defendant would not be liable for the acts of Sturdevant; but if Sturdevant was cutting for defendant's benefit, and his acts were beneficial to defendant, and he was cutting by defendant's assent, even if defendant told him not to cut over the line on plaintiff's land, yet, if Sturdevant, by mistake, not knowing and not having the means of knowing where the line was, cut over the line on plaintiff's land and possession, such act of Sturdevant would be the act of defendant; but if Sturdevant was cutting even with defendant's consent or direction, and knowingly or wilfully without defendant's consent or direction cut over on plaintiff's land or possession, the defendant would not be liable for such act. In reference to what was claimed, as to a license, the court told the jury, that even if they should find that plaintiff pointed out the corner further east than the true corner, and that defendant and Sturdevant did not either of them cut further east than the line would be, assuming the corner thus pointed out to be the true corner, if such evidence had a tendency to prove a license, it would not be a defence under the general issue, that in order for defendant to avail himself of that evidence, as a license, it should have been pleaded; but that such evidence was proper for the jury to consider and weigh, in reference to the question of fact, where the true line was, and in that point of view, it had a tendency to show that the true line was further east, than the line claimed by the plaintiff on trial. To the decision of the court overruling the motion to dismiss, and to the omission of the court to charge as requested, and to the charge as given, the defendant excepted. The jury returned a verdict for plaintiff.

A. Burt and *A. O. Aldis* for defendant.

H. R. Beardsley for plaintiff.

The opinion of the court was delivered by

REDFIELD, C. J.[1] The other objection depends a good deal upon the construction of the testimony. It is a small cause and seems to have been pretty thoroughly tried in the county court, and we have not been able to see very clearly any error in the trial. Sturdevant, although a volunteer, seems to have undertaken the office of a servant to the defendant *pro hac vice*, and to have been suffered to proceed in his service, without objection, or any other restriction, except to be careful not to cut trees standing upon the plaintiff's land; but he did cut trees on the plaintiff's land, negligently, and for want of proper information, and upon every principle of the relation of master and servant, the defendant must be regarded as liable for the act. If one could always excuse himself from liability for the acts of his servant, by giving such instructions, the liability would be reduced to cases of express assent. And in the present case, the act being done, in the presence of the defendant and for his benefit, and he not dissenting, in any manner, must be regarded, as assenting. As the evidence stood, there could be no reasonable doubt of defendant's liability for the acts of Sturdevant, upon either of these grounds, and we think, the case was correctly submitted to the jury, upon both grounds.

Judgment affirmed.

SADLER *v.* HENLOCK.

QUEEN'S BENCH. 1855.

[4 *E. & B.* 570.]

The declaration alleged that, before and at the time &c., there was, and thence hitherto &c., a common and public highway, in &c., for all the liege &c. to go, return, "pass and repass, on foot and by and with horses and carriages, at all times of the year, at their free will and pleasure: yet the defendant, well knowing the premises, heretofore, to wit on the 28th day of November in the year 1853, wrongfully and unjustly cut, dug and excavated a deep ditch or trench across the said highway, and partially filled and covered in the same with mud, dirt and other soft and loose materials, and thereby rendered that portion of the said highway, across, over and along the said ditch or trench so cut, dug and excavated as aforesaid, soft, miry, dangerous and unsafe to persons using and frequenting the said highway on horseback and otherwise. By means of which said several premises, afterwards, and while the said road remained and was in the said state and condition last aforesaid, and before the commencement of this suit, to wit on" &c., a horse of plaintiff, of great value &c., "which the plaintiff was then lawfully riding on and along the said highway, was thrown down by stepping in and upon the said portion of the road which was so rendered soft, miry, dangerous and unsafe as aforesaid: and thereby the knees of the said horse were broken, and the said horse was and is otherwise greatly injured and rendered of little or no use or value to the plaintiff, who was thereby also then subjected to and incurred great expense," &c.

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[1] Paragraphs as to procedure and license are omitted. — ED.

Plea: Not guilty. Issue thereon.

There were two other issues of fact not now material.

On the trial, before Platt, B., at the last Yorkshire Assizes, it appeared that the defendant was the occupier of some land adjacent to the highway mentioned in the declaration. The land was drained by a drain which passed from the land down under the highway. The drain having become obstructed, and the water having accumulated on defendant's land, he (in consequence, as it appeared, of having been told by the parish surveyor that the Board of Health would require all drains to be cleansed out) directed a man named Pearson to cleanse out the drain. Pearson was not otherwise in the employment of the defendant; he was a common laborer who had originally made the drain. Pearson executed the work with his own hands, and charged the defendant five shillings for the job, which the defendant paid. The defendant was not shown to have interfered with the work, or to have seen the way in which it was executed, or to have given any specific directions. Pearson, in clearing out the drain, took up the part of the highway under which the drain passed. After completing the work, he replaced the soil of the highway, but imperfectly, and with insufficient materials: and, in consequence, it gave way, as a horse belonging to the plaintiff, and on which plaintiff was riding at the time, was passing over it: and the horse, by falling into the hole thus made, was injured. The action was brought for this injury.

The counsel for the defendant contended that, under these circumstances, Pearson alone was answerable, and that the rule of *respondeat superior* did not apply. The learned Baron overruled the objection, reserving leave to move for a nonsuit or for entering a verdict for the defendant. The plaintiff had a verdict on all the issues.

In last term Hugh Hill obtained a rule calling on the plaintiff to show cause why a verdict should not be entered for defendant, or a nonsuit, on the plea of not guilty, or why a new trial should not be had, "on the ground of misdirection in this: that the Judge who tried the cause directed the jury to the effect that Pearson, who did the work, was the servant of the defendant, and that the defendant was responsible for the negligence of Pearson, although Pearson might have done the work which he was employed to do without being guilty of any negligence; and also that, if it was material to determine whether Pearson was a contractor or servant, that should have been left as a question to the jury."

T. Jones now showed cause.

Hugh Hill, *contra*.

Lord CAMPBELL, C. J. I am of opinion that this rule ought to be discharged. The real question is, what relation subsisted between the defendant and Pearson. Ellis *v.* Sheffield Gas Consumers Company, 2 E. & B. 767, is inapplicable: the act there could not be done at all without committing a public nuisance. Here the drain might have been cleansed without injury to the public or to any individual. The question therefore depends on this: whether Pearson was the defendant's servant. Had Pearson been the domestic servant of the defendant, and the defendant had said to him, "go and clean out the drain," no doubt Pearson, by doing the work negligently, would have made the defendant liable. Then what difference can it make that Pearson was an independent laborer, to be paid by the job? The defendant might have said, "fill up the hole in the road, but not as you are now doing it, lest, when a horse goes over the place, he may be injured." Pearson was therefore the defendant's servant; and, if so, *cadit quæstio.* Our decision is not inconsistent with that in Peachey *v.* Rowland, 13 Com. B. 182, and the other cases which have been cited, in which the relation of master and servant did not exist.

COLERIDGE, J. I am of the same opinion. The defendant was not called on by public authority to do the work; nor was there any reason why, if it could not be done properly, it should be done at all. If the work had been done by his own hand he would have been responsible. So he would if it had been done by his servant or by a common laborer whom he had employed. On what ground? Because the party doing the act would have been employed by him. Instead of this, he employs a person who seems to have been usually employed in such works. Such person is just as much his servant, for this purpose, as a domestic servant. The rule must be discharged.

WIGHTMAN, J. Really the question is whether Pearson is to be considered as the defendant's servant or as a contractor exercising an independent employment. The whole evidence shows that the former is the correct view. Pearson was not a person exercising an independent business, but an ordinary laborer, chosen by the defendant in preference to any other, but not exercising an independent employment. Our decision is in conformity with all the cases cited.

CROMPTON, J. I am of the same opinion. The real question is, whether the defendant and Pearson stood to each other in the relation of master and servant. I decide, not on the ground that Pearson did not employ the hands of another; for, if he was the defendant's servant, the defendant would be liable for the wrong doing of the person whom the servant employed: though it is true that such employment may sometimes be a test as to whether the employer was a servant or an independent contractor. The test here is, whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee. It is only on the ground of a contractor not being a servant that I can understand the authorities.

Rule discharged.

MOIR *v.* HOPKINS.

SUPREME COURT OF ILLINOIS. 1855.

[16 *Ill.* 313.]

THIS cause was heard before Wead, J., and a jury, at April term, 1855, of Henderson Circuit Court. The opinion of the court gives a statement of the case.

Stewart and *Goudy*, for plaintiff in error.

C. M. Harris, for defendant in error.

SKINNER, J. Trespass by Manassah Hopkins against William, James and Robert Moir, for killing Hopkins' horse. The defendants pleaded *not guilty*. Upon the trial, the plaintiff proved by William Hopkins, his brother, that plaintiff had worked for defendants with his team; that while he was at work he was taken sick, and went home, leaving his team with witness; that at night, witness took the team home where plaintiff boarded, and kept his team; that he put the team up and fed it, as directed by plaintiff; that the next day, plaintiff being still sick, witness worked for defendants; that on said day, defendants wanted a team to haul lumber in their mill-yard; that early in the morning, defendant, Robert Moir, directed witness to go and see if he could not hire a team to do the hauling; that witness accordingly endeavored to hire a team among the neighbors, but could not obtain one; that when defendant, Robert Moir, found that witness had been unsuccessful in hiring a team, he directed witness to go and get plaintiff's team; that witness then went and got plaintiff's team out of the stable, without plaintiff's knowledge or consent, and took it to the yard and used it for defendants, hauling lumber during that forenoon; that in the afternoon, defendants wanted some bricks hauled from the country, a distance of eight miles, and that defendant, James Moir, directed witness to go and haul the bricks; that witness started with plaintiff's team, got the bricks, and in returning, drove partly down a steep hill on the road; that as he got part way down, one of the horses was forced over the bank, fell and was killed; that the horse was of the value of $115; that witness was a married man; that the plaintiff was his brother, was an unmarried man, lived with witness, and kept his team at the stable of witness; that for some time previous to the time plaintiff was taken sick, plaintiff had been in the employ of defendants, with his team, hauling lumber for defendants; that plaintiff, on being taken sick, went to witness' house, and was there the next day, when witness took the team; that plaintiff was sick and confined for some time after the horse was killed.

The jury found the defendant, Robert Moir, *guilty*, assessed the plaintiff's damages at $115, and found the other defendants *not guilty.* Motion for new trial overruled, and judgment on the verdict.

The plaintiff in error, Robert Moir, assigns for error, the giving of the first and second instructions asked for by the plaintiff below, and the refusal of a new trial. These instructions are as follows: —

First. If the defendants, or either of them, directed the witness to go and get the plaintiff's horses, and he did go and get them, in pursuance of such directions, without the assent, express or implied, of the plaintiff, the person giving such instruction is a trespasser.

Second. If a person injures personal property belonging to another, of which he has obtained possession by a trespass, he is liable to pay for such injury.

The first instruction construed with reference to the facts before the jury, and in the sense evidently intended by the court, and understood by the jury, is clearly good law. The plaintiff below, Hopkins, had, with his team, been in the employ of the Moirs; had left on account of being sick; was then confined, and his team was idle. The Moirs had sent their agent among their neighbors to *hire* a team, and he had returned unsuccessful. Robert Moir then directed the same agent to "go and get" Hopkins's team. He did so. The instruction is based on the hypothesis of a command by the Moirs to their agent, to go and take Hopkins's team, and the evidence warranted the hypothesis. If, then, Robert Moir directed his agent to go and take Hopkins's team, and the agent did so, there can be no question of his liability for any injury done to Hopkins's property thereby.

The rule of law is, that all who aid, command, advise or countenance the commission of a *tort* by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner as they would be if they had done the same *tort* with their own hands. Judson *v.* Cook, 11 Barbour's R. 642; 1 Chitty's Pl. 208; Story on Agency, Sec. 455.

The general rule is, that the principal is liable for the *torts* of his agent, done in the course of his employment, although the principal did not authorize, or justify, or participate in, or even if he disapproved of them. If the *tort* is committed by the agent in the course of his employment, while pursuing the business of his principal, and is not a wilful departure from such employment and business, the principal is liable, although done without his knowledge. Story on Agency, sec. 452; Fuller *v.* Voght, 13 Ill. 285; Johnson *v.* Barber, 5 Gil. 425, and cases there cited; May *v.* Bliss, *et al.*, 22 Vt. R. 477.

And it would seem, that although Moir intended that his agent should get the owner's consent before taking his team, and the agent misunderstanding the instructions given, took it without the owner's consent, he would still be liable. 22 Vt. R. 478.

The second instruction is certainly the law, and the evidence sufficient to sustain the verdict. *Judgment affirmed.*[1]

PATTEN *v.* REA.

COMMON PLEAS. 1857.

[2 *C. B.* N. S. 606.]

THIS was an action against the defendant for negligence in driving a horse and gig. The declaration stated that, by the wrongful act, neglect, and default of one William Taylor, then being and acting therein as the servant of the defendant, a certain horse and carriage of the defendant were driven upon and against a horse of the plaintiff, which last-mentioned horse was thereby killed.

The defendant pleaded, — first, not guilty, — secondly, that the horse and carriage in the declaration mentioned were not the property of the defendant as alleged, — thirdly, that the horse and carriage in the declaration mentioned were not under the care, management, and direction of the defendant as alleged. Issue thereon.

The cause was tried before CROWDER, J., at the first sitting at Westminster in Hilary Term last. The facts which appeared in evidence were as follows: — The defendant was the proprietor of a repository for the sale of horses, at Newington, in the county of Surrey. Taylor was his manager there, acting as auctioneer in the sale of horses, collection of moneys, and otherwise in the general conduct of the business. He had a horse and gig, his own property, which were kept for him on the premises of the defendant free of charge, and which he was in the habit of using when going out upon the defendant's business. One Smith had bought a horse at the defendant's repository, which he ought to have paid for at the office upon the premises, but had not done so. On the 10th of November, 1856, Taylor was going in the gig to see his medical attendant at Finsbury Place, and also purposed to call upon Smith for payment of the debt he owed the defendant for the horse; and, whilst on his way to the former place, and before he got to Smith's, he negligently ran against and killed a horse belonging to the plaintiff.

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[1] See Wilson *v.* Noonan, 27 Wis. 598 (1871); Maier *v.* Randolph, 33 Kan. 340 (1885). — ED.

It appeared, that, whilst Taylor was getting ready the horse and gig for the purpose of going on the journey in question, the defendant asked him where he was going, when Taylor told him he was going to get Smith's money.

On the part of the plaintiff it was insisted, that, although the horse and gig were the property of Taylor, yet, as at the time of the accident he was using it in the defendant's business, and with his knowledge, the defendant was liable. The contrary was contended on the part of the defendant.

In answer to questions put to them by the learned judge, the jury found, that, on the occasion in question, there was no verbal request by the defendant to Taylor to go with the horse and gig upon the defendant's business; but that Taylor went on the journey upon the business of the defendant, and that the defendant knew it and assented to it.

Upon this finding, the defendant's counsel claimed to have the verdict entered for him upon the second and third issues.

The learned judge, however, ruled that the plaintiff was entitled to the verdict upon all the issues, and the jury assessed the damages at £31.

Atherton, in Hilary Term last, obtained a rule nisi for a new trial, on the ground of misdirection on the part of the learned judge, — first, in not leaving to the jury the question whether the horse and gig driven by William Taylor were used by him on his master's business, at the instance and *express* request of the defendant, — secondly, in not directing the verdict to be entered for the defendant, on the fact being found, and not disputed, that the horse and gig were the property of William Taylor, not by him made over or bailed to the defendant; or on the ground that the verdict was against the weight of evidence, if it was to be taken that the jury in fact found that the horse and gig driven by Taylor were used by him on his master's business at the instance and *express* request of the defendant.

Montagu Chambers, Q. C., and *Joyce*, now showed cause. — The evidence shows beyond dispute that Taylor was at the time the collision took place acting in the service and about the business of the defendant; and the fact of the horse and gig belonging to Taylor can make no difference; the defendant would have been equally liable if they had been the property of a stranger. Taylor had the general management of the defendant's business. A horse had been sold to one Smith, and Taylor was going to him for the purpose of obtaining payment for it. He was also, it is true, going elsewhere, for a purpose of his own: but he met with the accident before he reached Smith's. [WILLIAMS, J. — Was it essential to the master's business that the journey should be made with the horse and gig?] Probably not; but Taylor was in the habit of going about his master's business with the horse and gig. [COCKBURN, C. J. — Suppose the master had said to him, "Go to such a place," without more, would he be liable?] That would depend upon the surrounding circumstances. Here, the evidence was, that Taylor's horse and gig were kept for him free of cost upon the defendant's premises, that he was in the habit of using them when going upon the defendant's business, and that, on the occasion in question, the defendant knew where he was going, and the manner of going. He therefore tacitly assented to his going in that manner. The case of Goodman *v.* Kennell, 1 M. & P. 241, is very much in point. There, a person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left to the jury to say whether or not the horse was taken by the servant with the *implied* consent or authority of the defendant; and, they having found a verdict for the plaintiff, the court refused to interfere. Best, C. J., said: "It has been truly said that a servant's riding the horse of another, without the assent or authority of his master, cannot render the latter answerable for his acts. But here the question was, whether there was not sufficient evidence to show that Cocking was riding the horse with the defendant's assent, and on his business. It was proved that Cocking was the servant of the defendant; that the horse was in his stable; and that on the day the accident happened, Cocking was going on the defendant's business or employment. The proof of these three facts was sufficient to raise a strong presumption that Cocking was using the horse with the defendant's consent." Here, the proper question was left to the jury, — did Taylor go in the gig at the request of the defendant, or with his assent? The jury found that it was done with the defendant's knowledge and assent. [CROWDER, J. — The contention was, that, in order to render the defendant liable, there must be something tantamount to a command by the master. The rule is not quite correct in the use of the word *express*.] It might almost be said here that there *was* an express command. [The court called on

Atherton, Q. C., and *Barnard*, to support the rule. — This is an action against the defendant, not for an act or omission imputed to him personally, but for an act done by his servant. That Taylor was at the time of the accident acting in the service of the defendant, and about his business, is admitted. That, however, is not enough to impose upon him this liability. The rule of law is well exemplified by the language of the declaration itself: to render the defendant liable, Taylor must in the very act of driving have been acting as his servant, and not upon his own account. A man may be the servant of another at the time of doing the act which causes the injury, without that other being responsible for the mode of doing the act. The question is, not whether the servant was engaged on his master's business, but whether he was going in the particular manner, — with the horse and chaise, — as his servant. The mere fact of the master seeing him about to start in the chaise, and making no objection, is not enough. [COCKBURN, C. J. — That is only one circumstance. The facts seem to be these: — Taylor is employed in the general management of the defendant's business. He possesses a horse and gig; and it is mutually agreed, that, in consideration of the use of the horse and gig by Taylor for the purpose of the defendant's business, they shall be kept upon the defendant's premises without charge. Upon the occasion in question, Taylor was going out upon his master's business; the master saw him start upon the journey, and thereby assented to that mode of performing the service. The knowledge of the master was only one circumstance, in addition to the other and more material ones. I think it was a question for the jury, and that there was abundant evidence for them.] There was no evidence of any agreement or arrangement to the effect just stated. There was no bargain that the use of the horse and gig for the purpose of the defendant's business should be an equivalent for the horse's keep. [COCKBURN, C. J. — It was a tacit arrangement. That seems to have been assumed on all hands.] Suppose a master desires his servant to go to a certain place, and the servant of his own accord borrows a friend's horse for the purpose of riding there, and his master meets him by accident on the way, and says nothing, — could it be contended, that, in riding that horse, the man was acting in the service of his master, so as to make him responsible for any misadventure of the servant on the road? [CROWDER, J. — You must not lose sight of the other facts. Taylor was manager at the defendant's establishment; and his horse and gig were kept there without charge, and were used by him from time to time upon his master's business.] There was no evidence of any contract which made it his duty to use the horse and chaise in his master's service. It clearly was a misdirection not to leave it to the jury to say whether the horse and gig were used by Taylor on his master's business, at the instance and request, express or implied, of the defendant. [COCKBURN, C. J. — I think the master would have been liable if Taylor had taken the horse and chaise without his knowledge. I think there was abundant evidence for the jury, independently of that fact.] To justify the verdict, it should have been found as a fact that there was some obligation, some binding contract, on the part of Taylor to find a horse and gig for the service of his master.

COCKBURN, C. J. I am clearly of opinion that this rule must be discharged. I concur in the argument urged by the defendant's counsel, to this extent, that, to render the master liable, it is not enough to show that the person driving the vehicle which causes the damage is his servant, but that it must be shown that the servant was driving with his master's authority and upon his business. Now, I think there was abundant evidence here that Taylor was driving, at the time the accident occurred, with the defendant's authority and in the course of business as his servant. Taylor, it appears, was the general manager of the defendant's establishment; and, being so, he, either by express agreement or by some tacit arrangement, was in the habit of using in transacting the defendant's business a horse and gig, his own property, which, in consideration of that arrangement, were kept for him upon the defendant's premises free of charge. Looking at these circumstances, and considering the nature of the business, I think Taylor must be assumed to have had authority to exercise his discretion as to the mode of performing his duty to his master. Adding to this the fact that the master knew that his servant was using the horse and gig on the particular occasion, I think the evidence was ample to show that what was done had the sanction and authority of the master. That question was not at all withdrawn from the jury. The contention on the part of the defendant at the trial was, that he was not responsible for the damage, because the horse and gig were the property of Taylor, and because there was no evidence of any *express* command from the defendant to Taylor to use the horse and gig upon the occasion in question. I think the former part of the argument is met by the fact that the horse and gig were kept by the defendant free of charge to Taylor, and were ordinarily used by him in the performance of journeys about his master's business, and the latter by the fact that the master was cognizant of the course which his servant was pursuing at the time, and did not dissent. I think the case was properly presented to the jury, and that there is no ground for saying that the verdict was not well warranted by the evidence.

Williams, J. I am entirely of the same opinion. I agree with Mr. *Atherton*, that, in cases of this sort, the real question is, whether the servant while doing the negligent act complained of was acting as the agent of the defendant. That is demonstrated by the consideration that the plaintiff in declaring in such an action has the option of alleging the negligent act to be the act of the servant, or of relying upon the legal effect, and alleging it to be the act of the master. Thus, in Brucker *v.* Fromont, 6 T. R. 659, it was held that a declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse, is supported by evidence that *the defendant's servant* drove the cart. I think there was ample evidence here that Taylor, at the time of the accident, was acting as the servant and by the authority of the defendant. It was incumbent on the plaintiff, no doubt, to show that Taylor acted as the defendant's agent in the employment of the horse and gig upon the particular occasion. I think there was evidence enough of that for the jury, and that that question was properly left to them. The rule does not complain that it was not so left: the complaint is, that my Brother Crowder misdirected the jury in not leaving to them the question whether the horse and gig driven by Taylor were used by him on his master's business, *at the instance and express request of the defendant.* Now, it clearly is not necessary in cases of this sort that there should be any *express* request: the jury may imply a request or assent from the general nature of the servant's duty and employment. There was ample evidence of such implied request or assent here. The only other complaint made of the direction was not relied on by Mr. *Atherton* in his argument in support of the rule: nor could it have been with any hope of success. Upon neither ground, therefore, can this rule be sustained.

WILLES, J. I am clearly of the same opinion. The argument urged on the part of the defendant amounts in substance to a denial of the general rule laid down by Lord Holt in Turberville *v.* Stampe, 1 Lord Raym. 266, that "a master is responsible for all acts done by his servant in the course of his employment, though without particular directions." Was Taylor at the time the accident complained of happened acting in the course of his employment? It appears that part of the terms of his employment was that he should have the benefit of the keep of his horse and the standing of his gig upon his master's premises, in consideration of his using them when going about his master's business; and that he was actually engaged on his master's business, viz. going to collect a debt due to him, at the time. And it further appears that his master knew that he was going, and in what manner he was going. The master is clearly reponsible.

CROWDER, J., said nothing. *Rule discharged.*

WEED AND ANOTHER *v.* THE PANAMA RAILROAD COMPANY.

COURT OF APPEALS OF NEW YORK. 1858.

[17 *N. Y.* 362.]

APPEAL from the Superior Court of New York City. The action was brought by husband and wife to recover damages for breach of duty by the defendant as a carrier of passengers, whereby the wife was injured in her health. On the trial before Mr. Justice OAKLEY and a jury, it was proved that in August, 1854, the plaintiffs were passengers on a train of cars of the defendant from Obispo to Aspinwall, about thirty miles distant. The train proceeded about seven miles on the route, to a place called the Barbacoas Switch, where it was detained during a night, and did not reach Aspinwall until the afternoon of the day following. There were about four hundred passengers on the train, who remained in the cars during the night, from inability to procure other accommodations. The weather was stormy, and the wife was taken sick in the night and experienced great suffering. Much evidence was given tending to prove that in consequence of the detention her health was greatly and permanently injured.

In summing up, the plaintiffs' counsel insisted that the evidence established that the conductor designedly left the train at the Barbacoas Switch, having that intention when he left Obispo, and that for this reason exemplary damages might be given. He claimed damages on the ground of wilful misconduct and negligence. The counsel for the defendant asked the court to charge the jury that if the conductor acted wilfully in the detaining of the train the defendant was not liable for that, as there was no evidence that defendant authorized or approved such misconduct. The justice refused so to charge, and to such refusal the defendant's counsel excepted. The justice then directed the jury, among other things, that although they should find that the conductor acted wilfully in the detention of the train, the defendant would not for that reason be entitled to a verdict; to which the defendant's counsel excepted. The justice, after delivering his charge, directed the jury to answer the following questions, which were submitted to them in writing: First. Was the detention at the Barbacoas Station, by the conductor of the defendant, a wilful act of the conductor? Second. In detaining the train as he did there, did the conductor act negligently or without reasonable care and judgment? The counsel for the defendant excepted to the submission of the first question to the jury. The jury answered each of these questions in the affirmative, and rendered a verdict for the plaintiffs, assessing damages at $2,000. Judgment was suspended and a case made which, in pursuance of a direction at the close of the trial, was argued at a general term, where judgment was rendered for the plaintiffs on the verdict. The defendant appealed to this court.

James T. Brady, for the appellant.

A. J. Willard, for the respondents.

STRONG, J. The principal question in this case is, whether the defendants are liable for the detention of the train producing damages to the wife, although the detention was the wilful act of the conductor, neither authorized nor approved by the defendants. The obligation of the defendants from receiving the wife on their train of cars to be carried to Aspinwall and proceeding with the train part of the distance, to carry her to that place with all reasonable diligence, is not disputed by them and admits of no doubt. (Story on Bailment, § 545; Wibert *v.* New York & Erie Railroad Co., 2 Kern. 253.) Nor is it claimed by them that detention and delay on the route, from the mere negligence of the conductor or other servants of the defendants connected with the management of the train, occasioning damage to the wife, would not be a breach of the obligation for which the defendants would be responsible; but they insist that their obligation is not broken and that they are not liable for the wilful act of the conductor followed by such a result; and they invoke in support of their position the rule, well sustained by principle and authority, that a master is not liable for a wilful trespass of his servant.

It is important, therefore, to inquire whether that rule extends to a case like the present, and for that purpose, to consider the basis on which it is founded. The reason of the rule clearly appears by the cases in which it has been declared and applied.[1] . . . All the cases on the subject, so far as I have observed, agree in regard to the principle of the rule, and also in limiting the rule to that principle. For acts of an agent within his authority, the principal is liable, but not for wilful acts without his authority. (Phil. & Read. R. R. Co. *v.* Derby, 14 How. U. S. R. 468.)

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[1] Here were stated M'Manus *v.* Crickett, *ante*, p. 102; Wright *v.* Wilcox, *ante*, p. 118; Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill, 480; s. c. 4 N. Y. 479. Reference was also made to Hibbard *v.* New York & Erie Ry. Co., 15 N. Y. 455, 467, 468; and Story on Agency, §§ 456–462. — ED.

In the light of this examination of the class of cases which has been considered, it cannot fail to be seen that there is an important difference between those cases and the one before the court. The former are cases of wilful, unauthorized, wrongful acts by agents, unapproved by their principals occasioning damage, but which do not involve nor work any omission or violation of duty by their principals to the persons injured; wrongs by the agents only, with which the principals are not legally connected. In the present case, by means of the wrongful, wilful detention by the conductor, the obligation assumed by the defendants to carry the wife with proper speed to her destination, unless this wilful wrong of the conductor was an excuse to them, was broken. The real wrong to the wife in this case, and from which the damage proceeded, was the not carrying her in a reasonable time to Aspinwall, as the defendants had undertaken to do; and this was a wrong of the defendants, the carriers, unless the law excused them for their delay on account of the misconduct of their agent. It is for this alleged wrong of the defendants in not performing their duty as carriers with reasonable diligence, from which injury has been experienced, that this action was brought; and the only question in relation to the point under consideration would seem to be, whether they can defend themselves by showing that the delay on the route was the wilful wrong of one of their servants. The jury have found, as necessarily included in their general verdict for the plaintiffs, that the defendants did not use due diligence; but they have also found, in answer to a special inquiry, that the detention to which it was owing was a wilful act of the conductor. Upon these findings, connected with the exceptions to the refusal of the judge to charge that if the conductor acted wilfully in detaining the train the defendants were not liable and charging the contrary, the question must be whether the fact that the detention was a wilful wrong of the conductor at all varies the law of the case.

Viewing the general question, as it appears to be clear we must, as being whether the defendants have discharged their duty as carriers, and the particular point of inquiry, whether the circumstance that the detention was a wilful act of their servant will excuse what will otherwise be a want of proper diligence, this part of the case is relieved from difficulty. If the detention had resulted from negligence of the conductor, the liability of the defendants would be unquestionable. A master is answerable for negligence of his servants in the performance of their duties. (2 Kent. Com. 601, 602.) Story, in his Treatise on Agency (§ 452), says: "It is a general doctrine that a principal is liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligence, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in or indeed know of such misconduct, or even if he forbade the acts or disapproved of them," &c. "In every such case, the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency." (Story on Bailm., §§ 400–406; Stokes *v.* Saltonstall, 13 Pet. U. S. R. 181.) No reasons exist for holding a master liable for injuries from negligence of his servants in his employment, which do not equally and with like force preclude him from alleging an intentional default of a servant as an excuse for delay in the performance of a duty the master has undertaken. In the former case, the negligence of the servant is that of the master, and that is the ground of the master's liability; in the latter, the act of the servant is the act of the master, constituting negligence of the master: the motive of the servant making no difference in regard to the legal character of the master's default in doing his duty. The obligation to be performed was that of the master, and delay in performance, from intentional violation of duty by an agent, is the negligence of the master.

In the present case, the defendants, as carriers, were bound to carry the wife the entire journey with reasonable despatch, but the conductor stopped the train on the route unreasonably, in known disregard of his duty; the defendants did not send it forward as it was their duty to do, providing another conductor if that was necessary, and that was negligence of the defendants. It must be assumed, in the absence of any finding or even proof to the contrary, that it was practicable for the defendants to forward the train without injurious delay.

I am satisfied, for the reasons stated, that the rule of law relied on by the defendants to sustain their position, which has now been considered, is inapplicable to the case.

It is made a point by the defendants that judgment could not properly be rendered against them, for the reason that the findings of the jury that the detention was a wilful act of the conductor, and also that in detaining the train he acted negligently or without reasonable care and judgment, are inconsistent with each other; but in the view I have taken of the case, whether the act was wilful or negligent makes no difference as to the liability of the defendants; in either aspect the judgment was right.

HARRIS, J., did not sit in the case: all the other judges concurring.

Judgment affirmed.[1]

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[1] In Craker *v.* Chicago & Northwestern Railway Co., 36 Wis. 657, 668–669 (1875), RYAN, C. J., said: "We cannot help thinking that there has been some useless subtlety in the books in the application of the rule *respondeat superior*, and some unnecessary confusion in the liability of principles for wilful and malicious acts of agents. This has probably arisen from too broad an application of the *dictum* of Lord Holt, that 'no master is chargeable with the acts of his servant but when he acts in the execution of the authority given to him, and the act of the servant is the act of the master.' Middleton *v* Fowler, 1 Salk. 282. For this would seem to go to excuse the master for the negligence as well as for the malice of his servant. One employing another in

SEYMOUR *v.* GREENWOOD.

EXCHEQUER. 1861.

[6 *H. & N.* 359.]

DECLARATION. That the plaintiff was a passenger for reward in and upon a certain carriage of the defendant, used for the conveyance of passengers in a certain public street in the city of Manchester, to wit, Chester Road, and being and while he was such passenger, the defendant and his servants so negligently and improperly conducted themselves in and about the driving, managing and conducting of the said carriage, that the plaintiff was thereby cast from the said carriage to the ground with great violence, and his skull was fractured and his legs crushed and bruised, and he suffered great personal injuries, &c.

Pleas. First: Not guilty. Secondly, that the plaintiff was not a passenger.

At the trial, before BLACKBURN, J., at the last Liverpool Spring Assizes, it appeared that the action was brought against the defendant, the proprietor of an omnibus, by the plaintiff, who had been forcibly removed from the omnibus by the guard in charge of it, whereby the plaintiff's skull was fractured. The plaintiff's witnesses proved that the plaintiff pulled the wire and the bell rung. The guard then went

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good faith to do his lawful work, would be as little likely to authorize negligence as malice; and either would then be equally *dehors* the employment. Strictly, the act of the servant would not, in either case, be the act of the master. It is true that so great an authority as Lord Kenyon denies this in the leading case of McManus *v.* Crickett, 1 East, 106, which has been so extensively followed; and again, in Ellis *v.* Turner, 8 Term, 531, distinguishes between the negligence and the wilfulness of the one act of the agent, holding the principal for the negligence but not for the wilfulness. It is a singular comment on these subtleties, that McManus *v.* Crickett appears to rest on Middleton *v.* Fowler, the only adjudged case cited to support it; and that Middleton *v.* Fowler was not a case of malice, but of negligence, Lord Holt holding the master in that case not liable for the negligence of his servant, in such circumstances as no court could now doubt the master's liability. In spite of all the learned subtleties of so many cases, the true distinction ought to rest, it appears to us, on the condition whether or not the act of the servant be in the course of his employment, as is virtually recognized in Ellis *v.* Turner.

"But we need not pursue the subject. For, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it." — ED.

into the omnibus and seized the plaintiff by the collar. The plaintiff offering no resistance, the guard backed himself out of the omnibus, drawing the plaintiff after him, and threw the plaintiff upon the road. The plaintiff fell to the ground, and a cab, coming up, went over him. The guard did not fall. This was in August, 1859. In December the plaintiff's attorney wrote to the defendant as follows: —

"Sir, — I have been requested by Mr. Seymour to write to you in reference to the serious injuries he sustained at the hands of your servants on the 22nd of August last.

"I may state that he was a passenger on that day in your omnibus, &c. He signalled the guard to stop and let him alight. By the negligence and improper conduct of the guard, Mr. Seymour was cast with great violence upon the roadway. One of your Hansom cabs, which was following the omnibus, immediately came into contact with Mr. Seymour's head. I shall be glad to receive any communication from you upon the subject, &c.

"I am, sir,

"MR. JOHN GREENWOOD. R. W. STEAD."

In consequence of that letter a person named Baxter called on the plaintiff's attorney. He said that Mr. Seymour was mistaken in signalling the guard to stop; that he was drunk, and had refused to pay his fare; that he had created a disturbance in the omnibus lower down the road; that he had first assaulted the guard, and that there had been a scuffle, and that in the scuffle they had both rolled out into the road.

On cross-examination, the plaintiff said his memory was much affected by the accident, but he believed he was not drunk at the time, but he admitted that he had been drinking.

At the conclusion of the plaintiff's case, the defendant's counsel submitted that there was no evidence to charge the defendant with the assault committed by his servant, which was not any negligence in the performance of his duty, but an unwarrantable assault; and a verdict was entered for the plaintiff with leave to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no evidence on which the jury might reasonably find that the act of the servant was one for which the defendant was answerable.

T. Jones, having obtained a rule "to show cause why the verdict found for the plaintiff on the trial of this cause, &c., should not be set aside, and a nonsuit entered on the ground agreed upon, that there was no evidence to go to the jury."

Monk and *Wheeler* now showed cause. The question is, whether at the time when the act complained of was committed, the guard was acting as the servant of the defendant. In Rex *v.* Gutch, M. & M. 433, Lord Tenterden ruled that the proprietor of a newspaper, who intrusts the conduct of the publication to one whom he selects, is criminally answerable for a libel published in such newspaper, though it is not shown that he was individually concerned in the particular publication. One of the tests whether the maxim "respondeat superior" applies is, whether the party was enabled to do the wrongful act by reason of his employment. Here there was evidence that the plaintiff was drunk, and it may well have been the duty of the guard to remove him in a careful manner. The removal of the plaintiff from the omnibus was then an act done by the guard with the defendant's authority, and, in the ordinary course of the employment intrusted to him; and it was, therefore, an act for which the defendant is responsible: Patten *v.* Rea, 2 C. B. N. S. 606. The defendant does not suggest that the act of the guard was malicious. [POLLOCK, C. B. In removing the plaintiff from the omnibus, the guard seems to have acted so carelessly as to injure the plaintiff. MARTIN, B. The only question is whether there was evidence for the jury.]

T. Jones, in support of the rule. It may be conceded that the question is whether there was any evidence for the jury. It is submitted that the guard was a trespasser, and that the defendant is not liable for his act. A master is not liable for the trespass of his servant. [MARTIN, B. If a servant drives his master's carriage against another, the servant is liable in trespass, the master in case.] Was the act one which the relation between the guard and the defendant warranted him in doing? A master is not liable except for acts of omission on the part of the servant — not for acts of commission. Here what is complained of is a trespass — an act committed — not an act of omission, such as negligence in driving or managing the omnibus. By the concurrent testimony of all the witnesses, without provocation the guard dragged the plaintiff out of the omnibus, and threw him on the ground. [CHANNELL, B. Suppose the plaintiff, being a passenger, had grossly misconducted himself, the guard would have been justified in removing him without unnecessary violence. Therefore, if the representation of Baxter is well founded, it may show that the guard had the authority of the defendant to remove the plaintiff, and, in so doing, was engaged in the business of his master: Mitchell *v.* Crassweller, 13 C. B. 237.] M'Manus *v.* Crickett, 1 East, 106, shows that a master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master. [POLLOCK, C. B. Suppose a servant driving along a road in order to avoid supposed danger intentionally drove against the carriage of another, would not the master be responsible?] Not if the servant transgressed the line of his duty. In M'Manus *v.* Crickett, Lord Kenyon cites Bro. Ab., tit. "Trespass," pl. 435, where it is said: "If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished." And 2 Roll. Ab., 553, "If my servant, without my notice, put my beasts into another's land, my servant is the trespasser, and not I." In Savignac *v.* Roome, 6 T. R. 125, it was held that an action on the case, stating that the defendant's servant wilfully drove against the plaintiff's carriage, whereby it was damaged, could not be supported, and the court arrested the judgment on that ground. In Roe *v.* The Birkenhead, Lancashire and Cheshire Junction Railway Company, 7 Exch. 36, a railway servant, who had charge of a train, on receiving the plaintiff's ticket, told him he had come by the wrong train, and that he must pay 2*s.* 6*d.* more. This the plaintiff refused to pay, and he was thereupon taken into custody by a railway servant, under the direction of the superintendent. The court held that the plaintiff was bound to show that the person by whom he was arrested was not only the servant of the Company, but also that he had their authority to arrest him. [MARTIN, B. That case goes farther than any other on this subject. CHANNELL, B. Would it not have been negligence if the guard took the plaintiff out of the omnibus and left him in the middle of a street in a crowded thoroughfare, when he was too drunk to walk?] If a servant is guilty of anything which is not mere want of skill or want of care, the master is not responsible: Sharrod *v.* The London and North Western Railway Company, 4 Exch. 580; Gregory *v.* Piper, 9 B. & C. 591; Timothy *v.* Simpson, 6 C. & P. 499.

POLLOCK, C. B. We are all of opinion that the rule to enter a nonsuit must be discharged. I agree with my brother Martin that since the case of Roe *v.* The Birkenhead, Lancashire and Cheshire Railway Company the courts have been desirous to give full effect to the rule by which a master is made responsible for want of care on the part of his servants in executing his commands. As a judge, in determining what is evidence, and as a juryman in giving effect to it, I should have decided that the defendant's servant was ejecting a troublesome passenger from the omnibus — not with violence and brutality, for I do not believe that he intended to do more than put the plaintiff safely out of the omnibus, and that his act in so doing produced the mischief which occurred. I think then that there was evidence that the defendant's servant was executing his master's command, but with a want of care and consideration. I adopt the definition under which Mr. Jones admits that his client would be liable. The law on this subject has undergone much discussion of late years. At the time of the decisions of Scott *v.* Shepherd, 2 W. Black. 892, and M'Manus *v.* Crickett, the subject had not been so thoroughly considered as it has since been. For these reasons, I think that the rule must be discharged, and my brother Channell, who has left the court, is of the same opinion.

MARTIN, B. The question is, whether there was evidence from which a jury might find that the act was one for which the defendant was responsible. There was evidence that the plaintiff was drunk, and had refused to pay his fare; he had assaulted the guard, and a scuffle took place, in which the plaintiff was thrown to the ground and injured. If the guard used unnecessary violence, the defendant, his master, is responsible. There are many cases, of which Roe *v.* The Birkenhead, Lancashire, and Cheshire Railway Company is one, in which the liability of the master is put as resting upon the relation of principal and agent; but in reality it depends upon the relation of master and servant. If the act is one within the scope of the servant's employment, and is done in the master's service, an action lies against the master, and the master is liable, even though he has directed the servant to do nothing wrong. In the present case the act was one which was properly within the scope of the servant's employment. M'Manus *v.* Crickett is ordinarily cited as showing that the master is not liable for the malicious act of his servant. Of course we do not say that a master is responsible for everything which a servant does in the course of his employment. A great deal has been said as to the act being one which was purely a trespass; but it was nothing more than the guard of an omnibus putting a person out who had misconducted himself. The case of Roe *v.* The Birkenhead, Lancashire and Cheshire Railway Company was much considered in this court in the cases of Wilson *v.* The Lancashire and Yorkshire Railway Company, and Farren *v.* The Lancashire and Yorkshire Railway Company.[1] *Rule discharged.*[2]

LIMPUS *v.* LONDON GENERAL OMNIBUS COMPANY.

EXCHEQUER CHAMBER. 1862.

[1 *H. & C.* 526.]

ERROR on a bill of exceptions. The declaration stated that before and at the time of the committing of the grievances, &c., the plaintiff was lawfully possessed of an omnibus and harness, and of horses drawing the same, which were in a certain public highway. And the defendants were then possessed of another omnibus, and of horses drawing the same, which were then under the care, government and direction of a servant of the defendants, who was then driving the same in and along the same highway. Nevertheless, the defendants, by their said servant, so carelessly, negligently, and improperly drove, governed, and directed their said omnibus and horses, that by and through the mere carelessness, negligence, and improper conduct of the defendant by their said servant in that behalf, the said horses and omnibus of the defendants ran against and came in collision with the horses and omnibus and harness of the plaintiff, and overturned and broke to pieces and damaged the said omnibus and harness of the plaintiff, and bruised, wounded, and injured one of the horses of the plaintiff. By means whereof the plaintiff was put to and necessarily incurred expense in and about endeavoring to cure his said horse and repairing the damage done to his said harness and omnibus, &c.

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[1] Not reported. A short note of these cases may be seen in 27 Law Times, 204. — REP.

[2] *Acc.:* Higgins *v.* Watervliet Turnpike Co., 46 N. Y. 23 (1871); Bayley *v.* M., S. & L. Ry. Co., L. R. 8 C. P. 148 (Ex. Ch., 1873); Hoffman *v.* N. Y. C. & H. R. Railroad Co., 87 N. Y. 25 (1881). Seymour *v.* Greenwood was affirmed in the Exchequer Chamber, 7 H. & N. 355 (1861). — ED.

Plea. — Not guilty. Issue thereon.

The cause was tried before MARTIN, B., at the Middlesex Sittings after Michaelmas term, 1861. The bill of exceptions set out the Judge's note of the evidence, which was (in substance) as follows: —

The driver of the plaintiff's omnibus stated that on the 27th August he left the bank for Hounslow. After he had passed Sloane Street and was going towards Kensington, he stopped, about the barracks at Knightsbridge, to take up two passengers. The defendants' omnibus then passed him, and got ahead, eight to a hundred yards. In passing, the driver eased his pace, and witness went on at his regular pace and overtook him. There was room in the road for five or six omnibuses. When witness got up to the defendants' omnibus, it was on the off side of the road rather than the near; but there was plenty of room to pass. As witness was going to pass, the driver of the defendants' omnibus pulled across the road, and one of the hind wheels touched the shoulder of witness's near horse. Witness called out and tried to pull up, but could not. There was a bank there, and the defendants' driver forced the witness's off horse on to the bank. The wheels of plaintiff's omnibus went on the bank and threw the omnibus over. On cross examination the witness stated that the defendants' driver pulled his horses towards the witness's horses to prevent him passing.

Another witness stated that the defendants' driver drove across the road purposely to prevent the progress of the plaintiff's omnibus, and that he considered it a reckless piece of driving.

On behalf of the defendants, the driver of their omnibus stated that he passed the plaintiff's omnibus, when the driver pulled up on his near side to take up the two passengers. Afterwards the plaintiff's driver put his horses into a gallop to overtake the defendants' omnibus. The witness proceeded to say: "I pulled across him to keep him from passing me, to serve him as he had served me. His omnibus ran upon the bank and turned over on its side. I pulled across on purpose."

The witness stated that he was furnished with the following card:

"London General Omnibus Company (Limited).

"Attention is particularly directed to the following regulation of the Company, and the drivers are desired to act in accordance therewith.

"During the journey he must drive his horses at a steady pace, endeavoring as nearly as possible to work in conformity with the time list. He must not on any account race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof in his business, whether such omnibus be one belonging to the Company or otherwise.

"By Order. — A. G. Church, Secretary,
"31 Moorgate St."

Another witness, who was a passenger on the defendants' omnibus stated that at Knightsbridge there was a contention between the conductors of the two omnibuses which should have three ladies, who got into the plaintiff's omnibus. The defendants' driver wished to go on; the plaintiff's drove him across the road, so that he could not go on.

The defendants' driver said: "I will serve you out when I get on the road." The plaintiff's omnibus went on first, and stopped at the barracks to take up two passengers, when the defendants' omnibus passed it. When near Gore Lane, the defendants' driver maliciously and spitefully drove his horses suddenly to the footpath, not allowing the after omnibus any space at all.

MARTIN, B., directed the jury "that, when the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service; and that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant: that if the act of the defendants' driver, in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers and so to interfere with the trade and business of the other omnibus, the defendants were responsible: that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment; and the instructions given to the defendants' driver, and read in evidence to the jury, were immaterial if the defendants' driver did not pursue them; but that if the true character of the act of the defendants' servant was, that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible."

The defendants' counsel excepted to the said ruling, for that the said Baron misdirected the jury in telling and directing them as aforesaid; and, further, that, the learned Baron ought to have told the jury that, if they believed that the defendants' driver wilfully drove across the road as aforesaid, even for the purpose of merely obstructing the plaintiff's omnibus, the defendants were not responsible, and he ought to have told and directed the jury that for an act wilfully done by the servant of the defendants against the orders of his employers contained in the said paper or card, even though at the time of doing it he was in the course of driving for his employers, the defendants were not responsible: that the learned Baron ought to have told the jury that there was no evidence to justify them in finding that the driver of the defendants' omnibus, in doing the act complained of, was acting in the course of his employment; and he ought to have told them that there was no evidence to warrant them in finding for the plaintiff, and ought to have directed them to find their verdict for the defendants. The jury gave a verdict for the plaintiff, with £35 damages.

Mellish (*Matthews* with him) now argued[1] for the plaintiffs in error (the defendants below). The direction of the learned Judge was erroneous. There was evidence that the defendants' driver wilfully and recklessly drove across the plaintiff's omnibus for the purpose of impeding its progress. It is not contended that the fact of the servant having committed a wilful trespass necessarily, of itself, absolves the master from responsibility, but it is submitted that a master is not liable for a wilful trespass committed by his servant, unless it was done in obedience to the master's orders, or was within the scope of the servant's employment. Here the defendants' servant was employed to drive his omnibus, and if the wrongful act had been done in the course of that employment the defendants would be liable; but they are not if the act was done by the servant for some purpose of his own. The learned Judge made it an essential part of his direction, whether the defendants' driver was doing that which he believed to be for the interest of his employer; whereas the real question was whether the driver thought the act necessary for carrying out his masters' orders. The true rule is laid down in Croft *v.* Alison, 4 B. & Ald. 590: "If a servant driving a carriage, in order to effect some purpose of his own wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." [WILLIAMS, J. If a driver in a moment of passion vindictively strikes a horse with a whip, that would not be an act done in the course of his employment; but in this case the servant was pursuing the purpose for which he was employed, viz., to drive the defendants' omnibus. Suppose a master told his coachman not to drive when he was drunk, but he nevertheless did so, would not the master be responsible?] Here the defendants' driver recklessly and purposely obstructed the plaintiff's omnibus. That was not an act within the scope of his employment, and was contrary to the orders given to him by his master. If the action had been against the servant, it must have been in trespass, not case. [BLACKBURN, J. If the defendants' driver did the act to effect some purpose of his own, the case would fall within the latter part of the direction.] The doctrine laid down in Croft *v.* Alison was recognized and adopted in Seymour *v.* Greenwood, 7 H. & N. 355. [CROMPTON, J. Was not the driver carrying out his masters' purposes in attempting to get before the other omnibus and pick up passengers?] He states that he drove across the plaintiff's omnibus to prevent it from passing him, and to serve the plaintiff's driver as the plaintiff's driver had served him. [WIGHTMAN, J. Would the master have been responsible if the servant had thought it for his master's interest to drive against the other omnibus and overturn it?] Lyons *v.* Martin, 8 A. & E. 512, decided that a master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service; but not so if the act is in itself unlawful, and is not proved to have been authorized by the master. Here the servant wilfully did an act which he knew he had no right to do, and which he was instructed by his master not to do; and it can make no difference that he believed it to be for the benefit of his master, since it was not within the scope of his employment.

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[1] Before WIGHTMAN, J., WILLIAMS, J., CROMPTON, J., WILLES, J., BYLES, J., and BLACKBURN, J. — REP.

Lush, for the defendant in error (the plaintiff below). The direction was right. The true test is whether the servant, in doing the particular act, ceased to be the agent of his master, and did it solely for his own purposes. If the defendants' driver had wilfully driven against the other omnibus and overturned it, the jury could not have found that he did it in the course of his employment or for the benefit, or supposed benefit, of his master. The object of the defendants was to get as much traffic as they could on the road, and their driver, in doing the wrongful act, was attempting to carry out that object. [CROMPTON, J. It was merely an act of wrongful driving.] Suppose the defendants had told their driver not to drive faster than seven miles an hour, but he did so, would not the defendants be liable for damage resulting from it? The defendants' driver drove across the other omnibus, not for any purpose of his own, but believing that it was for the interest of his masters to prevent that omnibus from passing him. [WILLIAMS, J. Suppose the driver of an omnibus saw a passenger waiting at a distance, and, in order to reach him before another omnibus, drove at full speed and thereby ran over a person, would not the master be liable?] The fair meaning of the direction is that, if the defendants' servant did the wrongful act in order to effect any purpose of his own, they are not liable, but, if the act was done in the course of the employment or for the benefit of the defendants, they are responsible. That is directly within the principle laid down in Croft *v.* Alison, 4 B. & Ald. 590, and Seymour *v.* Greenwood, 7 H. & N. 355. The argument on the part of the defendants would limit the responsibility of a master to acts which are strictly within the authority of the servant. But a servant has a discretion intrusted to him by his master as to the pace and mode of driving. Lyons *v.* Martin, 8 A. & E. 512, merely decided that a master is not liable in trespass for a wilfully unlawful act of his servant unauthorized by him. — He also referred to Kyle *v.* Jeffres, 3 Macq. 611.

Mellish replied. *Cur. adv. vult.*

The learned Judges having differed in opinion, the following judgments were now delivered.

WIGHTMAN, J. It appears by the evidence in this case that the defendants were the proprietors of an omnibus plying between the Bank and Hounslow, which at the time in question was driven by a coachman in their service; that whilst upon the road, in the course of his employment to drive defendants' omnibus from Piccadilly to Kensington, he wilfully and on purpose, and contrary to the express orders of the defendants, wrongfully endeavored to hinder and obstruct the passage along the road of another omnibus belonging to the plaintiff; and for that purpose, he, who was ahead of the plaintiff's omnibus 80 or 100 yards, slackened his pace, until the plaintiff's omnibus came up to him and was about to pass, and he then purposely pulled across the road in order to prevent and obstruct his progress, and in so doing ran against one of the plaintiff's horses with his (the defendants') omnibus, thereby causing considerable damage. The reason assigned by the defendants' coachman for this wrongful proceeding was that he pulled across the plaintiff's coachman to keep him from passing, in order to serve him (the plaintiff's coachman) as he had served him (the defendants' coachman).

It seems clear upon the evidence that this was wholly a wilful and unjustifiable act on the part of the defendants' coachman, and not in the lawful prosecution of his masters' business.

A master is undoubtedly responsible for any damage occasioned by the negligence or carelessness of his servant whilst employed upon his master's business. In the present case it was no part of his employment to obstruct or hinder the passing of other omnibuses or carriages, — on the contrary he was directed not to do so.

The case appears to me to fall within the principle of the decision in the case of Croft *v.* Alison, 4 B. & Ald. 590, cited upon the argument. In that case the court said that the distinction was this: "That if a servant driving a carriage, in order to effect some purpose of his own wantonly strikes the horse of another person and thereby produces an accident, the master is not liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment."

In the case of Lyons *v.* Martin, 8 A. &. E. 515, Mr. Justice Patteson, in his judgment, says, "Brucker *v.* Fromont, 6 T. R. 659, and other cases, where the master has been held liable for the consequences of a lawful act done negligently by his servant, do not apply. Here the act was utterly unlawful. A master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one." There are other cases, some of which were cited upon the argument, to the same effect. In the present case the defendants' coachman wilfully did an illegal act contrary to his masters' orders, and quite beyond the scope of his employment. In this view of the case, it appears to me that, if the evidence of the defendants' coachman was believed, as well as that of the other witnesses in the case, the verdict ought to have been for the defendants. The question, however, before us is whether the direction of the learned Judge to the jury, as it appears upon the bill of exceptions, was right in point of law upon the case as it appeared in evidence. I entertain the highest and most sincere respect for the opinion of my brother Martin, but it does appear to me that the mode in which the questions were put to the jury was such as might mislead them, and induce them to find a verdict which I cannot but think was wrong.

He appears to have told them "that if the act of the defendants' driver in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him *in the course of his service*, and to do that which he thought best to suit the interests of his employers and to interfere with the trade and business of the other omnibus, the defendants were responsible; and that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the coachman not to obstruct another omnibus or hinder or annoy the driver in his business were immaterial."

It certainly appears to me that the wilfully or wrongfully attempting to obstruct the progress of another omnibus contrary to the express directions of the defendants, though done by their coachman *whilst* employed in the service of the defendants, cannot be considered an act done by him *in the course of his service.* It was quite beside the course of his service and what he was employed to do; and I cannot consider the express prohibition to the coachman to do what he did as immaterial in considering what was the course of his service in that respect. This was not a case of reckless or careless driving, but of wilfully and wrongfully attempting to obstruct the passage of another omnibus, and in so doing running against one of the horses. This cannot, I think, under the circumstances, be considered as an act done in the course of his service, even though the coachman might think that it was for his masters' interest by such wrongful means to obstruct the business of the other omnibus. The defendants' coachman was not employed to obstruct or hinder the plaintiff's omnibus, nor was it in the course of his service, in the proper sense, to do so. Upon the evidence it was entirely his own wrongful and wilful act, for which I think, according to the distinction taken in the cases to which I have referred, the defendants are not responsible. The jury, upon the direction to which I have referred, might well have thought that if the act was done during the time that the defendants' coachman's employment was to drive their omnibus, and that he thought it for their benefit to obstruct the other omnibus, the defendants would be liable. This I think was wrong for the reasons I have given; and I am therefore of opinion that there should be a trial de novo.

Williams, J., said. — I am of opinion that the judgment ought to be affirmed. If a master employs a servant to drive and manage a carriage, the master is responsible for any misconduct of the servant in driving and managing it which must be considered as having resulted from the performance of the duty intrusted to him, and especially if he was acting for his master's benefit and not for any purpose of his own. I think that the summing up of my brother *Martin* was substantially in accordance with that doctrine, and therefore there is no foundation for the bill of exceptions.

CROMPTON, J., said. — I must confess that my mind has altered in the course of the discussion. At first I was inclined to the opinion which my brother *Wightman* has expressed, but my present impression is in favour of the view of my brother *Williams*, that the injury resulted from an act done in the course of the driving and management of the omnibus. I do not follow my brother *Wightman* in one respect (for which however he has the authority of PATTESON, J., in Lyons *v.* Martin, 8 A. & E. 515, as to its being necessary that the act done by the servant should be a lawful act, for later cases show that the act need not be lawful in order to fix the master with responsibility; but my doubt has been whether this was an act done within the scope of the driver's authority, in other words, whether he was acting in the course of the driving or management of the omnibus. It appears by the evidence of the driver that he was driving the defendants' omnibus in an improper way, for, without intending to touch the horses of the plaintiff's omnibus, he drove so near to it, for the purpose of keeping it from passing him, that he caused the accident. It is not necessary to say what would have been the case if the driver had used the omnibus so as to block up the road; as it is, I cannot see that the direction of my brother *Martin* was necessarily wrong. If the matter had come before us on a motion for a new trial, it may be that I should have agreed with my brother *Wightman*, for the question might have been presented in such a way as to bring it more clearly before the jury, and it is possible that some expressions of the learned Judge may have led them to a wrong conclusion. But the question now is, whether any of the exceptions show that the learned Judge was wrong in point of law. Throughout his summing up he left it to the jury to say whether the injury resulted from an act done by the driver in the course of the service and for his masters' purposes. That is the true criterion; and I cannot see anything necessarily wrong in the ruling of my brother *Martin*. Therefore, though with considerable doubt, I do not think that we ought to reverse the judgment of the Court below.

WILLES, J., said: I am of opinion that the judgment of the Court below ought to be affirmed. The direction of my brother *Martin* was in accordance with principle and sanctioned by authority. It is well known that there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible; for there ought to be a remedy against some person capable of paying damages to those injured by improper driving. This was treated by my brother *Martin* as a case of improper driving, not a case where the servant did anything inconsistent with the discharge of his duty to his master, and out of the course of his employment. The defendants' omnibus was driven before the omnibus of the plaintiff, in order to obstruct it. It may be said that it was no part of the duty of the defendants' servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever. In my opinion those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability. Therefore, I consider it immaterial that the defendants directed their servant not to do the act. Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by his servant in the course of his employment?

But there is another construction to be put upon the act of the servant in driving across the other omnibus; he wanted to get before it. That was an act done in the course of his employment. He was employed not only to drive the omnibus, which alone would not support this summing up, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with his employment, when explained by his desire to get before the other omnibus. I do not speak without authority when I treat that as the proper test. Take the ordinary case of a master of a vessel, who it must be assumed is instructed not to do what is unlawful but what is lawful, if he has distinct instructions not to sell a cargo under any circumstances, but he does so under circumstances consistent with his duty to his master, the master is liable in damages to the person whose goods are sold.

It appears to me that the summing up is in accordance with the principle that a master is liable for acts done by his servant in the course of his employment. It is also consistent with authority. I need only refer to the authority of Lord HOLT in Tuberville *v.* Stampes, 1 Ld. Raym. 264, and of Lord WENSLEYDALE in Huzzey *v.* Field, 2 C. M. & R. 432. It is part of the history of the law that the judgment in Huzzey *v.* Field, although delivered by Lord ABINGER, was prepared by Lord WENSLEYDALE. That learned person there laid down that the proper question is whether the servant was acting at the time in the course of his master's service, and for his master's benefit; if so, his act was that of his master, although no express command or privity of his master was proved. It seems to me that in so laying down the law he was strictly accurate; and I feel bound to say that it is for the interest of every person (for all are liable to be injured by servants), that he should not be without remedy by the law being loosely administered. I entertain no doubt that the direction was correct, and that the judgment ought to be affirmed.

BYLES, J., said. — I am also of opinion that the direction of my brother *Martin* was correct. He used the words " in the course of his service and employment," which, as my brother *Willes* has pointed out, are justified by the decisions. The direction amounts to this. that if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant.

It is said that what was done was contrary to the master's instructions; but that might be said in ninety-nine out of a hundred cases in which actions are brought for reckless driving. It is also said that the act was illegal. So, in almost every action for negligent driving, an illegal act is imputed to the servant. If we were to hold this direction wrong, in almost every case a driver would come forward and exaggerate his own misconduct, so that the master would be absolved. Looking at what is a reasonable direction, as well as at what has been already decided, I think this summing up perfectly correct.

Blackburn, J., said. — I am also of opinion that the direction of the learned Judge was sufficiently correct to afford the jury a guide in the particular case, which is all that is required. It is admitted that a master is responsible for the illegal act of his servant, even if wilful, provided it was within the scope of the servant's employment, and in the execution of the service for which he was engaged. That the learned Judge told the jury, and perfectly accurately, but that alone would not be enough to guide them in coming to a correct conclusion. It was necessary that the jury should understand the principles which they must apply in order to ascertain whether the act was done in the course of the servant's employment. It is upon that part of the summing up that Mr. *Mellish* has mainly pointed his argument, saying that it gave the jury a wrong guide.

Now, we must look at what the particular employment was, in order to see what was understood by the jury. The defendants' servant was the driver of an omnibus, and as such it was his duty, not only to conduct it from one terminus to another, but to use it for the purpose of picking up traffic during the course of the journey. He drove across another omnibus under circumstances from which the jury might have thought that it was done for the purpose of wreaking his spite against the driver of that omnibus. The learned Judge, having to tell the jury what was the test by which they were to determine whether the act was done in the course of the service or not, used language in which he tells them, perfectly rightly, that if the act was done in the course of the service the defendants were responsible; and he goes on to say, "that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant." No doubt what Mr. *Mellish* said is correct: it is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses. But, in this case, I think the direction given to the jury was a sufficient guide to enable them to say whether the particular act was done in the course of the employment. The learned Judge goes on to say that the instructions given to the defendants' servant were immaterial if he did not pursue them (upon which all are agreed); and at the end of his direction he points out that, if the jury were of opinion "that the true character of the act of the defendants' servant was that it was an act of his own and in order to effect a purpose of his own, the defendants were not responsible." That meets the case which I have already alluded to. If the jury should come to the conclusion that he did the act, not to further his masters' interest or in the course of his employment, but from private spite, and with the object of injuring his enemy, the defendants were not responsible. That removes all objection, and meets the suggestion that the jury may have been misled by the previous part of the summing up.

Under these circumstances, I think that the direction given by the learned Judge was sufficiently accurate to guide the jury in coming to a right conclusion, and that there ought not to be a trial de novo.

Judgment affirmed.

MURPHEY *v.* CARALLI.

EXCHEQUER. 1864.

[3 *H. & C.* 462.][1]

THE first count of the declaration (which was the count relied on) stated that the defendant so carelessly, negligently, wrongfully, and improperly placed a pile of cotton bales in a certain cotton shed or warehouse, that by and through the mere carelessness, negligence, wrongful and improper conduct of the defendant in that behalf the same fell upon the plaintiff, who was then lawfully engaged and working in the said cotton shed or warehouse, and inflicted on him bodily injuries, and the plaintiff thereby became ill, &c.

Plea, — Not guilty. Issue thereon.

At the trial, before the Assessor of the Court of Passage for the borough of Liverpool, the following facts were proved on behalf of the plaintiff: The defendant was a Liverpool cotton merchant, and he and another firm of cotton merchants (Messrs. Dixon & Co.) had respectively caused some bales of cotton to be stored in the same warehouse. The plaintiff having been employed by Messrs. Dixon & Co. to recanvass their bales, went to the warehouse, and while engaged in recanvassing Messrs. Dixon & Co.'s bales received the injuries for which this action was brought from the fall of one of the defendant's bales. The defendant's bales had been stored some days before the accident by cotton porters in the defendant's employ, under the superintendence of one Jones, the warehouse keeper employed by the owner of the warehouse. From the evidence of Jones it appeared that it was his duty to see the bales piled properly, and that those who piled the bales were bound to obey his directions. He further stated that when the pile was not made properly at first, he was in the habit of pulling it down and ordering it to be repiled. Evidence was also given that, at the time when the defendant's bales were piled, they were not properly secured so as to prevent them from falling. It was not disputed that the cotton porters were workmen who understood the mode in which bales ought to be piled. The charges for warehouse room were at a given price per bale, no exclusive space in the warehouse being allotted to the different merchants.

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[1] The arguments of counsel are taken from the report in 34 L. J. N. S. Ex. 14. — ED

The learned Assessor, being of opinion that on this evidence it appeared that the act which caused the mischief was the act of the warehouse keeper, directed a nonsuit to be entered.

Littler, on a former day in this Term, obtained a rule nisi for a new trial, on the ground that there was evidence for the jury of negligence in the defendant's servants, and that the employment of a warehouseman under such circumstances did not protect the defendant; against which,

C. Russell appeared to show cause, contending that, as the damage was done by a person not under the defendant's control, and the defendant was not the owner of the warehouse or any part of it, but only of some bales which were stowed there, the nonsuit was right.

Littler, being called on by the Court to support his rule, cited the case of The Mobile, Swa. Adm. Rep. 127, where it was held that the owners of a vessel in charge of a licensed pilot are not exempted by the Merchant Shipping Act from liability for damage caused by the vessel, unless the pilot was exclusively to blame, and there was no blame attributable to the master and crew; and contended that the porters who packed the cotton were the defendant's servants, and that there was negligence on their part as well as on that of the warehouse keeper. [BRAMWELL, B. Is the master responsible for the negligence of his servants when they act under another person who is not his servant, but whom they are bound to obey?] Yes. The plaintiff here never touched the bales that fell, and there was no contributory negligence on his part. Had they fallen while being piled, the defendant would clearly have been liable. The warehouse keeper was for this particular service the servant of the owner of the cotton; and if the bales had fallen on one of the defendant's men while engaged in piling, it would have been said that he and the warehouse keeper were fellow-servants. It was no part of the warehouse keeper's duty to direct where the passers-by were to go. He had only to direct where the bales were to be stowed. He cited Martin *v.* Temperley, 4 Q. B. 298, and

Randleson *v.* Murray, 8 Ad. & E. 109, in which latter case a warehouseman who had engaged a master-porter to move a barrel was held liable for injury arising from the negligence of the men employed and the falling of the tackle used by the master-porter.

Pollock, C. B. I am of opinion that the nonsuit in this case was correct, and that this rule should be discharged. Jones was employed as warehouse keeper by the owner of the warehouse, and as such had control over the warehouse itself and also over the entrance to it. When bales were stowed they were stowed under Jones's directions, and by his orders restowed if not stowed properly at first. The bales which caused the mischief having been stowed under Jones's directions, I think that he and his master are alone responsible. The case of Randleson *v.* Murray, 8 A. & E. 109, seems at variance with the current of authority, but it certainly establishes no principle for constraining us to hold this defendant liable.

Bramwell, B. I also think the nonsuit right. I assent, indeed, to Mr. *Littler's* argument, that the men employed by the defendant, while engaged in piling the bales, were his servants so as to render him responsible for their acts. And if, while they were so engaged, there had been any negligence on their part with reference to any person lawfully passing by, I think the defendant would be liable. The question may, therefore, be treated as if the defendant had piled the bales himself. But suppose he *had* piled the bales, would he be liable? I think not. For in that alone there would have been nothing dangerous without the subsequent act of the warehouse keeper in permitting persons to approach the bales. Suppose the defendant had been present, and had pointed out to the warehouse keeper that the mode in which the bales were piled was dangerous. The warehouse keeper might surely have replied that that was his business, and that he would take the necessary steps to prevent any one coming near the bales. If from his subsequent omission to do so any mischief had occurred, the defendant would not be responsible for that mischief. Take this case. A. delivers at B.'s house goods which, from their nature, cannot at once be taken in. B. says: "Put them down in the highway, I will remove them directly, and will see that in the mean time no one runs against them." A. complies. The goods remain out all night, there is no light, and some one is injured. Who is responsible? B., the owner of the house, and not A., for though A.'s act be wilful it would not be dangerous without B.'s subsequent negligence. So here the defendant is not responsible for an act which would have produced no mischief without the warehouse keeper's subsequent negligence. If, indeed, the negligence were of a covert kind, so as to be less obvious to the warehouse keeper than to the men engaged in piling the bales, that might be a different case. For the warehouse keeper might then have no notice of the danger, and so the mischief might occur without any subsequent wrongful act on his part. But here the danger was at least as patent to the warehouse keeper as to the men; and the men were acting under his control, and the act in itself would not have caused the mischief. The warehouse keeper is liable, if any one.

CHANNELL, B. I agree that this rule should be discharged; and the ground of my opinion is that the act, of which the plaintiff complains, must be taken to have been done under the direction of the warehouse keeper. No personal negligence is imputed to the defendant; and, if he be liable at all, it must be on the ground that the act complained of was done by his servants. Now, I agree with my Lord as to the extent of the warehouse keeper's duties; and, indeed, that he had a right to control the mode in which the bales were packed is not disputed. We must presume he was attentive to his duties, and that what was done was with his approval. Consequently it must be taken to have been done under his direction. I think, therefore, that although, for certain purposes, the cotton porters were the defendant's servants, and although their duties did not terminate on depositing the bales in the warehouse but continued in the packing, yet in that proceeding, and in the negligence which then took place, they were not acting as servants of the defendant, but as the servants of the warehouse keeper and the owner of the warehouse.

PIGOTT, B. I agree, upon the grounds stated by my brother *Channell.* If the warehouse keeper, instead of controlling the mode in which the bales were packed, had let a certain space in the warehouse to the defendant, that would be a different case. There would then be a duty in the person sent to deposit the goods to deposit them carefully, and if he failed in that duty, the defendant who had appointed him might reasonably be held responsible. But where the person sent with the goods stows them under the control of a warehouse keeper, and is allowed to exercise no discretion as to the mode of stowage, the sender is not responsible, for he is guilty of no neglect of duty.

Rule discharged.

CHAPMAN, RESPONDENT, v. NEW YORK CENTRAL RAILROAD COMPANY, APPELLANT.

COURT OF APPEALS OF NEW YORK. 1865.

[33 *N. Y.* 369.]

CAMPBELL, J. The plaintiff brought this action to recover damages caused by the alleged negligence of the defendant in leaving down bars in the fence on the side of their railroad track, whereby the horses of the plaintiff in the night time escaped from his adjoining field on such track, and were struck and killed by a passing engine of the defendant. One Andrew Ryan, who was then and had been for some time in the employment of the defendant as a day laborer, receiving his pay monthly, but at a fixed rate for each day's labor, on the night of the accident took down the bars for the purpose of passing with a team, being engaged at the time in a business which concerned himself, and in which the defendant had no interest whatever. The bars were left down by Ryan, and through the opening the horses passed on to the track and were killed. The referee, before whom the cause was tried, found that while Ryan was thus in the employ of the defendant as a day laborer, it was understood in virtue of that employment, that he might be called upon in case of accident to perform extra labor, receiving compensation therefor, and if, at any time after his day's labor was over he saw anything amiss, he was required to give necessary attention to it without being specially directed so to do. In the language of Ryan, who was examined as a witness, "If I seen anything amiss after that, I had to do it." The referee found that under that employment it was the duty of Ryan as the servant of the company to replace the bars, and that his negligence was that of the company, and he reported in favor of the plaintiff, and the judgment was affirmed in the seventh district.

If the bars had been taken down by others, and Ryan, occupying the relation he did to the company, had seen them, or had been notified, there can be no doubt but it would have been his duty at once to have put them up. That he took them down himself can make no difference. The neglect of duty was in leaving them down. For that negligence, and which caused the loss of the plaintiff's horses, I think the company must answer in damages. That Ryan was intoxicated at the time was the misfortune of the company. That he had been retained in his place when known to be intemperate, was the fault of his immediate superior officers. But I am unable to see how this question of intoxication in any way affects the legal rights of the plaintiff, who seeks simply to recover for the loss of his property, caused by the neglect of the defendant's servant. The judgment should be affirmed.

Judgment affirmed.

HOWE v. NEWMARCH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[12 *Allen*, 49.]

TORT to recover damages sustained by reason of the negligence of the defendant's servant, in driving against the plaintiff in Cambridge.

At the trial in the Superior Court, before VOSE, J., it appeared that the defendant was a baker and employed William S. Brown to drive his wagon and deliver bread to his customers. There was a city ordinance prohibiting riding or driving upon any sidewalk in Cambridge. The plaintiff introduced evidence tending to show that on the morning of July 9th, 1857, he came upon a sidewalk in Cambridge, in front of a house owned by him, and turning to walk upon it he saw the defendant's horse and wagon upon the same sidewalk, in front of another house near by, and facing towards him; that he proceeded on the sidewalk till he got within some twelve feet of the horse, when Brown came out from that house pretty fast, threw his basket upon the wagon, and jumped to get on the seat, and the horse started, and the plaintiff turned round to escape, when the horse struck him and he was thrown down and injured.

The defendant introduced evidence tending to show that, on the day before the one referred to above, the plaintiff had told Brown not to drive on the sidewalk in front of his premises, and they then had some dispute together, and, on the morning of July 9, when Brown came out from the house, the plaintiff stood leaning against the fence, and, as soon as the horse started, the plaintiff walked across the sidewalk and caught him by the bridle and pulled him in towards the fence, and Brown jumped off and told the plaintiff to let go of the horse, which he did, and Brown got in and started again, and as he began to turn the horse into the street the plaintiff took hold of him again, and Brown again told him to let go, and the plaintiff did not let go, and Brown, after again telling the plaintiff to let go, started the horse, and the plaintiff, who still held on to the bridle, was thrown down. There was no evidence that the defendant knew of Brown's habit of driving on the sidewalk, or had ever given directions where he should drive.

The plaintiff requested the court to instruct the jury as follows:

"1. If the jury are satisfied that the defendant's servant, with his team, met the plaintiff on the sidewalk adjoining the plaintiff's premises, and neither of them would give the road, and the defendant's servant insisted on proceeding on the sidewalk, and a contest ensued in which the servant urged on his team, by means of which the plaintiff sustained an injury, a verdict should be rendered for the plaintiff, unless the injury resulted from want of due care on the part of the plaintiff. 2. If at the time of the injury the defendant's servant was engaged in the business of the defendant, and within the scope of his duty as such servant, and he drove the horse over the plaintiff and did him an injury, the defendant is responsible, whether the act was done wilfully or negligently, the plaintiff being in the exercise of due care himself."

The judge declined to give the instructions prayed for, but did instruct the jury that, "if they were satisfied that the defendant's servant, with his team, met the plaintiff on the sidewalk adjoining the plaintiff's premises, and neither of them would give the road, and the defendant's servant insisted on proceeding on the sidewalk, and a contest ensued in which the defendant's servant carelessly or negligently, but without the purpose or intention of driving against the plaintiff or doing him an injury, urged on his horse, by means of which the plaintiff sustained an injury, a verdict should be returned for the plaintiff, unless the want of due care on the part of the plaintiff contributed to the injury. And if Brown, while acting as the servant of the defendant in driving from house to house and delivering bread, wilfully and intentionally drove the horse upon the plaintiff for the purpose of carrying out his wish to drive unlawfully upon the sidewalk opposite the plaintiff's house, notwithstanding the remonstrance of the plaintiff, and thereby caused the injury complained of, and he did this without any previous direction or authority from the defendant, then the defendant is not responsible for such wrongful act of his servant."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

C. H. Hudson (*A. Cottrell* with him), for the plaintiff.

S. J. Thomas, for the defendant.

HOAR, J. The second instruction requested by the plaintiff at the trial, that "if at the time of the injury the defendant's servant was engaged in the business of the defendant, and within the scope of his duty as such servant, and he drove the horse over the plaintiff and did him an injury, the defendant is responsible, whether the act was done wilfully or negligently, the plaintiff being in the exercise of due care himself," seems to have been stated with substantial accuracy. It makes the test of the defendant's liability, not the intention of the servant, but the fact that the injurious act was done while engaged in his master's business, and within the scope of his duty as a servant. If the act of driving over the plaintiff was done wilfully, still it may also have been done negligently in the view of the law; that is, in disregard of the plaintiff's rights, and neglect and omission of the precautions necessary to his safety. It is obvious that the test of the master's liability cannot be whether the servant is a trespasser; for he who uses force upon the person or property of another is a trespasser, whether his violence be accidental or intentional, if it is without lawful justification. But if the servant is strictly within the scope of his employment, doing his master's work, and, for the purpose of doing what he is employed to do, does it in a manner which violates the rights of another, it is difficult to see why the master should be exempted from responsibility, because the servant knows that his act will be injurious, and intends to do it. If the consent of the master is made the ground of his liability, the master is no more consenting to the thoughtless negligence of his servant than to his wilful negligence. The authorities all agree that, where an action is brought against the master for an injury occasioned by the servant's negligence in his service, it is no defence to show that the master directed the servant to be careful; or even that he cautioned him against the particular act of negligence which produced the injury. Southwick *v.* Estes, 7 Cush. 385.

The act which causes the injury may be precisely the same, whether merely careless or intentional, and the authority of the master wanting as much in one case as in the other. Thus, if a servant driving his master's carriage becomes entangled in a crowd of other carriages, and is impatient to drive on, and there is not room to pass with safety, and reasonable care and prudence would require him to wait; but he persists in driving on, and in so doing strikes another carriage; this is negligence for which the master is responsible. Is the master's responsibility at an end if it is shown that the servant saw that he should strike the other carriage, and intended to extricate himself by so doing? He is in his master's employment in the one case as in the other. If his master has directed him to drive carefully, he is in each case alike acting without his master's authority or approval. His purpose in each case may be to do his master's work which he is employed to do. In the former, he does not think of or care for the rights of the other party, and so is negligent. In the latter, he perceives and understands the rights of the other party, but determines to disregard them.

It is not easy to reconcile the numerous cases on this subject. The leading case on which the defendant relies is M'Manus *v.* Crickett, 1 East, 106. That case merely decided that trespass *vi et armis* would not lie against a master for the wilful trespass of his servant, which was not authorized or consented to by the master, either directly or by implication from the nature or subject matter of his employment. The decision rests entirely upon the distinction between trespass and trespass on the case. Lord Kenyon says that "when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act." But he adds that "this doctrine does not at all militate with the cases in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant who had no purpose but the execution of his master's orders;" but that the form of such action must be case and not trespass. There is nothing in the opinion which bears upon the intermediate case of a servant who does not "quit sight of the object for which he is employed," but for the purpose of executing his master's orders, and in the course of his employment does an act injurious to another, or in disregard of his rights. The case of Savignac *v.* Roome, 6 T. R. 125, and Ogle *v.* Barnes, 8 T. R. 188, turned upon the same distinction between trespass and case.

M'Manus *v.* Crickett has been recognized as an authority in this Commonwealth in Foster *v.* Essex Bank, 17 Mass. 510; which was an action against the bank for the amount of a special deposit in gold which had been stolen from the vault by the cashier or chief clerk. The bank was held not liable for the loss. The court state the general rule to be, "that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger." In Lyons *v.* Martin, 8 Ad. & El. 512, the master had employed his servant to distrain horses damage feasant in his close; and it was held that he was not answerable in trespass for the act of his servant in driving the plaintiff's horse from the highway into the close in order to distrain him, as not being an act done by the master's authority, or in the course of the servant's employment. In Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill, 480, it was held that the owner of a steamboat is not responsible in an action on the case, for the wilful misconduct of the master in running her against and injuring another boat. And in Wright *v.* Wilcox, 19 Wend. 343, it was decided that if the act of the servant was wilful, although in the performance of his master's business, the master is not responsible in an action on the case, because " the law holds such wilful act a departure from the master's business."

This distinction has not been approved by several of the text writers. It is questioned by Judge Reeve in his treatise on the Domestic Relations, 357, 358; in Redfield on Railways, 384, *note;* and is stated with some qualifications in Smith on Master & Servant, 172 *et seq.*

In Croft *v.* Alison, 4 B. & Ald. 590, the Court of King's Bench say that "the distinction is this: if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." The case showed that the defendant's servant had wilfully struck the plaintiff's horses, when driving his master's carriage, in order to extricate himself from an entanglement of the carriages occasioned by his own fault, and thereby had caused an injury to the plaintiff's carriage; and a verdict for the plaintiff was supported. The action was case for negligence.

In Seymour *v.* Greenwood, 6 Hurlst. & Norm. 359, Chief Baron Pollock asks the question, " Suppose a servant driving along a road, in order to avoid a danger intentionally drove against the carriage of another, would not the master be responsible?" And in Limpus *v.* London General Omnibus Co., 1 Hurlst. & Colt. 526, it was decided in the Exchequer Chamber that the master is responsible if the servant is in the course of doing the master's work, and does the act to accomplish it.

Wherever there is a contract between the master and another person, the master is responsible for the acts of his servant in executing the contract, although the act is fraudulent, and done without his consent. So far the authorities are uniform. And this court has held the master answerable as a trespasser, where the servant committed a trespass in the course of his employment, and the business in which he was employed implied the use of force or violence to the persons or property of others, although the trespass consisted only in the use of force excessive in degree. Moore *v.* Fitchburg Railroad, 4 Gray, 465; Hewett *v.* Swift, 3 Allen, 420.

The instructions asked by the plaintiff at the trial were refused; and the court instructed the jury that if the defendant's servant carelessly or negligently, but without the purpose or intention of driving against the plaintiff, urged on his horse, and so injured him, the defendant would be answerable; but that if the servant, "while acting as the servant of the defendant in driving from house to house and delivering bread, wilfully and intentionally drove the horse upon the plaintiff for the purpose of carrying out his wish to drive unlawfully upon the sidewalk opposite the plaintiff's house, notwithstanding the remonstrance of the plaintiff, and thereby caused the injury complained of, and he did this without any previous direction or authority from the defendant, then the defendant was not responsible."

The objection to the latter branch of the instruction is, that it gives the jury no guide for their action in case they should find that the servant was within the scope of his employment, and was intending to do his master's work; and that his intention to drive against the plaintiff was only as a means of doing it. We think that, upon the facts reported, the jury might have been satisfied that the servant's driving on, though intentional, was not merely for the purpose of injuring the plaintiff. He was already upon the sidewalk, and may have wished to go on for the purpose of continuing his journey, and delivering bread to his master's customers, although he saw that in so doing he should drive against the plaintiff, who was resisting his progress. He would not then have been acting for a purpose of his own, losing sight of the object for which he was employed.

With the views we have taken of the law, we think the instructions given were defective, and that they did not fully supply the rule which the case required. The rule may be stated thus: The master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the wrongful act. But if the master give an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable. And in an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner.

It is not certain that the point to which the exceptions apply was essential to the decision of the case. If the plaintiff's evidence were believed, it would seem to be a case of negligence for which the jury were instructed that the master would be responsible. If the defendant's evidence were entitled to credit, the plaintiff could hardly have recovered, by reason of the want of ordinary care on his own part. But we cannot judicially know what view the jury may have taken of the evidence; and the ruling of the court appearing to be defective, there must be a new trial.

Exceptions sustained.[1]

WOOD *v.* COBB.

Supreme Judicial Court of Massachusetts. 1866.

[13 *Allen*, 58.]

Tort to recover damages for a personal injury, received in consequence of the neglect of the defendants' servant, in driving against the plaintiff.

At the trial in the Superior Court, before Morton, J., there was evidence tending to show that while the plaintiff was walking in a highway in Worcester a wagon was driven against him by a boy named Wheeler; that Wheeler was employed by the defendants, Cobb & Atwood, who were dealers in fish, and the wagon had just left their place of business loaded with their fish.

Thomas R. Foster, a truckman, testified that the defendants employed him to deliver all their parcels of fish every Friday to their customers, for the sum of one dollar; that he received the parcels in baskets, labelled where to go; that he took whatever route he chose, and suited his own accommodation; that at the time of the accident he had been sick several weeks and confined to his house; that he thought he told Pierce, his boy, to get some help if necessary; and that on the day of the accident he told Pierce to take the team up and tell the defendants they could have it if they wanted it.

Pierce testified that Foster had two teams; that on the day of the accident "Foster told me to ask Mr. Cobb if his boy could drive for me. I saw Wheeler, and asked him if he could drive for me. He said he did not know, must ask Mr. Atwood. Went in and asked Mr. Atwood if he could drive for me that morning. He said he might. He took the light team. At other times while Foster was sick, I had help elsewhere." Pierce and Atwood testified to substantially the same facts.

The judge instructed the jury that, if they believed the evidence of these witnesses as to what took place at the defendants' shop, the plaintiff could not recover; and the jury returned a verdict for the defendants. The plaintiff alleged exceptions.

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[1] *Acc.:* Wallace *v.* Navigation Co., 134 Mass. 95 (1883); Texas & P. Ry. Co. *v* Scoville, 62 Fed. R. 730 (C. C. A., Fifth Circuit, 1894). — Ed.

P. E. Aldrich & W. A. Williams, for the plaintiff.

G. F. Hoar & A. Dadmun, for the defendants.

Bigelow, C. J. There was no error in the instructions. The testimony of the witnesses introduced by the defendants would warrant no other inference than that the person who was in charge of the horse and wagon at the time the injury was done to the plaintiff was not in the employment or service of the defendants, but was acting as the servant of a third person, who exercised an independent employment in no way subject to the command or control of the defendants as to the mode in which it should be carried on. It is too well settled to admit of debate that under such circumstances no liability for the acts done attached to the defendants. Brackett *v.* Lubke, 4 Allen, 138; Forsyth *v.* Hooper, 11 Allen, 419, 421. *Exceptions overruled.*

POULTON *v.* LONDON AND SOUTH-WESTERN RAILWAY CO

Queen's Bench. 1867.

[*L. R.* 2 *Q. B.* 534.]

Declaration, that the defendants, by their servants, assaulted the plaintiff, and gave him into the custody of a policeman, and caused him to be imprisoned.

Plea, not guilty.

At the trial before Kelly, C. B., at the Hants spring assizes, it appeared in evidence, that the plaintiff, having the care of a horse, had taken it by the defendants' railway to an agricultural show held at Salisbury, in June, 1866. Under the railway arrangements advertised by the defendants, horses were to be taken to Salisbury at the usual rates; "on return free, if remaining unsold, on production of certificate to that effect." After the show the plaintiff produced the proper certificate to the defendants' servants, and the horse was put into a horse-box without any payment or booking, and the plaintiff having taken a third class ticket for himself travelled by the same train. On his arrival at his destination, Romsey Station, the plaintiff gave up his ticket and the certificate to a porter, and was taking the horse away along the road when the station master sent after him and demanded 6*s.* 10*d.* for the carriage of the horse, under a mistaken notion that the horse could not be carried free by that train. On the plaintiff explaining the circumstances and refusing to pay, he was detained and taken back to the station by two policemen, acting under the orders of the station master. After the plaintiff had been detained half an hour, the station master telegraphed to Salisbury, and on receipt of a telegram in reply, "all right," the plaintiff was allowed to proceed.

The jury returned a verdict for the plaintiff for £10, leave being reserved to move to enter the verdict for the defendants.

A rule having been obtained accordingly, on the ground that the station master had no authority from the defendants to take the plaintiff into custody,

June 28. *Prideaux*, Q. C., and *Lopes*, showed cause. The defendants, a railway company, can only act by their servants; the station master was the person in authority, and it must be assumed that he had authority to do all which the exigency of the business requires, and the defendants, therefore, are bound by his act in detaining the plaintiff. Goff *v.* Great Northern Railway Company, 30 L. J. (Q. B.) 148; 3 E. & E. 672.

[BLACKBURN, J. In that case there *was* a power to arrest, on the assumption that the facts were as the officer arresting supposed; here there is no such power. The distinction is kept in view in the judgment in that case, and was expressly made by an alteration in the judgment suggested by Sir Hugh Hill, which certainly made the judgment more strictly accurate.]

The arrest in that case was founded on the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 103, 104, which gives power to detain a person travelling on a railway without having paid "his fare." The plaintiff and his horse travelled by the same train, and it may well be that the payment for the carriage of the horse and himself may be treated as one contract, so that the carriage of the horse is part of the plaintiff's fare. But putting aside that contention, the station master is placed in a position of authority by the defendants, and he must be taken to have full authority to exercise his discretion as to law or fact; and the defendants must be held liable for his acts done so far in the course of his duty as to be for their benefit, just as if they had done the acts themselves. Seymour *v.* Greenwood, 30 L. J. (Ex.) 189; 6 H. & N. 359; Wilson *v.* Lancashire and Yorkshire Railway Company; Farren *v.* The Same, 27 L. T. 204.

[BLACKBURN, J. In Seymour *v.* Greenwood, 30 L. J. (Ex.) at p. 328; 7 H. & N. at p. 358; in the Exchequer Chamber, Williams, J., delivering the judgment of the court says: "It is urged that, though it cannot be denied that the defendant authorized his guard to superintend the conduct of the omnibus generally, and that that authority must include an authority to turn out any passenger who misconducts himself, yet that it gives no authority to turn out an unoffending passenger. But by giving the guard authority to turn out an offending passenger the defendant necessarily gave him also authority to judge for himself who should be considered an offending passenger." That is in exact accordance with Goff *v.* Great Northern Railway Company, 30 L. J. (Q. B.) 148; 3 E. & E. 672.]

It is a very fine distinction to say that the master is liable for a mistake of facts, but not for a mistake of law, when the servant is strictly acting in his master's service.

[BLACKBURN, J. It has been decided in the Exchequer Chamber, in the somewhat analogous case as to notice of action, that a *bonâ fide* mistake of facts entitles the defendant to the protection of the statute, but not when, on the given state of facts, the defendant was mistaken in law.[1]]

In Seymour *v.* Greenwood, 30 L. J. (Ex.) at p. 192; 6 H. &. N. at p. 365, Martin, B., puts the criterion of the liability of the master to be, not whether the master has given the authority to do the particular act, but whether the servant does it in the ordinary course of his employment. So in Limpus *v.* London General Omnibus Company, 32 L. J. (Ex.) 34; 1 H. & C. 526, the act upon which the master was held liable was in direct violation of his orders, but was in the course of the servant's employment.

H. T. Cole, Q. C. (*Pinder* with him), in support of the rule, cited Roe *v.* Birkenhead, &c. Railway Company, 21 L. J. (Ex.) 9; 7 Ex. 36; and Cox *v.* Midland Railway Company, 3 Ex. 268; 18 L. J. (Ex.) 65.

[*Prideaux*, contrà, called attention to Walker *v.* Great Western Railway Company, Law Rep. 2 Ex. 228; and the court then adjourned.]

June 29. BLACKBURN, J. I do not think we need trouble the defendants' counsel any further. There being no doubt whatever that the station master did give the plaintiff into custody and that that was false imprisonment, the only question is whether there was evidence that the station master was clothed with authority; that his act in detaining the plaintiff in custody was within the scope of his authority, and was such as that the evidence before the jury would properly convince them that he was authorized on the part of the company to do the wrongful act, and consequently that the company were responsible.

There can be no question, since the decision of the case of Goff *v.* Great Northern Railway Company, 30 L. J. (Q. B.) 148; 3 E. & E. 672, that where a railway company or any other body (for it does not matter whether it is a railway company or not), have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all those things on their behalf which are right and proper in the exigencies of their business, — all such things, as somebody must make up his mind, on behalf of the company, whether they should be done or not; and the fact that the company are absent, and the person is there to manage their affairs is *prima facie* evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake, or commits an excess, while acting within the scope of his authority, his employers are responsible for it.

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[1] See Roberts *v.* Orchard, 2 H. & C. 769; 33 L. J. (Ex.) 65. — REP.

In the present case the station master took the plaintiff into custody, because, as he erroneously supposed, the plaintiff had improperly not paid the fare for a horse that had been carried on the defendants' railway. Had the station master given him into custody under the erroneous supposition that he had not paid his own fare for carrying himself, as an individual, then, inasmuch as there is an authority by the Act of Parliament to arrest and take into custody any person who does not pay his fare, and, consequently, the act would have been an act which the railway company were authorized to do, it might be said that the station master, being the head man on the spot, had authority to take into custody those who did not pay their fares; and, if he made a mistake, it was a mistake in doing a thing which the railway company had given him authority to do, and then the railway company would be responsible. But what the plaintiff was given into custody for, was the not paying the money for carrying the horse. There was an attempt by the counsel for the plaintiff to argue that that was part of "his fare," within the meaning of the Act of Parliament; but we think that is untenable. The Act of Parliament enacts, in very careful words, that where a passenger does not pay his fare, he may be taken into custody, and that where goods are not paid for, they may be detained. Where a person does not pay for a horse, and he is himself a passenger in the train, it would be an abuse of language to say the money for the horse was part of "his fare."

Then comes the question we have to determine: can there be said to be any evidence from which it may be inferred that the railway company authorized the station master to do an act which it appears, on every view of the facts, he would be utterly unauthorized to do? We think not; we do not think it is within the scope of his authority, in what he was authorized to do, so to bind the company. It was an act out of the scope of his authority, and for which the company would be no more responsible than if he had committed an assault, or done any other act which the company never authorized him to do.

There is little need to refer to the cases, they all have this same distinction. In Goff *v.* Great Northern Railway Company, 30 L. J. (Q. B.) 148; 3 E. & E. 672, the act was the arresting a man for the benefit of the company, where there was authority to arrest a passenger for travelling without paying his fare, and the court thought, and no doubt rightly, that the station master and the policemen who were employed there must be assumed to be authorized to take people into custody whom they believed to be committing the act, and if there was a mistake, it was a mistake made within the scope of their authority.

In Seymour *v.* Greenwood, 30 L. J. (Ex.) at p. 328; 7 H. & N. at p. 358; in the Exchequer Chamber, Sir E. V. Williams, in delivering the judgment of the court, points out very distinctly that the conductor was authorized to remove a disorderly passenger; that that was part of his authority; and when, in removing a passenger whom he thought to be disorderly, he used more violence than was necessary, he was doing a thing within the scope of his authority.

In Limpus *v.* London General Omnibus Company, 32 L. J. (Ex.) 34; 1 H. & C. 526, where the question was, whether or not the direction of my Brother Martin to the jury was erroneous, there was a difference of opinion. The late Mr. Justice Wightman thought it was: that the learned judge had gone too far to make the company liable; the other judges thought there was no misdirection, and that the act done by the driver was within the scope of his authority, though, no doubt, it was a wrongful and improper act, and therefore that his masters were responsible for it.

In the present case an act was done by the station master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station master any power, to do the act. Therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station master personally, but not against the railway company.

MELLOR, J. I am entirely of the same opinion. I think the distinction is clear; it limits the scope of authority, to be implied from the fact of being the station master, to such acts as the company could do themselves, and I cannot think it ever can be implied that the company authorized the station master to do that which they have no authority to do themselves; and that seems to me to be the boundary line. It was well put by the counsel for the plaintiff, and no doubt there is a difficulty at first in seeing where the distinction begins and where its ends; but I cannot help thinking it is analogous to an action against magistrates. If the station master had made a mistake in committing an act which he was authorized to do, I think in that case the company would be liable, becouse it would be supposed to be done by their authority. Where the station master acts in a manner in which the company themselves would not be authorized to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different; and I think that is the distinction on which the whole matter turns. So if a magistrate acts within the scope of his authority, however erroneously he judges of the facts, he is protected; but the moment he assumes a jurisdiction over a matter which does not belong to him, then an action lies. It is a kindred distinction, and I only refer to it for the sake of illustration.

SHEE, J. I am of the same opinion. As pointed out by my learned Brothers, an authority cannot be implied to have been given to a servant to do an act, which, if his master were on the spot, the master would not be justified in doing, on the assumption of a particular state of facts. It is clear, from the construction of s. 103 of 8 Vict. c. 20, that the company had no power to arrest this passenger because he had not paid the price for the carriage of his horse.

Rule absolute.[1]

WHATMAN *v.* PEARSON.

COMMON PLEAS. 1868.

[*L. R.* 3 *C. P.* 422.]

DECLARATION for damage done to certain iron railings of the plaintiff by the negligence of the defendant's servant in the management of a horse and cart of the defendant.

Plea, not guilty, by statute 25 & 26 Vict. c. 102.

The cause was tried before BYLES, J., at the last sittings at Guildhall. The plaintiff was the owner of some houses at Deptford. The defendant, a contractor, was employed under the district board of Greenwich in carting away the soil excavated from a highway there during the construction of a sewer, and for this purpose employed a number of men with horses and carts. The duty of the men so engaged was, to travel with their carts for a certain number of hours each day between the place where the excavation was going on and the place of deposit for the earth and rubbish, with an hour's interval for dinner, but never to quit their horses or carts or to leave their work. One of the men, contrary to his instructions, went home to dinner at a place about a quarter of a mile out of the line of his work, and left his horse and cart in the street before his house; the horse had his bridle off and a nose-bag on, and there was no one to look after him. Whilst the driver was thus absent, the horse ran away, and damaged the plaintiff's railings. No notice of action was given.

The learned judge left it to the jury to say whether the driver had been guilty of negligence, whether he was at the time acting within the scope of his employment, and whether the injury complained of was a thing done or intended to be done under the act (25 & 26 Vict. c. 102, s. 106), under which the contractor's work was being done. The jury answered the first two questions in the affirmative and the third in the negative.

The learned judge reserved leave to the defendant to move to enter a nonsuit, on the ground that there was no evidence that the driver was acting in the scope of his employment, or on the ground that the defendant was entitled to notice of action under 25 & 26 Vict. c. 102, s. 106.

Montagu Chambers, Q. C., moved to enter a nonsuit, or for a new trial on the ground of misdirection.

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[1] Compare Moore *v.* Metropolitan Ry. Co., L. R. 8 Q. B. 36 (1872). — ED.

Bovill, C. J. I am of opinion that there should be no rule upon either ground. As to the first point, the jury found that the defendant's servant was acting in the course of his employment; and I think there was sufficient evidence to support that finding. In Joel *v.* Morison, 6 C. & P. 501, 503, Parke, B., lays it down that "the master is only liable where the servant is acting in the course of his employment." But he adds: "If he was going out of his way against his master's implied commands, when driving on his master's business, he will make his master liable." In the present case, the servant had charge of the horse and cart, and it was through his negligence and want of care, whilst acting in the course of his employment, that the accident occurred. The jury were quite at liberty to come to the conclusion they did; and I cannot doubt its accuracy. As to the notice of action, — it is difficult to see how such a case can be brought within the 106th section. The intention was that there should be notice in all cases where the act complained of was a thing done or intended to be done under the powers of the board or vestry or under the act. The cause of action here is not a thing done or intended to be done under the act; the whole thing was collateral. The defendant's servant was not acting or intending to act in the performance of any duty cast upon his master by virtue of the act. He was guilty of negligence in the care of the horse entrusted to him, whilst he was absent taking his meal. That clearly had no relation to an act done or intended to be done under the Act of Parliament. Neither the act done nor the mischief which resulted had anything to do with the performance of the powers of the act. No notice of action, therefore, was necessary.

Byles, J. I am of the same opinion. The question of negligence was left to the jury; and they found that the defendant had been guilty of negligence. I agree it is doubtful whether the second and third questions ought not to have been decided by the judge; but for safety sake I left them to the jury. When the defendant's servant left the horse at his own door without any person in charge of it, he was clearly acting within the general scope of his authority to conduct the horse and cart during the day. On the second point, I am of opinion that the thing complained of was not an act done or a default made under the powers of the board, or under the act. If negligence in looking after the horse was the cause of the injury, that clearly had nothing to do with the powers of the board; still less had the breaking of the plaintiff's railings.

Keating, J. I am of the same opinion. Upon the first point Mr. Chambers's contention in substance is, that there was such an amount of deviation by the defendant's servant from the line of his duty, that he ceased to be acting in the course of the employment of his master. It is always, however, a question of degree. I think my brother Byles was quite right in leaving the question to the jury. They found, and properly, I think, that the man was at the time of the accident acting in the course of his employment. As to the want of notice, — I see no ground for saying that the defendant's servant was acting or intending to act in pursuance of the Act of Parliament when he was guilty of the negligence complained of. Whether that be a question for the jury or the court, I am equally of opinion that the verdict was right.

Montague Smith, J. I am of the same opinion. There was evidence that the defendant's servant was acting within the scope of his authority, and not upon his own account independently of his master; and that evidence was properly submitted to the jury. Upon the other point, there was no evidence to satisfy the jury, or which ought in my judgment to satisfy us, that a notice of action was necessary. The injury sustained by the plaintiff did not arise from any negligence in the performance of anything done or intended to be done under the powers of the act. It is not because a man may believe that he is acting in pursuance of the act that a notice of action is necessary. The negligence of the defendant's servant here was entirely collateral to anything done or intended to be done under the powers conferred by the act. It would be difficult to say where the necessity for a notice of action would not arise, if it were held to be necessary here. If the servant were taking the horse out of the shafts, and in so doing negligently suffered it to run away and do damage, could it be said that that was a case within the act? It seems to me that it would be an absurd construction of the clause to hold a case like this to be within it.

Rule refused.[1]

TOLEDO, WABASH & WESTERN RAILWAY CO. *v.* HARMON.

Supreme Court of Illinois. 1868.

[47 *Ill.* 298.]

Appeal from the Circuit Court of Morgan county; the Hon. Charles D. Hodges, Judge, presiding.

This action was in case, to recover for injuries received by Harmon, by the running away of his team caused by an engineer of the road letting off steam from his engine with a loud noise, just as Harmon was crossing the track. The declaration contained two counts, each charging the steam to have been let off wantonly and maliciously, but one stating that the locomotive was standing still, and the other, that, while moving, the steam was let off. The counts differed, too, as to whether the engineer blew the whistle or let off steam.

A demurrer to the declaration was interposed and overruled. Defendants then pleaded the general issue.

For the plaintiff, three instructions were given: —

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[1] *Acc.:* Ritchie *v.* Waller, 63 Conn. 155 (1893). — Ed.

1st. The jury, if they find the defendants guilty, may assess the damages from all the facts, and may include punitive damages, but not to exceed $3000.

2d. If they find that defendants' engineer, with intent to frighten plaintiff's horses, unnecessarily and wantonly let off steam or blew a whistle, so that plaintiff's horses ran off and injured him, defendants are guilty, unless plaintiff is also guilty of negligence.

3d. Malice in the engineer need not be proved positively, but may be inferred.

For the defendants, nine instructions were asked, and all but the second and fifth were given: —

1st. If the plaintiff's neglect co-operated to cause the injury. defendants are not liable.

2d. If the jury believe the act of the engineer to have been wilful and malicious, and that the act was not authorized by any special or general command or permission, expressed or implied. of defendants, defendants are not liable. (Refused.)

3d. Unless they believe the act to have been wilful and malicious, as alleged, they must find for defendants.

4th. If the acts were usual and necessary at the time for the proper running of the engine, they will find for the defendants.

5th. If they believe the injury to have been caused by the wilful and malicious act of the agent of the defendants, they will find for the defendants. (Refused.)

6th. In the absence of evidence to the contrary, the presumption is that defendants ordered their servant in charge of the engine to do lawful acts in a lawful manner.

7th. That unless they believe that the engineer wilfully, by his wilful and malicious act, so managed his engine as to frighten plaintiff's horses and cause said injury, they will find for defendants.

8th. Unless the jury believe the injury to have been caused by the wilful and malicious act of defendants' servant, they will find for defendants.

9th. If, upon the weight of evidence, the jury can conscientiously explain the occurrence upon the theory of accident, and without a wilful and malicious purpose, they will find for defendants.

Verdict for plaintiff. Damage $500. Judgment in accordance therewith.

Motion for new trial by defendants upon the following grounds: —

1st. The court admitted improper evidence to go to the jury.

2d. The court erred in giving the 1st, 2d and 3d instructions asked by the plaintiff.

3d. The court erred in refusing to give the 2d and 5th instructions asked by defendants.

4th. The verdict of the jury is contrary to the law and evidence of the case.

Motion overruled and appeal taken.

Messrs. *Robertson & Barnes*, for the appellant. Messrs. *Ketcham & Atkins*, on the same side.

Messrs. *Morrison & Epler*, for the appellee.

Mr. Justice WALKER delivered the opinion of the Court. The evidence in this record is conflicting, and was properly left to the consideration of the jury. In such cases this court will not disturb the verdict, unless we can see that it is manifestly against its weight. An attentive examination of the testimony fails to satisfy us that the finding is unwarranted. On the contrary, we think it preponderates in favor of the finding of the jury. If the agents and employees of a railroad company, while in the discharge of their duty, act with such negligence as to occasion injury to others who are not in fault, the company must be held liable in damages for the wrong. The well-being of society requires these bodies to employ careful and skilful agents, and that they in the performance of their duties shall have due regard to the safety and rights of other persons. They are held to a high degree of caution and skill while exercising and enjoying their franchises. Negligence, or want of skill by their agents, producing injury, will create liability. And when they locate their stations and depots in populous cities and on thoroughfares, they must, for the protection of community be held to a degree of care commensurate with the greater danger such a situation involves. When located at such places, they know the hazard that must ensue, and must be held to an increased degree of care and diligence equal to the greater hazard. The life and property of individuals cannot be lightly or wantonly placed in jeopardy. If that might be done, then these great instruments of prosperity, and agents in the development of the resources of the country, and promoters of its commerce, instead of blessing, would become a nuisance, if not a curse to our citizens. If the lives of men, or their property, must be endangered in the pursuit of their ordinary and legitimate business, while lawfully passing over our public highways, and no person can be held responsible, then it would be an injury instead of a blessing to community that they were constructed.[1] . . .

It can make no difference in its results to appellee, whether the escape of steam was the effect of negligence, or from wanton and wilful purpose. The engine-driver does not pretend that there was any necessity, nor can we imagine any, for the escape of steam at that time. He had stopped his locomotive, and there could be no necessity to start it until appellee had crossed the track, which could have required, at most, not more than a very few seconds. There could have been no danger of an explosion, nor is it pretended there was. Then why the necessity for the escape of steam, either through the whistle or the escape pipes? It must have been the result of gross negligence under the circumstances, or of wanton and wilful purpose, in total disregard of the security of the life and property of appellee.

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[1] Several paragraphs not dealing with Agency are omitted. — ED.

It is, however, contended that if the engine-driver did the act wantonly or wilfully, it was outside of his authority, and hence the company are not liable for the damages resulting from the misconduct of the engineer. He was their servant, was engaged in the performance of the duty assigned to him, and if, while so engaged, he used the engine put into his possession and under his control, to accomplish the wanton or wilful act complained of, why should not the company be held liable? It is said that he was not employed for the purpose, nor directed to perform the act; and it is equally true that they do not employ engineers to inflict injuries through negligence or incompetency, and yet these bodies are held liable for such acts of their servants.

In the case of the Chicago, Burlington & Quincy R. R. Co. v. Parks, 18 Ill. 460, it was urged that the conductor, in ejecting Parks from the train, did not only an unlawful, but an unauthorized act, and the company were not liable for damages. The law prohibited him from removing or forcibly ejecting a passenger for refusing to pay his fare, except at a usual stopping place, while he put him off by force at a different place. In that case, the agent of the road did an act prohibited by the statute and outside of his authority, and yet the company were held liable. In the case of the Ill. Cent. R. R. Co. v. Reedy, 17 Ill. 582, it was said that while trespass might be maintained against the agents of the company for their immediate acts, yet the corporation who employed them would be liable in case for the damage inflicted by their servants; and if authority by the company to perform the act were to be made the test of liability, they would always escape, as they would never authorize their agents to do an unlawful act, or to omit any duty, or to carelessly or negligently perform others, whereby injury would result to individuals.

This court held, in the case of the St. Louis, Alton & Chicago R. R. Co. v. Dalby, 19 Ill. 353, that a railroad corporation is liable, in an action of trespass, for an assault and battery committed by an employee of the company on a passenger on the train; and this rule was fully approved in the case of the Ill. Cent. R. R. Co. v. Read, 37 Ill. 484. It was there said, in answer to the objection to the want of authority in the agent to commit the act, or that the company had no power to order a lawful act to be done in an improper mode, or so that it will violate the rights of others, and therefore, such act must be regarded as that of the agent, and not of the company; that such a rule would release railway companies from liability from all affirmative acts violating the rights of others; that in all such cases the ready answer would be, that because such act was wrongful, therefore it was unlawful, and not authorized by its charter, but the individual act of their agents, who exercise its functions. That the result of the position would be, that the company could not be liable for a trespass, because no corporation can be empowered to commit a wrongful act.

There can be no pretence, that where an agent commits an act wilfully, or otherwise, while he is not engaged in the performance of his duty to the company, they would be liable for the wrong; or even while so engaged, if he were to personally perform an act not connected with the business of the corporation, they would be liable. But when employed in the discharge of his duty, or while engaged in operating their engines and machinery on their road, if he uses such agencies in an unskilful manner, or so negligently as to occasion injury to another, or even if, while so engaged, he wilfully perverts such agencies to the purpose of wanton mischief and injury, the company should respond in damages. They should not be permitted to say, it is true he was an agent, was authorized by us to have the possession of our engines, was engaged in carrying on our business, and while so engaged, he wilfully perverted the instruments which we placed in his hands to something more than we designed or authorized, and, therefore, we should not be liable for the injury thus inflicted.

In this case, so far as the record discloses, the engineer was properly engaged in the use of the machinery of the company, and it can make no difference whether the escape of steam was negligently permitted, or wilfully done by the engineer, any more than if he had wilfully run his engine against appellee's wagon and team, and thus produced the injury. The question, whether it was negligently or intentionally done, can, we think, make no difference in results. It then follows that the instructions were not improper, and no error was committed by telling the jury that the company were liable if the act was intentional on the part of the engineer. The judgment of the court below is affirmed.

Judgment affirmed.[1]

ALDRICH *v.* BOSTON AND WORCESTER RAILROAD COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[100 *Mass.* 31.]

CONTRACT to charge the defendants as warehousemen with the value of three barrels of kerosene oil and four barrels of glassware burned between midnight and four o'clock in the morning of November 1, 1866, in their freight house at Milford.

At the trial in the Superior Court, ROCKWELL, J., refused a request of the defendants at the close of the evidence to direct a verdict in their favor, and the jury found for the plaintiff for the value of the glassware, but not of the oil. After this verdict, the judge, at the same time allowing a bill of exceptions taken by the defendants at the trial, reported the case, by agreement of the parties, for the determination of this court, judgment to be entered on the verdict if there was evidence of negligence which should have been submitted to the jury, otherwise the verdict to be set aside. The substance of the evidence is stated in the opinion.

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[1] *Acc.:* C., B. & Q. Railroad Co. *v.* Dickson, 63 Ill. 151 (1872). Compare Little Miami Railroad Co. *v.* Wetmore, 19 Ohio St. 110 (1869). See Harriman *v.* Railway Co., 45 id. 11, 36–38 (1887); and Railway *v.* Shields, 47 id. 387 (1890). — ED

G. S. Hale & F. P. Goulding, for the defendants.

H. B. Staples & T. G. Kent, for the plaintiff.

HOAR, J. The manner in which this case comes before us is irregular, and not authorized by statute. When the parties consent to the report of a judge after verdict, it should contain a statement of all the questions of law which it is proper to present; and a bill of exceptions cannot be sent with it. The losing party may have his bill of exceptions as a matter of right; but if the case is reported, all the exceptions allowed should be incorporated in the report. But as upon the report we are all of opinion that the action cannot be maintained, there is no need to examine the bill of exceptions; and the parties lose no right by disregarding it.

The action is brought to recover the value of goods destroyed by fire, which were in the custody of the defendants as warehousemen. The goods were in their freight house at Milford, which was burned in the night-time with its contents. The fire, for which it is agreed that the defendants were not responsible, was caused by the burning of another building in the neighborhood; and the only ground of liability charged at the trial was the negligence of their agents in not removing the goods from the freight house at the time of the fire.

It appeared that different persons in the defendants' employment came upon the ground from time to time, and evidence was offered to show that with due care and diligence they might have saved the plaintiff's property. There was no evidence that the general agent who had charge of the freight house heard the alarm or was present at the fire; or that he was in any fault for not being there. The servants of the company who were present were, a clerk employed to check freight as it was received, and to help deliver it; a baggage-master and brakeman; a road-master and superintendent of the repairs of the track; another baggage-master, who had charge of the freight house in the day-time, and locked it at night, but did not keep the key; and a clerk employed to receive freight.

The legal obligation of the defendants as warehousemen is well settled by the authorities, and there is no substantial difference between the parties respecting its nature and extent. They are responsible for due care in storing the goods in a place of reasonable safety, and are to be charged only upon proof of their own negligence, or that of their servants in the course of their employment. They are not insurers against loss by an accidental fire.

As the defendants furnished a suitable warehouse, properly secured, in which the goods were deposited, they had done their whole duty, until the time came when, upon reasonable notice of danger, an obligation should arise to remove them. Tobin *v.* Murison, 5 Moore, P. C. 110. They were not chargeable with the negligence of any of their servants, unless it was negligence within the scope of the servant's employment. And a true test of this liability may be found in the question, Whether any one of the defendants' servants who were present at the fire would be answerable to his employers for a neglect of his duty?

The answer to this question, upon the evidence reported, seems to us perfectly plain. It was no part of the service for which either of them was engaged, to attend to the removal of goods from the freight house in case of a fire in the night. Neither of them was under any obligation, by reason of his employment, to rise in the night and be present at the fire. Neither of them had any custody, or responsibility for the safety, of the goods at that time. If they were under no obligation to be present, their voluntary attendance imposed upon them no legal liability for mere omission to do anything when on the spot.

It is a mere confusion of terms to say that the servants of the company were present and neglected to remove the goods. They were not then and there, in any legal sense, the servants of the company. Whatever they did was done by them as volunteers, as neighbors and citizens. They had the full control of their own time and labors. They had the right to choose for themselves whom they would assist, and whose goods they would try to save; and, in making the choice, they in no manner implicated the railroad company, or assumed any of its obligations.

As the clerks, brakeman, and baggage-master, and superintendent of track repairs, were under no legal liability to the defendants for their omissions at the fire, it follows, therefore, that the defendants are not chargeable with their neglect, any more than with the neglect or inefficiency of any other persons who were there; and the whole foundation of the action fails. *New trial granted.*

STOREY *v.* ASHTON.

QUEEN'S BENCH. 1869.

[*L. R.* 4 *Q. B.* 476.]

DECLARATION. That the defendant was possessed of a horse and cart then being driven under the control of a servant of the defendant, and, by the servant's negligence in driving, the horse and cart were driven over the plaintiff, who was crossing a certain highway, to wit, the City Road.

Pleas: 1. Not guilty.

2. That the horse and cart were not under the control of the defendant's servant.

Issue joined.

At the trial before HANNEN, J., at the sittings in Middlesex, during Trinity Term, 1868, it appeared that the plaintiff, a child of six years old, was on the 23rd of February, 1867, run over in the City Road by a horse and cart of the defendant, driven by a servant of the defendant.

The defendant was a wine merchant having offices in Vine Street, Minories. On the day in question, which was a Saturday, the defendant sent a clerk and a carman with a horse and cart to deliver wine at Blackheath. They delivered the wine and received some empty bottles, and it was then the duty of the carman to have driven back direct to the defendant's offices, left the empties there, and taken the horse and cart round to the stables in the neighborhood; instead of doing this, it being after business hours (3 P. M.) on Saturday, the carman, after he had crossed London Bridge, when about a quarter of a mile from home, instead of turning at the statue in King William Street to the east toward the Minories, at the persuasion of the clerk drove northward to the clerk's house, near the City Road, and thence to fetch a cask (which the clerk had sold to a cooper in the city), from the house of the clerk's brother-in-law at Barnsbury; and it was while they were driving along the City Road towards Barnsbury that the accident happened to the plaintiff.

There was contradictory evidence as to who was in fault; but by consent the only question left to the jury was the amount of damages; and a verdict was directed for the defendant, with leave to move to enter it for the plaintiff for £80, the amount found by the jury, if the Court should be of opinion, on the evidence, that the defendant was liable for the negligence of his servant.

A rule having been obtained accordingly,

Prentice, Q. C., and *A. L. Smith*, showed cause.

Digby Seymour, Q. C., and *Finlay*, in support of the rule.

COCKBURN, C. J. I am of opinion that the rule must be discharged. I think the judgments of Maule and Cresswell, JJ., in Mitchell *v.* Crassweller, 13 C. B. 237; 22 L. J. (C. P.) 100, express the true view of the law, and the view which we ought to abide by; and that we cannot adopt the view of Erskine, J., in Sleath *v.* Wilson, 9 C. & P. 607, 612, that it is because the master has intrusted the servant with the control of the horse and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment. It is true that in Mitchell *v.* Crassweller, 13 C. B. 237; 22 L. J. (C. P.) 100, the servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going a great deal too far to say that under such circumstances the master was liable.

MELLOR, J. I am of the same opinion. Generally speaking, the master is answerable for the negligent doing of what he employs his servant to do; and it is not, as Cresswell, J., says, because the servant in executing his master's orders does so in a roundabout way, that the master is to be exonerated from liability. But here, though the carman started on his master's business, and had delivered the wine and collected the empty bottles, when he had got within a quarter of a mile from the defendant's office, he proceeded in a directly opposite direction, and as soon as he started in that direction he was doing nothing for his master; on the contrary every step he drove was away from his duty.

LUSH, J. I am of the same opinion. The question in all such cases as the present is whether the servant was doing that which the master employed him to do. If he was, the master is liable for the negligence just as if he himself was guilty of it. Here the employment was to deliver the wine, and carry the empty bottles home; and if he had been merely going a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-servant's account, and could not in any way be said to be carrying out his master's employment.

HANNEN, J., concurred. *Rule discharged.*

MURRAY *v.* CURRIE.

COMMON PLEAS. 1870.

[*L. R.* 6 *C. P.* 24.]

THE declaration stated that the defendant, by his servants and workmen, being engaged in the unloading of a vessel in or near a public dock in Liverpool, by his said servants and workmen so negligently and improperly conducted himself about the premises that by means thereof certain machinery or cog-wheels were set in motion, whereby the hand of the plaintiff, who was lawfully upon the ship, was drawn in between the said cog-wheels and crushed and injured, &c.

Pleas, first, not guilty; secondly, a denial that the defendant by his servants and workmen was engaged in unloading the ship. Issue thereon.

The cause was tried before the assessor of the Passage Court, Liverpool, on the 20th of July last. The defendant, it appeared, was the owner of the steam-ship Sutherland, which at the time of the accident in question was alongside a quay in the Nelson Dock. For the purpose of facilitating the loading and unloading of cargo the vessel was provided with a winch at each of her four hatchways, worked by a donkey-engine. On the 15th of January last, whilst the plaintiff, who was a dock-laborer, was engaged together with one Davis, one of the Sutherland's crew, in unloading the vessel by means of one of the winches, his hand was, through the negligence of Davis, jammed between the cog-wheel and pinion, and much injured. The work of unloading the vessel was being done by one Kennedy, a master stevedore; and all the men engaged in it were under his direction and control.

Kennedy, who was called for the defendant, stated that he supplied the labor for the unloading and the working of the steam-engine; that Davis worked the winch, and was fully competent; that the office [i. e. the defendant] paid him, but deducted the sum paid from his (Kennedy's) bills; that all the unloading was under his control and that of his foreman; that he would have had to get labor elsewhere, if the ship had not found men; that the ship-owner selected those of the crew who were employed in unloading, but he (Kennedy) selected the work for them, and had control over it; and that he could have refused to employ Davis or any man whom he thought incompetent.

The verdict was by consent entered for the plaintiff, damages £50, with leave to the defendant to move to enter a verdict for him if the court should be of opinion that the defendant was not under the circumstances liable for the negligence of Davis, — the court to be at liberty to draw inferences of fact.

C. Russell obtained a rule nisi, citing Murphy *v.* Caralli, 3 H. & C. 462; 34 L. J. (Ex). 14.

Herschell showed cause. Davis was the servant of the defendant, and not of Kennedy, the stevedore, and the defendant was therefore responsible for his negligence. The fact that Davis was at the time of the accident acting under the direction of the stevedore makes no difference.

[BOVILL, C. J. The question is, who was working the winch, — the defendant or Kennedy?

BRETT, J. If Davis by his negligence had damaged part of the cargo, would not Kennedy have been liable to the owner?]

It is submitted that he would not. The true test is, whose servant was Davis, not under whose immediate orders he was working; or, as Crompton, J., says in Sadler *v.* Henlock, 4 E. & B. 570, 578; 24 L. J. (Q. B.) 138, 141; cited in Warburton *v.* Great Western Railway Co., Law Rep. 2 Ex. 30: "The test is, whether the defendant retained the power of controlling the work."

[BRETT, J. How do you meet the case of Murphey *v.* Caraili cited by Mr. Russell on moving?]

There the work was being done under the control and superintendence of the warehousekeeper, and for his benefit; the persons through whose negligence the injury was caused were not in any sense acting as the servants or in pursuance of orders of the defendant. The case is so put by BRAMWELL, B., in his judgment.

C. Russell, *contra,* was not called upon.

BOVILL, C. J. Mr. Herschell has put the case very clearly before us; but his argument has failed to carry conviction to my mind. Kennedy, the stevedore, undertook to execute the work of unloading the Sutherland, and for that purpose a steam-winch belonging to the ship was placed at his disposal. The work of unloading was done by Kennedy under a special contract. He was acting on his own behalf, and did not in any sense stand in the relation of servant to the defendant. He had entire control over the work, and employed such persons as he thought proper to act under him. He had the option of using the services of the crew of the ship; but he was under no obligation to do so. Whether he selected independent laborers or part of the crew, they were all his servants, and their acts were his acts, and not the acts of the owner. The owner did not exercise any control over the work. All was left to the stevedore and those whom he employed. The stevedore paid for the labor he engaged, making an allowance to the owner of the vessel for the pay of those of the crew who assisted in the work. Davis was employed in this way by the stevedore, and was doing his work, and under his control and superintendence. In no sense, therefore, can it be said that Davis was working for or under the orders of the defendant, so as to make the maxim "Respondeat superior" apply. The defendant did not stand in the relation of superior. The rule must be made absolute to enter a nonsuit.

WILLES, J. I am of the same opinion. It is to be observed that this is not a question arising between ship-owner and charterer. The employment of stevedores has grown out of the duty of the owner to load and unload the ship. This duty used formerly to be executed by the crew; but, in dealing with large cargoes, the exigencies of modern commerce have created a necessity for the employment of persons skilled in the particular work of stowing cargo. The stevedores, however, are not the servants of the owner of the ship; but they are persons having a special employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. They are not put in his place to do an act which he intended to do for himself. I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back, and make the employer of that person liable. The question here is, whether Davis, who caused the accident, was employed at the time in doing Kennedy's work or the ship-owner's. It is possible that he might have been the servant of both; but the facts here seem to me to negative that. The rule, out of which this case forms an exception, that a servant or workman has no remedy against his employer for an injury sustained in his employ through the negligence of a fellow-servant or workman, is subordinate to another rule, and does not come into operation until a preliminary condition is fulfilled; it must be shown that, if the injury had been done to a stranger, he would have had a remedy against the person who employed the wrong-doer. Here, I apprehend, the defendant would not have been liable to the charterer if the wrongful act of Davis had caused damage to any part of the cargo; and for this simple reason, that the person doing the work in the performance of which the damage was done was not doing it as his servant. He was acting altogether independent of his control. The defendant could not have taken him away from the work. It was Kennedy's work that he was employed upon, and under Kennedy's control. The liability of a master for the acts of his servant extends only to such acts of the servant as are done by him in the course of the master's service. The master is not liable for acts done by the servant out of the scope of his duty, even though the master may have entered into a bargain that his servant should be employed by another, and is paid for such service, as was done here. It seems to me to be quite plain that the defendant incurred no liability for the act of Davis.

MONTAGUE SMITH, J. I am of the same opinion. Applying all the usual tests, the defendant was not the master of Davis in doing the work in the course of which the injury was received by the plaintiff. He was not the immediate principal of Davis, but Kennedy, who was an independent contractor as stevedore to unload the vessel, was. In order to perform his contract, it was necessary for Kennedy to employ a number of laborers. He selected them. Some of them were persons unconnected with the ship. Others were part of the crew of the vessel, employed at the request or upon the recommendation of the defendant or the master. But, though he employed them upon that recommendation, it was competent to Kennedy to reject their services. It follows, therefore, not only that Kennedy was the immediate principal for whom the work was done, but also that he was the employer of Davis, and the entire controller of the labor of those whom he employed. An ambiguity was sought to be raised from the circumstance of Davis being one of the crew; but he was employed under an arrangement by which his wages for the time were to be ultimately paid by Kennedy. I entirely agree with the rest of the court that Davis was the servant of Kennedy and not of the defendant, and was subject only to Kennedy's orders, and consequently that the defendant is not liable.

Brett, J. The ordinary contract and liability of a stevedore is well established; and the only question here is whether there was anything in the evidence to take the case out of the ordinary rule. The only circumstance relied on for that purpose is that the defendant placed the services of Davis at the disposal of the stevedore. But I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor.

Rule absolute.

LAWRENCE v. SHIPMAN.
LUX v. SHIPMAN.

Superior Court of Hartford County, Connecticut. 1873.

[39 *Conn.* 586.]

The following opinion was given by Hon. O. S. Seymour, Judge of the Supreme Court, in two cases in the Superior Court in Hartford County, submitted to him as an arbitrator, under a rule of court, by William T. Lawrence, plaintiff in the one, and Peter Lux, plaintiff in the other, and Nathaniel Shipman and George M. Bartholomew, defendants in both cases, the defendants being trustees. The questions of law considered and decided make the opinion one of interest to the profession and the public. The facts are sufficiently stated by the judge.

H. S. Barbour and *Merrill*, for the plaintiffs.

Robinson for the defendants.

JUDGE SEYMOUR'S OPINION.

These two cases have been submitted to me as arbitrator under a rule of court. The two are substantially alike. The plaintiffs were respectively tenants of the defendants, occupying a brick building called the Russ Place, which the defendants owned as trustees in fee, situate on the west side of Main street, in the city of Hartford. The plaintiffs aver that while they were thus occupying the tenement on the 13th day of July, 1869, and for several days next previous thereto, the defendants carelessly and negligently excavated and removed, and caused to be excavated and removed, the earth and foundation from under the south wall of said tenement, and did thereby remove the necessary support of said wall, and on said day had negligently and carelessly made and caused to be made the excavation and removal aforesaid, without providing other necessary support of said wall, and had negligently omitted to shore up said wall as aforesaid, although warned by the plaintiffs of the danger, whereby the wall sank and fell and the whole building was demolished, and the plaintiffs' goods of great value were destroyed.

There is no serious conflict of testimony. Indeed most of the facts are agreed to. The relation of the parties to each other is as stated in the writ. One Duffy owned the premises south of and adjoining those of the defendants, and he had pulled down a tenement on his lot in order to rebuild. Neither building had a cellar. Duffy had made considerable progress in digging a cellar on his lot, when he had a communication with the defendants proposing that they should join him in building a party wall of stone under the south wall of the defendants' tenement. Duffy's proposition was favorably entertained, and resulted in a verbal contract with a builder and mason by trade, to remove the earth from under the south wall of the defendants' tenement and underpin it with stone. He was to furnish everything needed for the job. The stone structure was to be laid eight feet below the sidewalk, and was to extend the depth of the defendants' building, and was to be two and a half feet in thickness, nine inches being on Duffy's land and one foot nine inches on the defendants' land. The price agreed on was $500, one half to be paid by Mr. Duffy and one half by the defendants. The defendants and Duffy were the contracting parties on one side and the mason on the other. The defendants did not have, nor were they by the terms of the contract to have, any oversight or direction of the job. They relied on the skill and experience of the mason to do the work properly, carefully, and according to his contract.

The contractor commenced his work about the 12th of July, undermining at first about nine feet of the defendants' wall and immediately began filling up the gap with stone. On the 13th he continued his stone work, but unfortunately and unadvisedly he undermined the wall at another place before the first gap was filled and thus weakened the foundation, so that at about half-past three o'clock in the afternoon of the 13th of July, the whole building tumbled into a mass of shapeless ruins. The occupants barely escaped with their lives, saving none of their property.

The principal question of law raised in the case arises out of the foregoing facts. Some other facts, however, appeared in evidence which will be hereafter noticed, as bearing upon the question of the defendants' liability. The first question suggested is, whether this negligence of the mason can in law be imputed to the defendants. If he was their servant his carelessness is in law theirs. If, on the other hand, he was merely a contractor, acting as such in an independent business, they are not under the general rule of law liable, though they may even then under certain circumstances be held responsible. Whatever obscurity may heretofore have rested upon the distinction between servant and contractor, it is now established law that such a distinction exists, and the elements which distinguish the one from the other by the modern decisions have been determined with considerable approach to exact-ness and accuracy, though it must be admitted that in some instances the distinction is nice and difficult. In this case it is to be noticed:

1. That the mason was employed in a single transaction at a specified price for the job.

2. By the terms of the contract he was to accomplish a certain specified result, the choice of means and methods and details being left wholly to him.

3. The employment was of a mechanic in his regular business, recognized as a distinct trade, requiring skill and experience, and to which apprenticeships are served.

4. The contractor's duty was to conform himself to the terms of the contract, and he was not subject to the immediate direction and control of his employers.

These circumstances by all the authorities indicate a contractor in contradistinction from a mere servant, and the defendants cannot in my judgment be subjected for the negligence of the contractor, upon the basis of the relation of master and servant. But it was suggested in the argument that as the contractor was at work on the defendants' property, by their procurement and for their benefit, and being selected by them, natural justice requires that they should bear the consequences of his negligence rather than the plaintiffs, who are innocent sufferers, having had no agency whatever in the transaction which caused the loss.

These suggestions are not without a show of reason, and their force is fully admitted in the law as applicable to a certain class of cases.

1. If a contractor faithfully performs his contract, and a third person is injured by the contractor, in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for negligences of the contractor, not done *under* the contract but in *violation* of it, the employer is in general not liable. It is not claimed here that the injury to the plaintiffs arose from the due *performance* of the contract. On the contrary, it resulted from the *breach* of the contract, by the contractor not doing his work with suitable care.

2. If I employ a contractor to do a job of work for me which in the progress of its execution obviously exposes others to unusual peril, I ought, I think, to be responsible upon the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. The case now before me could not, however, I think, come under this head. The peril, whatever it was, was mainly to the defendants' own tenement, and cannot be treated, notwithstanding the unfortunate event, as one at all imminent to the plaintiffs.

3. If I employ as a contractor a person incompetent and untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. This, too, has no application to the case before me. But the plaintiffs claim that the same principle is applicable to the employment of a person pecuniarily irresponsible,

and evidence was received, subject to objection, that the contractor was destitute of property; and I am called upon to decide the effect of this fact. I am not prepared to say that this fact may not be of some weight where the work to be done is hazardous to others. If a person having an interest in a job which naturally exposes others to peril, should attempt to shield himself from responsibility by contracting with a bankrupt mechanic, I think the employers might be subjected for damages done by the contractor, but, as before stated, the work to be done by the contractor involved no peril in its usual performance, and I cannot hold the defendants liable under this claim.

4. The employers may be guilty of personal neglect, connecting itself with the negligence of the contractor in such manner as to render both liable. I find no precedents to guide me under this head, but the principles of the law lead inevitably to this conclusion.

[Here follows an examination of the evidence on this point, which is omitted by the reporter; the conclusion of the judge being that the defendants had not been guilty of any personal negligence.]

I therefore award that the defendants are not guilty in manner and form as alleged.

There are other cases than those mentioned in which the employer is liable for the negligence of his contractor, but they have no special application to the matter before me. I will barely allude to them. It has always been understood that if the negligence creates a nuisance the employer is liable, though in a late English case this seems to be somewhat doubted. Overton *v.* Freeman, 11 C. B. 867. So if the contract is to do an unlawful thing, the employer as well as the contractor is liable for the damage done in the execution of the contract. There was formerly a doubt whether the owner of real property could be protected from liability caused by work upon it by a contractor, but it is now settled that real and personal property stand upon the same footing in this respect.

These cases are submitted to me as an arbitrator, with full power, as I understand, upon questions of law and fact. The plaintiffs are innocent sufferers to a large amount by the fall of this building. The suits have been very fairly conducted with a view to a full investigation of the facts and the law applicable to the facts. There are circumstances connected with the case which I think justify me in making the matter so far a mere matter of arbitration as to award that no costs be taxed against the plaintiffs, and that the arbitrator's fees be paid half by the plaintiffs and half by the defendants.

O. S. SEYMOUR.[1]

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[1] On the distinction between servants and independent contractors, and on the responsibility for the acts and omissions of the latter, see further: Blake *v.* Ferris, 5 N. Y. 48 (1851) Hilliard *v.* Richardson, 3 Gray, 349 (1855); Boswell *v.* Ladd, 8 Cal. 469 (1857); Storrs *v.* City of Utica, 17 N. Y. 104 (1858); Hole *v.* Sittingbourne & Sheerness Ry. Co., 6 H. & N. 488 (1861); Pickard *v.* Smith, 10 C. B. N. S. 470 (1861); McCafferty *v.* Spuyten Duyvil & Port Morris Railroad Co., 61 N. Y. 178

BURNS *v.* POULSOM.

COMMON PLEAS. 1873.

[*L. R.* 8 *C. P.* 563.]

ACTION against the defendant for an injury to the plaintiff through the negligence of the defendant's servant.[1]

Gully showed cause. Malone, in throwing the iron out of the cart, was not acting within the scope of his employment. His duty commenced only when the iron rails had been placed on the ground; and, in anything done by him beyond taking them from the ground to the ship, and there stowing them, he was a mere volunteer. A master is not responsible for acts done by his servant which do not fall within the ordinary scope of his authority. It is only for the negligent exercise by the servant of his duty to his master that the latter is liable.

[GROVE, J. Where the act is closely connected with the employment, must it not be a question for the jury? Can we say that this act of Malone was so wholly unconnected with the scope of his employment that it could not have been his duty to help the carter to unload the iron?]

The only question of fact for the jury was whether or not Malone had been guilty of culpable negligence.

[DENMAN, J., referred to Whatman *v.* Pearson, Law Rep. 3 C. P. 422, and Storey *v.* Ashton, Law Rep. 4 Q. B. 476.]

[The following cases were cited, — Limpus *v.* London General Omnibus Co., 1 H. & C. 526; 32 L. J. (Ex.) 34; Seymour *v.* Greenwood, 7 H. & N. 355; 30 L. J. (Ex.) 189; and Page *v.* Defries, 7 B. & S. 137.]

Crompton, in support of the rule. The plaintiff is entitled to a verdict, if there was any evidence which could properly have been submitted to the jury that Malone was acting within the scope of his employment; and that question ought to have been left to them. [The following cases were cited, — Poulton *v.* London and South Western Railway Co., Law Rep. 2 Q. B. 534; Barwick *v.* English Joint Stock Bank, Law Rep. 3 Ex. 259; The Thetis, Law Rep. 2 A. & E. 365; Bayley *v.* Manchester, Sheffield, and Lincolnshire Railway Co., Law Rep. 7 C. P. 415; in error, Law Rep. 8 C. P. 148.]

[DENMAN, J. Is it not a question of fact whether this was anything more than a slight deviation from the strict line of Malone's duty? I think it was held by the Court of Queen's Bench in a recent case of Woolley *v.* Curling, not reported, that the question whether or not an act was within the scope of the servant's authority ought to be submitted to the jury.] *Cur. adv. vult.*

(1874); Tarry *v.* Ashton, 1 Q. B. D. 314 (1876); Hughes *v.* Percival, 8 App. Cas. 443 (1883); Circleville *v.* Neuding, 41 Ohio St. 465 (1885); Hexamer *v.* Webb, 101 N. Y. 377 (1886); Norwalk Gaslight Co. *v.* Borough of Norwalk, 63 Conn. 495, 528-529 (1893). — ED.

[1] The reporter's statement is omitted. — ED.

The judges differing in opinion, the following judgments were delivered: —

Denman, J. In this case which was tried before the judge of the Passage Court at Liverpool, who nonsuited the plaintiff, a rule was obtained to set aside that nonsuit, and to enter a verdict for the plaintiff for £30 damages, if this court should think fit.

It was assumed, upon the argument of the rule, by the counsel on both sides, and I think we are also bound to assume, that this reservation means that the plaintiff is to be entitled to the verdict for £30 if this court should be of opinion that there was evidence upon which the jury might not unreasonably have found for the plaintiff. I am of opinion that there was such evidence.

The material facts proved at the trial were as follows: The defendant was a stevedore who was employed to ship some iron rails which were to go by a ship lying in the Huskisson Dock at Liverpool. He had a foreman named Malone, who on the day in question was acting for him at the dock. The iron rails were being unloaded from a cart which belonged to one Wood, and was standing at a small distance from the ship on board of which the rails were in course of being loaded. The carter, in unloading the rails, was putting them down on one side of the cart, when Malone, — for what purpose is not stated, but, I think it may be inferred, in order to assist his own operations in some way, — told him to put them on the other side, and, upon his refusal, got into the cart and threw out some rails, one of which injured the plaintiff, a passer-by.

The only evidence in relation to Poulsom's or Malone's duty in respect of the iron rails in question was as follows: The second witness, a warehouseman in the service of the plaintiff's employers, on his cross-examination, said: "Poulsom is a stevedore. He receives the iron rails after they are thrown out of the cart on to the ground, and takes them to the ship." The carter on his cross-examination said: "It is our duty to put the rails down out of the cart on the ground; and then the stevedore takes them to the ship."

It was contended for the defendant that, upon these facts, there was no evidence upon which a jury could have found a verdict for the plaintiff; and upon this ground the learned judge nonsuited the plaintiff.

The contention before us on the part of the defendant was, that, inasmuch as the duty of the stevedore did not commence, in relation to any particular portion of the rails in question, until they were on the ground, it was impossible to hold the defendant liable for the act of Malone in throwing the rail in question from the cart; that that act could not be within the scope of his employment or duty, being an act done at a period antecedent to that at which his duty in relation to the iron commenced, and at a place where he had no business to be meddling with it at all.

In my opinion, this contention of the defendant proceeds upon too narrow a view of the duty or employment of Malone; and I think that the cases applicable to the subject establish that, even though in the ordinary course of his employment, it would not be a part of Malone's duty to assist in moving the rails from the cart, it was still a question for the jury, and not for the judge, whether in this particular case he was acting within the scope of his employment.

It cannot, I think, be contended in this case that the judge or jury were bound to hold that Malone was acting for any purpose of his own, as distinguished from his master's service, as was the case in Storey *v.* Ashton, Law Rep. 4 Q. B. 476, where the carman through whose negligence the plaintiff was injured had been induced by a clerk of the defendant's to drive him in a wrong direction, after business hours, on business of the clerk's; nor, as it appears to me, if it was a question for the jury, would it be unreasonable for them to have found that he was acting within the scope of his employment, inasmuch as they might not unreasonably have thought that the act was one done for his master's benefit, and with a zealous desire to expedite the work, and, for aught I know, in a manner proper and even usual under the circumstances for a person employed as Malone was at the time.

In Joel *v.* Morison, 6 C. & P. 501, which, though a nisi prius case, is cited with approval in many other cases decided by the courts, — Parke, B., says: "The master is only liable where the servant is acting in the course of his employment:" but he immediately adds: "If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable." And earlier in the same summing-up the learned Baron says: "If the servant, being on his master's business, took a detour to call upon a friend, the master will be responsible." And this view of the law is entirely in accordance with the judgments in Whatman *v.* Pearson, Law Rep. 3 C. P. 422, cited for the plaintiff, which indeed is a stronger case, inasmuch as there the servant acted in violation of his instructions. No doubt, cases may be put in which a servant may so conduct himself, about goods of his master with which he is dealing as servant, as to make it clear that the master is not responsible for his negligence in the course of such conduct. Storey *v.* Ashton, Law Rep. 4 Q. B. 476, mentioned above, and Mitchell *v.* Crassweller, 13 C. B. 237; 22 L. J. (C. P.) 100, were such cases. But can it be said that, in the present case, it would have been unreasonable for a jury to find that the act of the foreman in getting into the cart and throwing the iron down was an act *bona fide* and not unreasonably done in the zealous discharge of his duty to his master, in the course of the business he was employed upon? And, if they were of that opinion, might they not also properly find that he was acting within the scope of his employment? I think they might, and therefore that this nonsuit was wrong, and that, by virtue of the understanding at the trial, the rule should be made absolute to enter the verdict for £30.

My Brother Grove agrees with me that in this case there was evidence for the jury, and that the nonsuit was therefore wrong.

Brett, J.[1] The question was stated in argument on both sides to be, whether there was evidence that Malone was acting within the scope of his authority. If there was, it was admitted by the defendant's counsel that the judgment should be for the plaintiff. If there was not, it was admitted by the plaintiff's counsel that the judgment should be for the defendant.

The arguments raise the question, what is the proper application in point of law in this case of the phrase or doctrine "that the servant must be acting within the scope of his authority." Some cases have raised the question whether the servant in what he did was intending to act for his master or for purposes of his own. That does not seem to me to be the point in this case. Malone may be considered to have been intending to act in performance of the duty delegated to him. In this case the question is whether the time had arrived or the circumstances had arisen for doing anything which the servant was employed to do. Had his employment commenced? "The question," says Lush, J., in Storey *v.* Ashton, Law Rep. 4 Q. B. at p. 480, "in all such cases is, whether the servant was doing that which the master employed him to do." "Where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant:" per Maule, J., in Mitchell *v.* Crassweller, 13 C. B. 237, 247; 12 L. J. (C. P.) 100. "It is not sufficient that the act should be done with intent to benefit or intent to serve the master. It must be something done in doing what the master has employed the servant to do:" per Blackburn, J., in Limpus *v.* London General Omnibus Co., 1 H. & C. 526; 32 L. J. (Ex.) 34. In Whatman *v.* Pearson, Law Rep. 3 C. P. 422, the servant was held to be acting in the course of his employment, because he was employed to manage the horse and cart during the day: per Byles, J., Law Rep. 3 C. P. at p. 425.

Now, in the present case, Brocksop, who was the warehouseman of Davis & Co., the shippers of the iron rails, stated that the defendant's employment was to receive the rails after they were thrown out of the cart on to the ground, and take them to the ship. It was, therefore, obviously the business of Davis & Co., by their own servants or some other agent of theirs, to carry the rails to the quay and place them on it, i. e., on to the ground there, for the defendant to carry them thence into the ship and there stow them. And it is obvious that Davis & Co. employed Wood, a master carter, to carry the rails to the quay and deliver them there. Strongfellow, who was Wood's carter, stated, "It is our duty to put the rails down out of the cart on the ground, and then the stevedore takes them to the ship." The joint employers of Wood and the defendant, therefore, limit the commencement of the defendant's employment to a time after the rails were on the ground. And the person employed on the previous and antecedent operation, viz., that of carrying the rails from the warehouse and delivering them out of the cart on to the quay, equally limits the commencement of the defendant's employment to the time after the rails are on the ground.

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[1] After stating the case. — Ed.

Now, what the defendant was employed to do, what he might according to that employment have done himself, he employed Malone to do. He employed Malone to carry the iron rails, after they were on the ground at the quay, thence into the ship, and there stow them. For anything done by Malone in carrying or stowing the rails, or anything done by Malone with the rails after they were on the ground, with intent to carry out his orders to take them into the ship and stow them there, the defendant would have been liable. But it seems to me that the defendant had not employed Malone to do anything with regard to the rails before they were on the ground. The defendant himself was not employed to do anything with the rails before they were on the ground. Anything voluntarily done by Malone, therefore, before the rails were on the ground, though done with intent to serve the defendant, was not a thing done which the defendant had employed Malone to do. The evidence which described and limited the employment of the defendant and of Malone was given on behalf of the plaintiff, and there was no evidence to vary or render doubtful the limitation of the commencement of that employment. There was no question which the jury would have been entitled to entertain about it. The judge was, in my opinion, bound to say that what was done by Malone was done before his employment by the defendant was called into play, that is to say, it was a thing which the defendant had not employed Malone to do.

I am of opinion, therefore, that the learned judge was right in nonsuiting the plaintiff, and that this rule ought to be discharged.

The majority of the court, however, being of a different opinion, the rule will be made absolute to set aside the nonsuit and enter a verdict for the plaintiff for £30, the damages agreed upon at the trial.

Rule absolute.

ROUNDS, BY GUARDIAN, RESPONDENT, *v.* THE DELAWARE, LACKAWANNA, AND WESTERN RAILROAD COMPANY, APPELLANT.

COURT OF APPEALS OF NEW YORK. 1876

[64 *N. Y.* 129.]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment on a verdict. (Reported below, 3 Hun, 329; 5 T. & C. 475.)

This action was brought to recover damages for injuries sustained by plaintiff in consequence of being kicked off of one of defendant's baggage cars by the baggageman.

The transaction resulting in the injury occurred at Norwich, May 3, 1872. The defendant operated a broad-gauge railroad from Binghamton to Norwich, and a narrow-gauge road from Norwich to Utica. The passenger train from Binghamton on this occasion as usual ran to the depot at Norwich and transferred the passengers and freight to the Utica train and then backed south on a switch, a distance of about sixty rods, to the round-house, to make up the new train which was to run back to Binghamton. The train consisted of the engine, an express car, a baggage and smoking car, one car divided into two compartments, and one passenger car. The conductor of the train got off with the passengers at the depot and left it in charge of the baggageman to run back on the switch and make up the new train. While the train was unloading and transferring the passengers at the depot the plaintiff, a boy twelve years old, living near the depot, got on the platform of the baggage and smoking car, at the rear end, to ride down to the round-house. A quantity of wood was piled at one point along near the west side of the track for a distance of over 100 feet. While the train was backing down the track, and when it arrived at the wood pile, the baggageman in charge of the train discovered the plaintiff on the platform and ordered him off. According to the plaintiff's testimony, he replied: "I can't, the wood is right here; I want you to help me;" and thereupon the baggageman kicked him off. He fell against the wood and rolled under the car, the wheel of which passed over and crushed his leg. A printed notice was posted up in the baggage car and another one near where the plaintiff was standing on the platform, as follows: "No person will be allowed to ride on this baggage car except the regular train men employed thereon. Conductor and baggageman must see this order strictly enforced." Another printed notice was contained in the posted time cards as follows: "Train baggagemen must not permit any person to ride in the baggage car, except the conductor and news agent connected with the train. Conductor and baggageman will be held alike accountable for a rigid enforcement of this rule."

At the close of the plaintiff's evidence the defendant's counsel moved for a nonsuit on the grounds: 1. The plaintiff was a trespasser, or wrongfully on the cars of the defendant, and is not entitled to recover. 2. The plaintiff, by his own negligence, contributed to the accident. 3. Upon the evidence the defendant was not guilty of any negligence or wrongful act in reference to the plaintiff; that the acts of Gow (baggageman), which caused the injury, were not authorized by the defendant, but were a wilful and wanton assault by Gow upon the plaintiff, and for these acts and their consequences the defendant is not responsible to the plaintiff. The court denied the motion and ruled that it was a question for the jury whether the baggageman was there acting within the authority of the company in putting the boy off, and whether he acted wilfully and wrongfully; to which the defendant excepted. After the defendant had given evidence contradicting the plaintiff's testimony, and at the close of the case, the defendant's counsel renewed his motion for a nonsuit on the same grounds, and also on the ground that no right of action is made against the defendant, and that the evidence does not warrant a submission of any question of fact to the jury which could authorize a recovery. The motion was denied and the defendant excepted. The court then submitted the following questions to the jury, to which the defendant also excepted: 1. Did Gow put the boy off the cars? 2. Was he acting within the authority given him by the defendant? 3. Was he acting maliciously and in excess of his authority?

The court then charged the jury, among other things, that the plaintiff was a trespasser on the car, but if the baggageman, nevertheless, in the discharge of his duty, pushed him off the train in an improper manner, and at a dangerous place, the defendant was liable; to which the defendant excepted. The court also charged the jury that if the baggageman pushed the boy off the train, and in doing so was acting as the employee of the defendant in good faith in the discharge of a duty he owed the company, the defendant would be liable for the careless and negligent discharge of his duty; but if he was acting wilfully and maliciously toward the plaintiff, outside of and in excess of his duty, then the baggageman alone would be responsible in law for the consequences; to which the defendant excepted and requested the court to modify the charge or to charge that defendant was not liable if the baggageman acted wilfully and wantonly without authority from defendant. This the court refused.

Francis Kernan, for the appellant.

E. H. Prindle, for the respondent.

Andrews, J. There is, at this time, but little conflict of judicial opinion in respect to the general rule by which the liability of a master for the misconduct of his servant, resulting in injury to third persons, is to be tested and ascertained. In Higgins *v.* The Watervliet Turnpike Company, 46 N. Y. 23, this subject was considered by this court, and the rule was declared to be, that the master was responsible, *civiliter*, for the wrongful act of the servant causing injury to a third person, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the master, and within the scope of the business intrusted to him. The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto. When the master is to be considered as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of difficulty. Where authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the master, and this, although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant, from which injury to a third person has resulted, that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable for the negligent or tortious act of the servant, the servant acted not only without express authority to do the wrong, but in violation of his duty to the master.

It is, in general, sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another. But it is said that the master is not responsible for the wilful act of the servant. This is the language of some of the cases, and it becomes necessary to ascertain its meaning when used in defining the master's responsibility.

The case of McManus *v.* Crickett, 1 East, 106, turned upon the form of the action and the distinction between trespass and case, but Lord Kenyon, in pronouncing the judgment of the court, said: "Where a servant quits sight of the object for which he was employed, and, without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts." This language was cited with approval in Wright *v.* Wilcox, 19 Wend. 343, and the master was held not to be responsible where the servant, in driving his master's wagon along the highway, wilfully whipped up his horses while the plaintiff's son, a young lad, was standing between the front and back wheels, attempting, with the implied permission of the servant, to get into the wagon, in consequence of which the boy was thrown down, run over, and injured. The servant was cautioned by a bystander that if he did not stop he would kill the boy. The court, in the opinion delivered, assumed that the evidence showed that the servant whipped up the horses with a wilful design to throw the boy off. The act of the servant was imminently dangerous, and it might reasonably be inferred from the evidence that he designed the injury which resulted from it. "The law," said Cowen, J., "holds such a wilful act a departure from the master's business." So in Vanderbilt *v.* The Richmond Turnpike Company, 2 Comst., 479, the master of the defendant's boat intentionally ran into the boat of the plaintiff, and the court held that this was a wilful trespass of the master for which the defendant was not liable. In Lyons *v.* Martin, 8 Ad. & El. 512, it was held that where a servant merely authorized to distrain cattle damage-feasant, drives cattle from the highway into his master's close, and there distrains them, the master is not liable. In Mali *v.* Lord, 39 N. Y., 381, the act complained of was an illegal imprisonment of the plaintiff by the servant of the defendant, and the court held that the authority to do the act could not be implied from the general employment of the servant. The imprisonment, assuming that the suspicion upon which it was made was well founded, was illegal. The master could not lawfully have detained the plaintiff if he had been present, and the court were of the opinion that the servant could not be said to be engaged in his master's business when he assumed to do what the master could not have done himself. See, also, Bolingbroke *v.* The Local Board, etc., L. R. 9 C. P. 575. It is quite useless to attempt to reconcile all the cases. The discrepancy between them arises not so much from a difference of opinion as to the rule of law on the subject as from its application to the facts of a given case.

It seems to be clear enough from the cases in this State that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. If he is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a wilful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders. In this view, the judge at the trial correctly refused to qualify his charge, or to charge that it was sufficient to exempt the defendant from liability that the act of the brakeman in putting the plaintiff off the car was wilful. He had already charged that if the brakeman acted "wilfully and maliciously towards the plaintiff, outside of and in excess of his duty," in putting him off the car, the defendant was not liable. If the counsel intended to claim that the defendant was exempt from responsibility if the brakeman acted wilfully, although without malice, the point was not well taken. That the brakeman designed to put the plaintiff off the car was not disputed, and this was consistent with the authority and duty intrusted to him. But a wilful act which will exempt a master from liability for the tort of his servant, must be done outside of his duty and his master's business. The charge was, therefore, strictly correct, and the exception was not well taken.

Neither was the defendant entitled to have the court rule, as matter of law, that, upon the circumstances as shown by the evidence on the part of the plaintiff, the defendant was not responsible. It is conceded that the removal of the plaintiff from the car was within the scope of the authority conferred upon the baggageman. The plaintiff had no right to be there. He was not a passenger or servant, and had no express or implied permission to be upon the car. The brakeman, in kicking the boy from the platform, acted violently and unreasonably, and to do this while the car was in motion, and when the space between it and the wood-pile was so small, was dangerous in the extreme. But the court could not say from the evidence that the brakeman was acting outside of and without regard to his employment, or designed to do the injury which resulted, or that the act was wilful within the rule we have stated. If the master, when sued for an injury resulting from the tortious act of his servant while apparently engaged in executing his orders, claims exemption upon the ground that the servant was, in fact, pursuing his own purposes, without reference to his master's business, and was acting maliciously and wilfully, it must, ordinarily, be left to the jury to determine this issue upon a consideration of all the facts and circumstances proved. See Jackson *v.* The Second Ave. R. R. Co., 47 N. Y. 274. There may be cases where this rule does not apply, and where the court would be justified in taking the case from the jury; but where different inferences may be drawn from the facts proved, and when, in one view, they may be consistent with the liability of the master, the case must be left to the jury. The fact that the plaintiff was a trespasser on the cars is not a defence. The lad did not forfeit his life, or subject himself to the loss of his limbs, because he was wrongfully on the car. The defendant owed him no duty of care by reason of any special relation assumed or existing between the company and him, but he was entitled to be protected against unnecessary injury by the defendant or its servants in exercising the right of removing him, and especially from the unnecessary and unjustifiable act of the brakeman by which his life was put in peril, and which resulted in his losing his limb. Sanford *v.* Eighth Ave. R. R. Co., 23 N. Y. 343; Lovett *v.* Salem, etc., R. R. Co., 9 Allen, 557; Holmes *v.* Wakefield, 12 id. 580.

No error of law was committed on the trial, and the judgment of the General Term should be affirmed, with costs.

All concur. *Judgment affirmed.*

PHELON AND WIFE *v.* STILES.
ELLEN PHELON *v.* STILES.

SUPREME COURT OF CONNECTICUT. 1876.

[43 *Conn.* 426.]

ACTIONS of trespass on the case, for injuries from the negligent acts of the servant of the defendant; brought to the Superior Court in Hartford County. The two cases involved the same facts and were tried together. The court made the following finding of facts: —

On the first day of November, 1872, Stiles was, and had for a long time been, engaged in selling flour and feed in Suffield. He then had, and for more than a year before had had, in his employ one George H. Babcock, whose principal employment was to deliver the goods so sold by Stiles to his customers. On that day, in the afternoon, Babcock took a load of twenty bags of flour and six of bran, the former to be delivered at a Mr. King's and the latter at a Mr. Smith's. Smith lived on a side road branching off from the road leading to King's, and when Babcock came to this side road he took off from his load the bags destined for Smith's and piled them up on the side of the road within the limits of the highway, and left them there while he went on to King's with the remainder. While these bags were so remaining there Mrs. Samuel C. Phelon and Mrs. Ellen Phelon were driving along the road, and their horse being frightened at the bags ran away and threw them both out and injured them.

I find that the bags so left were an object calculated to frighten horses of ordinary gentleness; that the horse driven by the plaintiffs was of ordinary gentleness; and that the plaintiffs were not guilty of any negligence which contributed to the injury.

I find that Babcock placed the bags in the highway without the knowledge or express authority of the defendant, and for the purpose of so shortening the time to be occupied by him in delivering the goods as to enable him to return to Suffield in time to take a train for Hartford on the same day on his own private business.

If the defendant was liable to pay the damages so happening to the plaintiffs, I assess the damages at the sum of three hundred dollars in each case, and I reserve for the advice of the Supreme Court the question whether Stiles is liable for the damages so caused by the acts of Babcock.

C. E. Perkins and *J. W. Johnson*, for the plaintiffs.

W. C. Case and *S. A. York*, for the defendant.

PARK, C. J. The same principles of law apply to both of these cases, and therefore they will be considered together.

The defendant claims that the court below has not found that Babcock was the servant of the defendant. We think there is no foundation for this claim. We construe the phrase, "had in his employ one George H. Babcock," as meaning that Babcock was in the employ of the defendant as a hired servant.

The principal question in the case is, whether Babcock in depositing the bags of bran intended for Mr. Smith by the side of the highway, and leaving them there until his return from Mr. King's, where he went to deliver the bags of flour, was engaged in the business of the defendant in the the regular course of his employment.

The defendant was a flour and feed merchant, and it was his practice to deliver his merchandise at the residence of his customers. Babcock was employed to make delivery, and, on the occasion in question, started with his bags of flour and bran, sold by the defendant to King and Smith, to deliver them to these parties in the regular course of his employment.

The question then is, was Babcock engaged in the defendant's business while depositing and leaving the bags by the side of the road?

The defendant claims that those acts were performed by him on his own account; that he was desirous to take a train for Hartford later in the day, on his own private business, and that he left the bags by the roadside to enable him to make his delivery more rapidly and return earlier, so that he could accomplish his purpose.

But what business of his own was he then doing? He was not then attending to private business in going to Hartford. That was to be undertaken later in the day. He left the bags to expedite the delivery. Did it make the business his own because he despatched it more speedily than it would naturally have been done? He was sent by the defendant to deliver the flour and bran. Did he do anything else than deliver them? His whole object in leaving the bran by the side of the road was to gain time. Suppose he had driven the horse with such speed as amounted to carelessness in order to gain time, and had injured a person by so doing, would he be transacting his own business while driving so rapidly, so that the defendant would not be liable? Suppose he had left the bran out of consideration for his horse, and the same result had followed, would the defendant be excused? He was under the necessity of taking the bran to Mr. King's, or of leaving it by the side of the road until his return; suppose he had taken the latter course without any special object in view, would it make any difference in the case? We think all that can be said of the matter is, that Babcock performed the defendant's business in delivering the bran in a shorter time than he would have done had he not intended to go to Hartford later in the day; and certainly the rapidity with which the business was transacted cannot operate to excuse the defendant.

The defendant further claims that the bags, left as they were by the side of the road, became a public nuisance, and that the leaving of them was therefore a public offence, and that he cannot be liable for such an act of his servant. But Babcock did not intend to create a nuisance. The case does not find that he intended any harm. All that can be said is, that he negligently left them while performing the business of the defendant, and for such negligence the defendant is of course liable. We think there is nothing in this claim.

We advise judgment for the plaintiffs.

In this opinion the other judges concurred; except FOSTER, J., who dissented.

CASWELL *v.* CROSS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1876.

[120 *Mass.* 545.]

TORT for an arrest and false imprisonment. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on an agreed statement of facts, in substance as follows: —

The defendant employed J. E. Cupples & Co. to collect a bill in his favor against the plaintiff, amounting to twelve dollars and accrued interest. Cupples & Co. advertise and hold themselves out to the public as a "Law and Collection Bureau," and have their place of business on School Street, in Boston. They are not regularly admitted attorneys, but they sue out writs upon claims placed in their hands for collection, sometimes appearing in court as the attorneys of record in their cases, and sometimes using the names of regularly admitted attorneys.

In all courts in the vicinity of Boston, where they are permitted to do so, they enter their own appearance only, and always retain the exclusive control and management of their cases in and out of court, whenever an attorney's name is entered of record. They use the name of a regularly admitted attorney for the mere purpose of complying with the rules of court. In addition to appearing in court in their own cases, they examine poor debtors arrested by them, and do the general business of regular attorneys, in making writs and declarations, levying and collecting executions, &c.

Upon the claim placed in their hands by the defendant they brought an action against the plaintiff in the Municipal Court of Boston, using the name of a regularly admitted attorney, and recovered judgment on September 1, 1874, on default, for the amount of $15.12 debt and $8.19 costs, and took out an execution in favor of the plaintiff on said judgment, which execution was duly returned in no part satisfied.

Cupples & Co. then brought another action upon said judgment in the Police Court of Charlestown, and recovered a new judgment, including the full amount of the prior judgment and costs. They then took out an execution on this last judgment, with the usual directions for the arrest of the defendant in said action; and one Perkins, who was a clerk in the employ of Cupples & Co., and who had the general management of their cases in and out of court, made an affidavit as required by law for the arrest of poor debtors, which affidavit was duly attached to said execution. Perkins then gave said execution to an officer with instructions to arrest the judgment debtor. The officer arrested him; he recognized with surety to take the oath for the relief of poor debtors, gave the required notice, submitted himself to be examined, was examined by Perkins in behalf of the judgment creditors, and was finally discharged from arrest, upon taking said oath.

The judgment upon which execution was issued, and upon which the plaintiff was thus arrested, was for less than twenty dollars, excluding the costs in that and the prior action; but this fact was unknown to the plaintiff or his attorney until after the oath had been administered to him, — both judgments having been upon default and without his actual knowledge.

The defendant gave Cupples & Co. no special instruction as to the manner in which they were to proceed, or the proceedings they were to adopt in collecting said bill. He called upon them in answer to their advertising card sent to him, a copy of which is printed in the margin.[1] He had no knowledge of the manner in which they collected bills and conducted their business, except such as he derived from this advertisement, and he had no actual knowledge of any of the proceedings of Cupples & Co. and Perkins, in trying to collect his claims against the plaintiff, or in making said affidavit, or in causing the plaintiff to be arrested, until after the bringing of this suit. He left with them several other claims against other parties for collection, at the same time, Cupples & Co. agreeing with him to make no charge against him or any of his claims unless they were successful in making the collections.

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[1] "Office of 'The New England Collecting Agency' for the Special Collection of Physicians' Accounts. 3 School Street, Room 15. Boston, Mass., Dec. 1873. Sir: As the close of the year is now at hand when it is customary for books to be made up and accounts sent out, we would again direct your attention to our agency for the collection of physicians' accounts. We have made complete arrangements for systematically and promptly collecting all such, throughout the city and neighborhood. Every effort is made to trace parties who have moved, and most energetic steps are taken to compel reluctant and dilatory debtors to settle. Should you intrust us with your collections we shall take your instructions as to the manner in which you wish your debtors treated, whether with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended. Our terms are ten per cent. commission on the amount we collect. Settlements made as often as wished. Yours obediently, J. E. Cupples & Co." — REP.

Upon the foregoing facts, if the plaintiff was entitled to recover, a default was to be entered against the defendant, and the case stand for the assessment of damages only; otherwise, judgment for the defendant.

P. H. Cooney, for the plaintiff.

C. W. Turner, for the defendant.

LORD, J. It is not necessary in this case to consider whether the relation of attorney and client existed between Cupples & Co. and the defendant, nor whether the defendant understood Cupples & Co. to hold themselves out as attorneys at law. The card sent by them to the defendant, which he received and to which he responded, contains ample notice of the character of the firm and of the business pursued by them. They held themselves out as professional duns; a character quite well enough known. Their card contains full notice of the mode in which they did business. They announced that they would act under instructions; that they had modes of doing business, either with delicacy which could not offend, or with a severity which indicated that there was to be no trifling. We think any person who employs such agents with such knowledge on his part, giving no special instructions, authorizes the agents to use, and becomes responsible for injuries caused by the use of, such means as they see fit to adopt in the prosecution of his business for his benefit, whether those means be honorable and proper or whether resort is had to insolence and insult or to misuse or abuse of legal process. They are his servants to do his work in their own manner, though that manner may be unjustifiable or illegal. This view of the case renders it unnecessary to inquire whether the mere fact that the present defendant was the plaintiff in the proceedings against Caswell, and that the execution upon which Caswell was arrested was in his name and prosecuted for his benefit would be of itself sufficient to hold the defendant responsible for the illegal arrest and imprisonment of the plaintiff. Upon the agreed statement, therefore, the defendant is to be defaulted, and the case is to stand for

Assessment of damages.[1]

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[1] Compare Smith v. Keal, 9 Q. B. D. 340, 349–354 (C. A., 1882). — ED.

ROURKE *v.* THE WHITE MOSS COLLIERY CO.

COURT OF APPEAL. 1877.

[2 *C. P. D.* 205.]

APPEAL from the decision of the Common Pleas Division, making absolute an order to enter judgment for defendants. 1 C. P. D. 556.

The action was for injuries caused to plaintiff by the negligence of defendants' servants; and was tried before Lush, J., at the Liverpool winter assizes, 1875.

The defendants were the owners of a colliery, and had begun sinking a pit or shaft, for which purpose they employed workmen (among whom was the plaintiff), and had erected a steam engine near the mouth of the shaft, and employed men to drive it. Having sunk some depth, they entered into an agreement with Roger Whittle to carry on the work for them. The following were the terms of the agreement, &c., detailed by the managing director of the defendant company in answer to interrogatories: —

"3. The sinking and excavating were executed by Roger Whittle, contractor, under a verbal contract, at a certain price per yard, Whittle to find and provide all labor necessary for such sinking, and the company to provide and place at the disposal of Whittle the necessary engine power, ropes, and hoppets, with two engineers to work the engine, one for the day and one for the night, such engineers, engine, and hoppets being under the control of the contractor,

"4. The engine, pulley, and hoppet which were used to bring to the surface the stuff excavated in the shaft were the property of the defendants, but were at the time of the accident under the control of the contractor.

"5. Ellis Lawrence, engineer, was in charge of the engine, pulley, and hoppet on the 27th of October, 1874, under the control of Whittle. Lawrence was employed by the defendant company, who on the 7th of November paid him for his work from the 21st of October to the 3d of November."

On the 27th of October, 1874, the plaintiff, being one of the men employed and paid by Whittle, was working at the bottom of the shaft, when, owing to Lawrence, the engineer, falling asleep, the engine was not stopped at the proper time, and the hoppet was overturned, and fell with its contents on the plaintiff below, and injured him severely.

A verdict was found for the plaintiff for £300, with leave to move to enter judgment for the defendants, if the court should be of opinion that the defendants were not liable to the plaintiff for Lawrence's negligence.

The Common Pleas Division ordered judgment to be entered for the defendants.

The plaintiff appealed.

L. Temple, Q. C., and *Gulley*, for the plaintiff.

Herschell, Q. C., and *McConnell*, for the defendants.

L. Temple, Q. C., in reply.

COCKBURN, C. J. I am of opinion that the judgment of the Common Pleas division should be affirmed. My mind has fluctuated during the argument; but I have been led to the opinion I have formed by the answers given to the interrogatories by the managing director of the defendant company. It is quite unnecessary to say whether the case of Wiggett *v.* Fox, 11 Ex. 832; 25 L. J. (Ex.) 188, which was relied on for the defendants, was rightly decided. My own view is that it was not; though it might agree with the decision if I could come to the conclusion that the facts were what Baron Channell appears to have thought they were, in the explanation he gives of that case in Abraham *v.* Reynolds, 5 H. & N. at pp. 149–150. But I cannot agree that the facts were as the learned Baron states them. It is, however, unnecessary to express any decided opinion on that case, because it does not apply to the present, the facts being different. I regret that our decision must be against the plaintiff, for he has sustained a serious injury owing to the negligence of a man who undoubtedly was at the time of the accident the general servant of the defendants, and who had been placed by them in the position he occupied. But these circumstances afford no ground, in point of law, for visiting the defendants with the result of the man's negligence, if he was not in point of fact their servant at the time, in the sense of being actually employed to do their work. If the agreement had been that, whereas Whittle was to sink the shaft and get away the soil, and do all the necessary work to make a proper shaft, yet that incidentally to this work the defendants had undertaken to do part of it themselves by means of their machinery and servants — so that this part of the work would have been carried on independently of Whittle and not under his control, — then the defendants would have been liable. For in that case Lawrence, the engineman, would have continued to be the servant of the company, and would have been working as their servant at their work. But when we look at the answers to the interrogatories the facts amount to no more or less than this: Whereas Whittle would have been obliged to hire an engine and engineers in order to carry out the excavation which he had undertaken, the company, having already an engine and attendants on the spot, say to the contractor, "We have got an engine and enginemen already, and it shall be part of the contract that we will let you have them to do your work and to be under your control, and we will pay you so much the less per yard than we should have done had you been obliged to find the engine and pay the engineer yourself." It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him. Looking at the present case, I think we must arrive at the conclusion that Lawrence was practically in Whittle's service at the time he was guilty of the negligence complained of; and this being so, it follows that Lawrence became the fellow-servant of the plaintiff; and it is settled law, which it is now too late to disturb, that a servant cannot recover damages from his employer for any injury he may have sustained through the negligence of a fellow-servant. Therefore, Lawrence and the plaintiff, being fellow-servants in the employ of Whittle, it follows that the plaintiff cannot maintain an action against the defendants. The judgment must, therefore, be affirmed.[1]

Judgment affirmed.[2]

EVANS *v.* DAVIDSON.

COURT OF APPEALS OF MARYLAND. 1880.

[53 *Md.* 245.]

APPEAL from the Circuit Court for Cecil County.

The case is stated in the opinion of the court.

Exception.— At the trial the plaintiff offered the following prayers: —

1. If the jury believe that the defendant's servant, in the course of his master's service, negligently killed the plaintiff's cow, the plaintiff is entitled to recover the value of said cow.

2. That if the jury find that the servant of the defendant killed the plaintiff's cow, by negligently knocking it on the head with a stone while driving said cow out of defendant's field, and shall also find that said cow was at the time eating up the corn of the defendant, and had escaped into said field through a defect in defendant's fences, which he was bound to repair, and that at the time the said servant was in the defendant's employ, hired for a period of nine months to do general farm work, and had, on the day of the injury complained of, been sent into said corn-field to cultivate said corn, and that the defendant was absent at said time, that then the plaintiff is entitled to recover; provided the jury shall believe that the servant was acting in the course of his employment, at the time of the killing, and that it was part of

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[1] Concurring opinions were pronounced by MELLISH, L. J., BAGGALLAY, J. A., and BRAMWELL, J. A. — ED.

[2] *Acc.:* Miller *v.* M. & N. W. Railway Co., 76 Iowa, 655 (1888); Powell *v.* Construction Co., 88 Tenn. 692 (1890); Wyllie *v.* Palmer, 137 N. Y. 248 (1893); Donovan *v.* Laing, &c., Construction Syndicate, [1893] 1 Q. B. 629 (C. A.); Byrne *v.* K. C., Ft. S. & M. R. Co., 61 Fed. R. 605 (C. C. A., Sixth Circuit, 1894).

Contra: Burton *v.* G., H. & S. A. Ry. Co., 61 Tex. 526 (1884); New Orleans, &c., Railroad Co. *v.* Norwood, 62 Miss. 565 (1885). Compare Omoa Coal & Iron Co. *v.* Huntley, 2 C. P. D. 464 (1877). — ED.

said servant's duty to protect his said master's corn by driving cattle from said field.

3. That it is not necessary, to establish the master's liability for the acts of his servant, that he should direct the particular act, but if the jury believe that he was placed by his master, in his stead, to do the class of acts necessary to be done to protect his master's property, it will be sufficient authority from the master to authorize the servant to do an act within such class; and if the jury believe that the defendant's servant was sent in this case to cultivate his master's corn, in his master's absence, and that the plaintiff's cow, together with about thirty other cattle, broke into said corn-field, and were eating up said corn of the defendant, and shall find that the said servant of the defendant was employed at the time by the nine months, to do general farm work for the defendant, that then there is evidence in the case from which the jury may find that in driving said cow of the plaintiff from defendant's corn-field, and protecting his corn, the servant was acting in the service of his master, with his master's authority.

The defendant prayed the court to instruct the jury: —

That there is no evidence in this case legally sufficient to entitle the plaintiff to recover.

The court (ROBINSON and STUMP, JJ.) granted the defendant's prayer, but rejected the plaintiff's prayers; the plaintiff excepted, and the verdict and judgment being for the defendant, the plaintiff appealed.

The cause was argued before BARTOL, C. J., MILLER, ALVEY, and IRVING, JJ.

Albert Constable and *Henry W. Archer*, for the appellant.

George A. Blake and *W. E. Evans*, for the appellee.

ALVEY, J., delivered the opinion of the court.

The only substantial question in this case is whether the defendant, the present appellee, is liable for the wrongful act of his servant in killing the plaintiff's cow while driving her out of the defendant's corn-field.

It appears in proof that the defendant was a farmer, and that his farm adjoined that of one Boulden; that he had employed on his farm negro Lewis and two other negro hands, and that they were employed for a period of nine months to do general farm work on the farm; that on the day the plaintiff's cow was killed the defendant was away from home, and that the three negro servants or hirelings were at work in the corn-field, cultivating the corn, when a herd of cattle, consisting of about thirty head, among which was the plaintiff's cow, broke into the defendant's corn-field, where his hirelings were at work, from the adjoining farm belonging to Boulden; and that upon discovering the cattle among the corn the servants "immediately started to drive them out, and in doing so the said negro Lewis negligently struck the plaintiff's cow with a stone and killed her before she had left the field." There was also proof on the part of the defendant that he had given no orders in regard to driving cattle out of the field, and that he did not know that the cattle were in the corn until after the cow had been killed.

The court below, at the instance of the defendant, instructed the jury that there was no evidence in the cause legally sufficient to entitle the plaintiff to recover. To this ruling and the rejection of the prayers offered by the plaintiff the latter excepted.

There is no question as to whether the relation of master and servant existed between the defendant and the party doing the wrongful act complained of; that is conceded. But the question is whether the act of driving the cow out of the corn-field was within the scope of the servant's employment under the circumstances of the case.

If that act was, either expressly or by fair implication, embraced within the employment to do general farm work on the defendant's farm, then it is clear the latter is liable for any wrong or negligence committed by the servant in doing the act authorized to be done. In one sense, where there is no express command by the master, all wrongful acts done by the servant may be said to be beyond the scope of the authority given; but the liability of the master is not determined upon any such restricted interpretation of the authority and duty of the servant. If the servant be acting at the time in the course of his master's service and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown. This general principle is sanctioned by all the authorities. Baltimore & Ohio R. Co. *v.* Blocher, 27 Md. 277; B. & Y. Turnpike Co. *v.* Boone, 45 id. 344; Turberville *v.* Stampe, 1 Ld. Raym. 265; Huzzey *v.* Field, 2 C. M. & R. 439; Seymour *v.* Greenwood, 7 H. & N. 354; Limpus *v.* London Gen. Omnibus Co., 1 H. & Colt. 526; Barwick *v.* English Joint Stock Bank, L. R., 2 Exch. 262; Wood Mast. & Servt., § 307, and the authorities there collected. Therefore the fact that the master gave no express direction in regard to driving the cattle out of the corn-field and did not know of their being in it until after the doing the injury complained of, will not avail to exonerate the master, if the servant was acting in the course of his employment.

Was then the servant acting in the course of his employment? What is embraced, as commonly understood, in general farm work? In the very nature of the employment there must be some implied authority and duties belonging to it; and this as well for the protection of the master as third parties. If, for instance, a servant thus employed should see a gate open or a panel or fence down, through which a herd of cattle might or would likely enter and destroy his master's grain, we suppose all would say that it would be the positive duty of the servant to close the gate or put up the fence, to prevent the destruction of the grain; and if he should pass by and wilfully neglect such duty, it would constitute cause and a sufficient justification for the discharge of the servant. If that be so, how much more imperative the duty where, as in this case, in the absence of the master, the servant being in the field at work, and seeing a herd of cattle break into the field, and in the act of destroying the corn, to drive out the cattle and thus to save the corn from destruction? To do such act, for the preservation of the growing crop, must be regarded as ordinary farm work, and such as every farmer, employing a servant to do general farm work, would reasonably contemplate and have a right to expect as matter of duty from the servant. The servant, therefore, was acting in the course of his employment in driving out the cattle, and if he did, while driving them out, commit the wrong complained of, the master is liable therefor.

It follows that we cannot concur with the court below in the instruction given to the jury; and for the reasons already stated, we think the first and second prayers offered by the plaintiff should have been granted. The plaintiff's third prayer seems to have been intended, not so much as an instruction upon the law of the case, as an instruction as to the conclusion of fact at which the jury were at liberty to arrive upon finding certain other facts. This form of prayer is not free from objection, and there was no error in rejecting it.

Judgment reversed, and new trial awarded.

STEVENS AND ANOTHER *v.* WOODWARD AND OTHERS.

QUEEN'S BENCH DIVISION. 1881.

[6 *Q. B. D.* 318.]

APPEAL from the Lord Mayor's Court.

Action for negligence. At the trial before the Recorder it appeared that the plaintiffs occupied premises beneath the offices of the defendants, who were solicitors. Evidence was given for the plaintiffs that a quantity of water had come from the offices of the defendants, and it was found to have escaped from a tap left open in a lavatory there. It damaged the property of the plaintiffs. At the close of the plaintiffs' case, counsel for the defendants submitted that there should be a nonsuit as there was no evidence that the defendants or any servant of them had been guilty of negligence, and he cited Ross *v.* Fedden, Law Rep., 7 Q. B. 661. The learned judge declined to nonsuit, whereupon evidence for the defendants was given, and one of them said: "The lavatory is in my room, and is for my own use exclusively, and my orders are that no clerk shall come into my room after I have left. I left the office on the 12th of August, at 5.45, after washing my hands and turning off the tap." A clerk of the defendants said, "I went into the room of the last witness to wash my hands. I turned the tap and the water did not flow, and then I went out." The jury found a verdict for the plaintiffs for £15, and leave was reserved to the defendants to move for a nonsuit if the court should be of opinion that there was no evidence of negligence, or that under the circumstances the defendants were not liable.

A rule having been obtained accordingly,

Candy showed cause. The learned Recorder was right in refusing to nonsuit, and also in leaving the case to the jury. They have decided the question. If the master himself had left the tap open he would have been undoubtedly liable. The clerk to a solicitor is more than a servant, he acts for his employer in his absence. Here the clerk was in the office during working hours, and it was part of the routine of the day's work to wash his hands. It is the general practice for such clerks to wash their hands in the offices where they are employed. Here the clerks' room contained a lavatory for their use, but the water failed there, and so the clerk went to the other room. That he was forbidden to do so is irrelevant. Whatman *v.* Pearson, Law Rep. 3 C. P. 422. He was acting within the scope of his employment. Venables *v.* Smith, 2 Q. B. D. 279. This case is not like Storey *v.* Ashton, Law Rep. 4 Q. B. 476, where the defendant's carman after business hours drove a clerk out on business of his own, and was negligent while on the independent journey. In such cases no doubt the master is not liable: Mitchell *v.* Crassweller, 13 C. B. 237. The question is whether the subordinate is acting within the scope of his authority if he be an agent, or in the course of his employment if he be a servant. The clerk here was so acting.

Petheram, Q. C. (*De Witt* and *G. G. Kennedy* with him), in support of the rule. The principle is well stated in Whatman *v.* Pearson, by Montague Smith, J. Here the clerk was acting for himself, and on his own responsibility. His duty was clearly to keep in his own room, and not to wash his hands in the room of his master. Could it be said that the master would have been liable if the clerk had washed his hands at some tavern near during office hours and had left the tap there running? His negligent act was not in the scope of his employment, and the defendants are not answerable for the consequences. If the contention for the plaintiffs were right, a master would be liable for any independent and wrongful act of the servant done on the employer's premises.

Grove, J. I am of opinion that the verdict should be entered for the defendants. No doubt this question is a very nice one, and there may be cases close to the line between the liability and non-liability of a master for the act of another person done in the "course of his employment" if he is servant, or within the "scope of his authority" when he is an agent, for as Mr. Candy well says, such is the mode in which those terms have been applied by the courts, although the words "scope of authority" may cover both cases. The facts are simple. The defendants were solicitors, with a clerk who had an office or some room in which he was entitled to be, and where, if he wished to wash his hands he could, as the learned counsel admits, wash them. The master left the premises, whether finally for the evening or not does not distinctly appear, nor is it, I think, material. He had left, and he says, "The lavatory is in my room, and is for my own use exclusively, and my orders are that no clerk shall come into my room after I have left." The clerk therefore would have no right to enter contrary to this particular prohibition, *prima facie* at least he would not be entitled to do so, and the *onus* would lie on the plaintiffs to show that the clerk had permission to use his master's room. The case is a little stronger by reason of the prohibition, but I quite agree with Mr. Candy that there are cases where a prohibition would have no effect, and I cannot put a nearer one than that I suggested during argument: suppose this were not a clerk, but a housemaid, whose duty it was to clean up the room and attend to the lavatory and wipe out the basin; then I think that, although she was expressly prohibited from using the basin, and was told not to leave the tap open, yet, notwithstanding the prohibition, her act of using the basin and omitting to turn off the water would be so incident to her employment that the master would be liable. Although a definition is difficult, I should say that the act for which the master is to be held liable must be something incident to the employment for which the servant is hired, and which it is his duty to perform. All the cases tend to show, and Mitchell *v.* Crassweller and Storey *v.* Ashton, point out clearly that line of distinction; in one case a servant was employed to drive his master's cart, and after coming home to the stable started off on a fresh journey for his own purposes, and during that second journey, which was not incident in any way to his employment, an accident happened; in the other case, which goes a little further, before the servant put up the cart he turned off and went in another direction, making a détour, and an accident happened; in both those cases the master was held not liable. I think I should have come to the same conclusion as that I have arrived at if there had been no express prohibition in the case, and it had merely been shown that the clerks had a room of their own and a lavatory where they could wash their hands. Then what possible part of the clerk's employment could it be for him to go into his master's room to use his master's lavatory, and not only the water but probably his soap and towels, solely for his, the clerk's own purposes? What is there in any way incident to his employment as a clerk? I see nothing. The case seems to me just the same as if he had gone up two or three flights of stairs and washed his hands in his master's bedroom. It is a voluntary trespass on the portion of the house private to his master. I do not use the word trespass in the sense of anything seriously wrong, but he had no business there at all. In doing that which his employment did not in any way authorize him to do he negligently left the stop-cock open, and the water escaped and did damage. I think there was nothing in this within the scope of his authority or incident to the ordinary duties of his employment. Then it is said that is a question for the jury, and that if there is evidence on both sides the court is bound to accept the finding of fact

That is so where there is a conflict of evidence, but there is no conflict here. The plaintiffs' case was one of apparent probability, that the water came from premises in which a stop-cock was left open. That might happen in various ways, but the learned Recorder seemed to think he must assume, until the contrary was shown, that there was an implied liability on the defendants. If, however, that was removed by uncontradicted evidence, showing the implication to be a mistake, as it would have been if the defendants had shown that a stranger, some friend of one of the clerks, had come in and washed his hands in the lavatory and had left the stop-cock open, surely those facts would dispose of the *prima facie* liability. The prohibition is material as showing the local limit of the clerk's duties. The case is wholly free from any conflict of evidence, for the jury believed the evidence given both for the plaintiffs and the defendants, it being quite consistent. The evidence for the plaintiffs made out a ground of liability, and the evidence for the defendants limited it, by showing that the clerk was not in the relation of servant to the master in respect of this particular act of neglect. I think the judgment should be for the defendants.

Lindley, J. I am of the same opinion, and I agree for much the same reasons. I do not see on what principle the defendants are to be held liable for a negligent act of a man who trespasses in their room and leaves their tap running. The facts show that the clerk was a trespasser after his master had left. I think this a plain case, and that our judgment should be for the defendants, with costs.

Rule absolute.[1]

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[1] Compare Ruddiman *v.* Smith, 60 L. T. Rep. N. S. 708 (Q. B. D., 1889). There the defendants, manufacturing stationers, supplied in their apartments a lavatory for the use of their clerks. A few minutes after the close of business, the foreman went to the lavatory to wash his hands, found the water had been turned off, and negligently left the tap open. When the water was turned on, damage was done to the premises and goods of the plaintiffs, who sublet from the defendants the floor below. In the Lord Mayor's Court of London the Recorder gave judgment for the plaintiffs. The defendants appealed. The Queen's Bench Division dismissed the appeal. Lord **Coleridge**, C. J., said: "The master is liable if the act of negligence was done by the servant, either within the scope of his authority or as an incident to his employment. I say, with some doubt, on the variety of cases decided, that it might have been within the scope of his employment to wash his hands; I should say it was, though I do not desire to place my judgment upon that, as I am clearly of opinion that it was an incident to his employment. In such houses there is generally some place for the clerks to hang up their hats, and a lavatory, and so on; all these things are incident to the employment. . . . Stevens *v.* Woodward, as far as the decision goes, is a decision by which the master was held not liable, but held not liable by both judges on the ground that the clerk had been forbidden to do what he had done. . . . The ground on which that case was decided was, that there was an act of trespass committed, and that it would be monstrous to make the person against whom that trespass was committed liable for the damage thereby caused. . . . I do not wish to place my judgment on the case of Rylands *v.* Fletcher, L. R. 3 H. L. 330." **Hawkins**, J., said: "I rest my judgment entirely on the ground that it was intended that the clerks should use this tap in the course of their employment; that this clerk did use it in the course of his employment, and for the negligent use of the tap the master is liable. . . . Here there is a lavatory provided for the use of the clerks, the clerk uses it, and it is as a clerk, and because he is a clerk, that he uses it." — **Ed.**

MORIER *v.* ST. PAUL, MINNEAPOLIS, & MANITOBA RAILWAY COMPANY.

SUPREME COURT OF MINNESOTA. 1884.

[31 *Minn.* 351.]

APPEAL by defendant from an order of the District Court for Polk County, STEARNS, J., presiding, refusing a new trial.

R. B. Galusha and *P. A. Dufour*, for appellant.

R. Reynolds, for respondent.

MITCHELL, J. All the evidence in this case tends to prove that some section men, under the charge of a section foreman, were, in the employment of defendant, engaged in repairing its railroad near defendant's farm, on the 21st of October, 1882. While engaged in such work, they usually returned to their boarding-house for dinner, but on this day, their work being at some distance, they took their dinner with them. At noon, when they quit work to eat, they built a fire, or rekindled one which some other person had kindled, on defendant's right of way, for the purpose of warming their coffee. After eating dinner they resumed their work, negligently leaving the fire unextinguished, which spread in the grass and ran on to plaintiff's land and burned his hay. There is no evidence that the defendant was boarding these men, or that it was any part of its duty to prepare or cook their meals. Neither is there anything tending to show that the defendant either knew or authorized the kindling of a fire for any such purpose, either on this or any other occasion. Nor is their any evidence that it was the duty of these section men to exercise any supervision over the right of way, or to extinguish fires that might be ignited on it. So far as the evidence goes, their employment was exclusively in repairing the railroad track.

The doctrine of the liability of the master for the wrongful acts of his servant is predicated upon the maxims, *respondeat superior* and *qui facit per alium facit per se.* In fact, it rests upon the doctrine of agency. Therefore, the universal test of the master's liability is whether there was authority, express or implied, for doing the act; that is, was it one done in the course and within the scope of the servant's employment? If it be done in the course of and within the scope of the employment, the master will be liable for the act, whether negligent, fraudulent, deceitful, or an act of positive malfeasance. Smith on Master & Servant, 151. But a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was *at the time* engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, *pro tempore*, the master is not liable. If the servant step aside from his master's business, *for however short a time*, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. 2 Thompson on Negligence, 885, 886; Shearman & Redf. on Negligence, §§ 62, 63; Cooley on Torts, 533 *et seq.*; Little Miami R. Co. *v.* Wetmore, 20 Ohio St. 110; Storey *v.* Ashton, L. R. 4 Q. B. 476; Mitchell *v.* Crassweller, 13 Com. B. 237; McClenaghan *v.* Brock, 5 Rich. (Law) 17.

It would seem to follow, as an inevitable conclusion, from this, that on the facts of this case the act of these section men in building a fire to warm their own dinner was in no sense an act done in the course of and within the scope of their employment, or in the execution of defendant's business. For the time being they had stepped aside from that business, and in building this fire they were engaged exclusively in their own business, as much as they were when eating their dinner; and were for the time being their own masters, as much as when they ate their breakfast that morning, or went to bed the night before. The fact that they did it on defendant's right of way is wholly immaterial, in the absence of any evidence that defendant knew of or authorized the act. Had they gone upon the plaintiff's farm and built the fire, the case would have been precisely the same. It can no more be said that this act was done in the defendant's business, and within the scope of their employment, than would the act of one of these men in lighting his pipe, after eating his dinner, and carelessly throwing the burning match into the grass. See Williams *v.* Jones, 3 Hurl. & C. 256. The fact that the section foreman assisted in or even directed the act does not alter the case. In doing so he was as much his own master, and doing his own business as were the section men. Had it appeared that it was a part of his duty to look after the premises generally, and extinguish fires that might be ignited on them, his omission to put out the fire might possibly, within the case of Chapman *v.* N. Y. C. R. Co., 33 N. Y. 369, be considered the negligence of the defendant.

But nothing of the kind appears, and the burden is upon plaintiff to prove affirmatively every fact necessary to establish defendant's liability.

Order reversed, and new trial granted.[1]

SINGER MANUFACTURING CO. *v.* RAHN.

SUPREME COURT OF THE UNITED STATES. 1889.

[132 *U. S.* 518.]

ERROR to the Circuit Court of the United States for the District of Minnesota.

The original action was brought by Katie Rahn, a citizen of Minnesota, against the Singer Manufacturing Company, a corporation of New Jersey, for personal injuries done to the plaintiff by carelessly driving a horse and wagon against her when crossing a street in Minneapolis. The complaint alleged that the driver of the wagon was the defendant's servant and engaged in its business. The answer denied this, and alleged that the driver, one Corbett, was engaged in selling sewing-machines on commission, and not otherwise, for the defendant. The replication denied the allegations of the answer.

At the trial before a jury, after the plaintiff had introduced evidence to maintain the issues on her part, the defendant put in evidence the contract between itself and Corbett, headed "Canvasser's Salary and Commission Contract," the material provisions of which were as follows: —

"1st. The party of the first part agrees to pay unto the party of the second part, for his services in selling and leasing the Singer sewing-machines, five dollars for each and every acceptable sale of a new machine sold by him; and in addition to said five dollars a further sum of ten per cent of the gross price realized for said sales so made shall be paid to said second party, which, in addition to the five dollars on each acceptable sale, shall be deemed a selling commission.

"2d. The party of the first part shall pay unto the second party, for his further services, a collecting commission of ten per cent on the amounts or balances due from customers having purchased machines from him, payable as the cash shall be collected and paid over to the said first party or its authorized representative at Minneapolis; and the said per centum so paid shall be in full for the services of said second party in collecting or other service rendered to date thereof."

"7th. The said first party agrees to furnish a wagon, and any damage to said wagon through negligence shall be at the cost and expense of said second party; and the said second party agrees to furnish a horse and harness, to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business; and said second party agrees to give his exclusive time and best energies to said business, and pay all expenses attending same.

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[1] See Williams *v.* Jones, 3 H. & C. 256 (1864), s. c. in Exchequer Chamber, 3 H. & C. 602 (1865). — ED.

"8th. The said second party agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe, and in all respects to comport himself to the best interests of the business of the said first party, and to neither sign nor to make use of the name of the said company in any manner whereby the public or any individual may be led to believe that the said company is responsible for his actions, said party's power being simply to make sales and turn over the proceeds to the said first party. If any special acts are required of said second party, the power to perform the same will be specially delegated."

"10th. It is further agreed that if said second party sells any other than the machines furnished to him by said first party, it shall work a forfeiture of any commissions that accrue under this agreement, if violated prior to the termination of the same."

"12th. This agreement may be terminated by the first party at any time, and by said second party by giving first party ten days' notice in writing."

The defendant requested the court to instruct the jury "that the contract under which Corbett, the driver of the horse causing the accident, was operating made him an independent contractor, and the defendant could not be liable for any damage done through his negligence, if he was negligent." The court declined to give the instruction requested, and instructed the jury that the contract established the relation of servant and master between Corbett and the defendant, and that the defendant was answerable for Corbett's negligence while engaged in its service.

The jury returned a verdict for the plaintiff in the sum of $10,000, upon which judgment was rendered; and the defendant tendered a bill of exceptions, and sued out this writ of error.

Mr. *Grosvenor Lowrey* and Mr. *Joseph S. Auerbach*, for plaintiff in error.

Mr. *W. P. Clough*, Mr. *John W. Willis*, and Mr. *Charles A. Ebert*, for defendant in error.

Mr. Justice GRAY, after stating the case as above reported, delivered the opinion of the court.

The general rules that must govern this case are undisputed, and the only controversy is as to their application to the contract between the defendant company and Corbett, the driver, by whose negligence the plaintiff was injured.

A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. Philadelphia & Reading Railroad *v.* Derby, 14 How. 468, 486. And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words "not only what shall be done, but how it shall be done." Railroad Co. *v.* Hanning, 15 Wall. 649, 656.

The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled "Canvasser's Salary and Commission Contract." The compensation to be paid by the company to Corbett, for selling its machines, consisting of "a selling commission" on the price of machines sold by him, and "a collecting commission" on the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for his "services." The company may discharge him by terminating the contract at any time, whereas he can terminate it only upon ten days' notice. The company is to furnish him with a wagon; and the horse and harness to be furnished by him are "to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business."

But what is more significant, Corbett "agrees to give his exclusive time and best energies to said business," and is to forfeit all his commissions under the contract, if while it is in force he sells any machines other than those furnished to him by the company; and he further "agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe."

In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.

The provision of the contract, that Corbett shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

The Circuit Court therefore rightly held that Corbett was the defendant's servant, for whose negligence in the course of his employment, the defendant was responsible to the plaintiff. Railroad Co. *v.* Hanning, above cited; Linnehan *v.* Rollins, 137 Mass. 123; Regina *v.* Turner, 11 Cox Crim. Cas. 551.

Judgment affirmed.[1]

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[1] See Pickens *v.* Diecker, 21 Ohio St. 212 (1871). — ED.

STAPLES *v.* SCHMID.

SUPREME COURT OF RHODE ISLAND. 1893.

[26 *Atl. R.* 193.]

ACTION by Phoebe A. Staples against John M. Schmid and another to recover for her wrongful arrest, caused by defendants. There was judgment for plaintiff, and defendants petition for a new trial. New trial granted, provided plaintiff refused to remit all damages in excess of $100.

George J. West, for plaintiff.

Frederick Rueckert, for defendants.

DOUGLAS, J. The jury have substantially found in this case that the defendants' salesman, erroneously suspecting the plaintiff of having stolen a package of spoons from the store, which was in his charge, detained her, sent for a police officer, and caused her to be sent to the police station, and there searched, and they assessed the damages to the plaintiff in the sum of $750. The defendants bring their petition for a new trial, alleging that the verdict is against the evidence; that, if the facts were as found, the defendants are not liable; and that the damages are excessive. The questions of law involved are raised by exceptions to the refusal of the presiding judge to rule as requested by the defendants, and by exceptions to the charge as given. The proposition upon which these exceptions are based, and which the defendants contend is established by the cases he cites, is that, as matter of law, it is not within the scope of the employment of a salesman left in charge of a store to cause the arrest and search of a person whom he believes to have stolen property from his custody. The general rule defining the liability of a master for the acts of his servant is thus laid down in Wood on Master and Servant (section 279): "For all acts done by the servant under the express orders or direction of the master, as well as for all acts done in the execution of his master's business within the scope of his employment, the master is responsible; but when the act is not within the scope of his employment, or in obedience to the master's orders, it is the act of the servant, and not of the master, and the servant alone is responsible therefor." The principle of the rule is stated by Andrews, J., in Rounds *v.* Railroad Co., 64 N. Y. 129.[1] . . .

It is not contended that this general rule is not settled by reason and authority, but the defendants say that the acts here complained of were not within the scope of their agent's employment. It is obvious that in most cases the question is one of fact. What are the limitations of an agent's or a servant's authority depends generally upon the things he is to do, the object he is set to accomplish, the degree of discretion which the position where he is placed and the exigencies of the occasion reasonably call for. These are matters of common knowledge when they pertain to the ordinary occupations of men, matters of fact, as well known to the jury as to the court, or inferences of fact from well-known or proven facts, which it is as much the province of the jury to draw as it is the province of the court to carry out a principle of law to particular deductions. It is only when the act under consideration is clearly foreign to the scope of the employment that the court can exclude it as a matter of law. Opinion of Denman, J., for a majority of the court in Burns v. Poulson, 42 Law J. C. P. 302, L. R. 8 C. P. 563. "What is or is not within the course of the servant's employment or the course of his authority is, within certain limits, a question of fact; and the decisions of the courts on the subject are not altogether consistent, or easily to be reconciled." Add. Torts (6th ed. by H. G. Wood), * 107. Some of these inconsistencies have evidently arisen from attempts to ascertain sharp legal distinctions where the cases presented legitimately only questions of fact. Bearing in mind these considerations, we may now consider the cases cited by counsel as settling principles by which this case should be decided.

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[1] A quotation from Rounds *v.* D. L. & W. Railroad Co., *ante*, pp. 218, 220–221, is omitted. — ED.

Two principles seem to be recognized by the English cases cited: First, that, when a servant not specially appointed to protect property arrests a person whom he supposes to have stolen his master's goods, the servant must be presumed to have acted in pursuance of his duty as a good citizen, and not in the scope of his employment as a servant. This was strenuously urged by counsel in Edwards v. Railway Co., L. R. 5 C. P. 445, and was adopted by the court as the rule for that case. We doubt its cogency as a rule of universal application. The arrest of a thief is not an ordinary necessity of commercial business. An attempt to steal is an extraordinary event which puts the guardian of the property to an instantaneous election of means to frustrate it. A clerk or salesman in such a case may *ex necessitate* be invested with duties and powers which are more germane to the scope of employment of an officer. The opinions of the judges, however, are instructive in this connection as showing assent to the converse of the proposition, which is nearer the case at bar. Keating, J. (page 448), says: "If there is any evidence to fix the defendants, it must be upon an implied authority resulting from Holmes' position as their servant, and that raises broadly, the question whether a person in the position of Holmes has implied authority to give into custody any one whom he suspects to have stolen his master's goods. I think there is no such implied authority. It is admitted that the point is new, and that there is no case in which such an authority has been assumed to exist. . . . There seems no grounds for saying that what was done was in the ordinary course of the business of the company, nor that it was for their benefit, except in so far as it is for the benefit of all the queen's subjects that a criminal should be convicted. If Holmes acted from a sense of the duty which rests on every one to give in charge a person whom he thinks is committing a felony, his conduct would in no way be connected with the defendants." Montague Smith, J., says: "No doubt, if in furtherance of the particular business of the company it is necessary to arrest a person, the servants of the company have an implied authority to do it. . . . Here, however, the cause of the arrest was not at all connected with the company's business, and it cannot, I think, be presumed that the company gave authority to their servants generally to apprehend any person whom the servants think is committing a felony, even though on the company's property." Brett, J., "It is not enough that the act should be for the benefit of the master, but it must be in the ordinary course of business, in order that an authority to do it may be implied. In the case of a person being arrested for breaking the company's by-laws, it may well be said that this is the way in which the company carry on their business; and similarly if an officer be appointed expressly to watch the company's property. I should think, if he took an innocent person into custody on the charge of stealing, it might well be said that the company were liable." In Allen *v.* Railway Co., L. R. 6 Q. B. 65, a booking clerk for the railway company caused the arrest of a person who had apparently attempted to rob the till in his charge. The attempt was unsuccessful, and had ceased at the time of the arrest. It was held that such an arrest was not in the scope of the clerk's employment, its object being the punishment of the offence, not the protection of the property, but, in the course of his opinion, Blackburn, J., says (page 68): "I am inclined to think that if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, it might be that that also might be within the authority of a person in charge of a till. I am not, however, prepared to pronounce a a decided opinion on these supposed cases. The present case is altogether different. There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done." Second, that it cannot be inferred as matter of law that a master has authorized his servant to do an act which he could not lawfully do himself in the circumstances supposed by the servant to exist. In Poulton *v.* Railway Co., L. R. 2 Q. B. 534, this proposition is thus expressed by Mr. Justice Shee (page 541): "An authority cannot be implied to have been given to a servant to do an act which, if his master were on the spot, the master would not be justified in doing on the assumption of a particular state of facts." The servant in this case caused the arrest of a passenger because he supposed the freight due for transportation of the passenger's horse had not been paid. If the supposition had been true, the arrest would have been unlawful, and there could be no implied authority, because the limit of the servant's powers was defined by act of parliament. In the same case, Blackburn, J., says (page 538): "There can be no question that where a railway company, or any other body, have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority to do all those things on their behalf which are right and proper in the exigencies of their business, — all such things, as somebody must make up his mind, on behalf of the company, whether they should be done or not; and the fact that the company are absent, and the person is there to manage their affairs, is *primâ facie* evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake, or commit an excess, while acting within the scope of his authority, his employers are responsible for it."

In applying the principle of this case, its limitations must not be forgotten.

1. It is a rule for the court, in the absence of evidence bearing upon the issue. It does not prevent a logical inference of fact from proven facts, even when that inference is that the master has directed a wrong. The court of appeals of New York, in Lynch *v.* Railroad Co., 90 N. Y. 77, found that the jury were justified in believing from the evidence that the gate-keeper was expected by the company to detain persons who refused to present tickets or to pay their fares. The scope of the employment being thus ascertained, they say (page 86): "In anything that he did he did not act for any purpose of his own, but to discharge what he believed to be his duty to his principal. It matters not that he exceeded the powers conferred upon him by his principal, and that he did an act which the principal was not authorized to do, so long as he acted in the line of his duty, or, being engaged in the service of the defendant, attempted to perform a duty pertaining, or which he believed to pertain, to that service. He detained the plaintiff at the [railroad] station, caused his arrest, went with the police officer to the police station, there made a complaint, and then the next morning appeared before the police magistrate, and renewed his complaint. These were successive steps taken by the gate-keeper to enforce the payment of the fare by the plaintiff, or to punish him for refusing to pay it, and for all that he did the defendant is responsible." See, also, Smith *v.* Webster, 23 Mich. 298; Barden *v.* Felch, 109 Mass. 154.

2. Neither does this principle forbid the court to imply the responsibility of the master for the wrongful or excessive exercise of the servant's discretion in a case where the act done would have been lawful if the supposed circumstances had been real. This limitation, carefully made by Mr. Justice Shee, seems to have been ignored in the case of Mali *v.* Lord, 39 N. Y. 381, which is cited by counsel as decisive of the case at bar. The opinion delivered by Judge Grover, rests the case upon the reasoning of Poulton *v.* Railway Co., but makes, as

we think, an unwarranted extension of it. The court say (page 384): "It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present. The master would not, if present, be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods, and secreted them upon his person. The authority of the superintendent could not, therefore, be implied from his employment." It is quite true that the master would have had no right to arrest and search an innocent person; but it is equally true that he would have had the right to detain a thief, and to recapture his property from him. The case, therefore, was one where the act, aside from any excessive force, might be lawful or unlawful according to whether the supposed circumstances were real or unreal. The servant was left in a situation where he was obliged to determine the fact, and where his duty to his master depended upon his decision. The decision was his, as the substitute of the master, and the act was one intended by him to be for his master's benefit, and which his duty required if the facts were as supposed; hence, as to third persons, it was the master's act. The criterion of the master's liability can never be whether the act would have been lawful for the master to have done in the circumstances as they actually existed.

It remains to apply these principles to the case at bar. The servant in this case was left with an assistant in charge of his master's store. His ordinary duties undoubtedly were to show goods, and to sell them to customers. It was, however, equally his duty to protect his master's property from pilfering. The acts complained of were evidently done with that intention. The arrest was for the purpose of searching for and recovering the master's property, not with the object of punishing crime against the public. The establishment was not a railroad station where the multiplicity of employees confines each one to a narrow round of duties, where special officers are stationed to preserve order and detain criminals; nor a large dry goods emporium, where detectives and watchmen are employed to guard against thieves. The servant here was salesman and custodian in one. Whatever the master might do in the protection of his property he expected his servant to do in his absence. If the servant had seen the plaintiff take up and secrete the package of spoons in question, and had allowed her to walk away with them unmolested, could any one say that he had not been derelict in his duty to his master? If, in the performance of this duty, he mistook the occasion for it, or exceeded his powers, or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master. We conclude, therefore, that the directions asked by the defendants were rightly refused, and that the charge correctly stated the law of the case. We are not convinced by an examination of the testimony that the preponderance of evidence is so strongly against the verdict as to warrant us in disturbing it. If the jury believed the plaintiff instead of the clerk and the police officer, they were justified in finding the verdict of guilty. The damages, however, which were awarded are grossly excessive as compensation for the wrong which the plaintiff suffered. They must have been estimated on the supposition that exemplary or punitive damages were allowable in a case of this kind. The law upon this point was settled at an early day by this court in the case of Hagan *v.* Railroad Co., 3 R. I. 88, where the late Chief Justice Brayton clearly shows that, unless the principal participates in or approves the wrong of his servant, he can be held only for the actual damages occasioned thereby. The opinion of Judge Brayton is quoted with approval by the supreme court of the United States in the recent case of Lake Shore & M. S. Railway Co. *v.* Prentice, 147 U. S. 101. For this reason we think a new trial should be granted, unless the plaintiff will consent to remit the damages in excess of the sum of $100.[1]

BOWLER *v.* O'CONNELL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[162 *Mass.* 319].

TORT, for personal injuries occasioned to the plaintiff by being kicked by a colt belonging to the defendants. At the trial in the Superior Court, before MASON, C. J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions. The material facts appear in the opinion.

G. D. Robinson, (*T. B. O'Donnell* with him), for the defendants.

W. H. Brooks, for the plaintiff.

ALLEN, J. In determining the legal question which is presented, we must assume that the jury adopted the plaintiff's view as to the circumstances attending the accident, and the testimony in contradiction thereof may be disregarded. With reference to this aspect of the case, the defendants asked an instruction to the jury that they were not responsible for the acts of Frank O'Connell, who was thirteen years of age and the son of one of the defendants, in his invitation to the plaintiff to take a ride upon the colt. The jury, however, were instructed that, if Frank O'Connell was the servant of the defendants in leading the colt from the stable to the defendants' yard, and while so leading the colt the plaintiff, who was between five and six years of age, was invited by Frank to ride, and was injured as he was going forward to accept the invitation, it would be competent for the jury to find that such invitation was within the scope of the employment of Frank; and again, that if, while Frank was leading the colt along or across the sidewalk or in the yard of the defendants, as the servant of the defendants, and, while so leading the colt in the line of his duty, he of his own accord, and without the knowledge or authority of or direction from the defendants, invited the plaintiff to ride upon the horse, and while the plaintiff was attempting to go forward to accept the invitation of Frank he was injured, it was competent for the jury to find the action of Frank to be negligent, and such negligence to be within the scope of his employment.

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[1] As to causing arrest, compare Goff *v.* Great Northern Railway Co., 3 E. & E. 672 (1861); Palmeri *v.* Manhattan Railway Co., 133 N. Y. 261 (1892); Central Railway Co. *v.* Brewer, 78 Md. 394 (1894). See also Ramsden *v.* B. & A. Railroad Co., 104 Mass. 117 (1870). — ED.

The correctness of these instructions is to be determined with reference to the testimony in the case. The colt, it would seem, was about two years and nine months old. It was not harnessed into a wagon, but the boy Frank, who must be assumed to have been in the defendants' employment, was leading it from the watering-tub to his stall, or to some other place. The defendants were contractors and excavators, and owned many teams. There was nothing to show that it was any part of their business, or that it was their habit or custom, to furnish horses or colts to ride, or to allow boys to ride upon them, or that they in any way ever authorized or permitted Frank to do this. Under this state of things, we are unable to see how the invitation by Frank to the plaintiff to ride upon the colt, although given while Frank was engaged in his employment, can be considered to be an act done in the course of such employment, or for the purpose of doing the business of his masters. The true test of liability on the part of the defendants is this. Was the invitation given in the course of doing their work, or for the purpose of accomplishing it? Was this act done for the purpose, or as a means, of doing what Frank was employed to do? If not, then in respect to that act he was not in the course of the defendants' business.

An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master. And under this rule, in view of the testimony, the defendants were not responsible for the consequences of Frank's invitation to the plaintiff to ride upon the colt. Howe *v.* Newmarch, 12 Allen, 49; Hawks *v.* Charlemont, 107 Mass. 414; Hawes *v.* Knowles, 114 Mass. 518; Levi *v.* Brooks, 121 Mass. 501; George *v.* Gobey, 128 Mass. 289, 290; Wallace *v.* Merrimack River Navigation & Express Co., 134 Mass. 95; Walton *v.* New York Central Sleeping Car Co., 139 Mass. 556; Young *v.* South Boston Ice Co., 150 Mass. 527; Mitchell *v.* Crassweller, 13 C. B. 237; Croft *v.* Alison, 4 B. & Ald. 590; Limpus *v.* London General Omnibus Co., 1 H. & C. 526; Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259, 265; Storey *v.* Ashton, L. R. 4 Q. B. 476; British Mutual Banking Co. *v.* Charnwood Forest Railway, 18 Q. B. D. 714; Snyder *v.* Hannibal & St. Joseph Railroad, 60 Mo. 413, 419; Morier *v.* St.

Paul, Minneapolis, & Manitoba Railway, 31 Minn. 351; Davis *v.* Houghtellin, 33 Neb. 582.

There may be cases where injuries result from accepting unauthorized invitations to ride which do not fall within the above rule, and are to be distinguished. Such cases may be found in the books, and need not be considered here, the circumstances being different.

Under the circumstances disclosed in the present case, it was not competent for the jury to find that the invitation given to the plaintiff to ride was within the scope of Frank's employment, and for this reason there must be a new trial. *Exceptions sustained.*

ILLINOIS CENTRAL RAILROAD CO. *v.* LATHAM.

SUPREME COURT OF MISSISSIPPI. 1894.

[16 *So. R.* 757.]

APPEAL from Circuit Court, Panola county: EUGENE JOHNSON, Judge. "To be officially reported."

Action by Lincoln Latham against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Mayes & Harris, for appellant.

G. D. Shauds, for appellee.

WHITFIELD, J. Accepting the plaintiff's testimony as true, it appears that he was riding on top of the coach to avoid the payment of his fare, and did not go back to the caboose because he feared the conductor would say something. He got on at Memphis to go to Sardis. The fare was $1.50. The brakeman did not demand $1.50, but 50 cents. He did not eject him when the demand for 50 cents was first made and declined, and not until the transit was nearly terminated, Under the rules introduced by plaintiff, and as explained by Homer Williams, a witness for plaintiff, it would have been the duty of the brakeman to report to the conductor the presence of plaintiff on the train, and acted, as to his ejection, under the conductor's orders. The brakeman made no report to the conductor whatever, but acted independently of him. Failing to get the money, — the 50 cents, — he cursed the plaintiff, and shoved him off the moving train. Surely, in no just and reasonable view can it be held that in the acts of the brakeman, thus done, was he acting in his master's business, or with intent to perform any duty due to the master. He was not demanding fare, but money to put in his pocket. He did not eject him under the orders of the conductor, nor when, aside from any orders of the conductor, he first discovered him, nor at the next station. He was plainly attempting to extort money for his private use. We are not prepared to hold that it may not be the implied duty of a brakeman to eject trespassers, on the idea clearly put by Judge Andrews in Hoffman *v.* Railroad Co., 87 N. Y. 28, that "the implied authority in such a case is an inference from the nature of the business, and its actual daily exercise according to common observation and experience," — a statement of the law copied literally and approved in Railroad Co. *v.* Kelley (Kan.), 14 Pac. 173. It is true the contrary is held in Bess *v.* Railroad Co., 35 W. Va. 492; 14 S. E. 234, and possibly in other cases; but what may be the better reason is not now before us, and we leave this open, as not necessary now to decide. The question here is whether the brakeman, in doing what he did, as he did it, was acting for the company, or in the accomplishment solely of his own independent, wilful, malicious, and wicked purposes; using his authority to eject trespassers, if any there were, as a mere cover under which to extort money from appellee, not for fare, but for his pocket. The case in 14 Pac. 173 is clearly a case where the injured boy was ejected from the train as a trespasser, simply to get him off, as being improperly on the train, in execution of what the court held the implied duty of the brakeman to eject trespassers. Manifestly, in that case the brakeman acted in discharge of what he deemed a duty to the company. There was no hint in that case of any act done by the brakeman for his own private benefit, or to gratify even private malice. The true rule is thus clearly announced in Rounds *v.* Railroad Co., 64 N. Y., at page 136.[1] . . . We approve this as an admirable statement of the law. It is true that ordinarily the question whether the brakeman's act was within the line of his duty, done for the master and in his business, is one of fact, for the jury, since ordinarily there is conflict in the evidence; but in this case, on the plaintiff's own testimony, the court should have granted the peremptory charge, following the cases of Railway Co. *v.* McAfee, 71 Miss. 70, 14 South. 260, and Railroad Co. *v.* Harris, 71 Miss. 74, 14 South. 263.

Judgment reversed and cause remanded.

McGILVRAY *v.* WEST END STREET RAILWAY COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1895.

[41 *N. E. R.* 116.]

APPEAL from Superior Court, Suffolk county; JOHN HOPKINS, Judge. Action by Daniel McGilvray against the West End Street Railway Company for an assault committed by one of defendant's employees.

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[1] The passage appears at pp. 222–223, *ante.* — ED.

The court ruled that plaintiff had no evidence on which to go to the jury, and he excepts. Exceptions overruled.

Plaintiff testified that while he was standing in the street with one foot on the sidewalk and the other on the step to defendant's car-house, waiting for a car, he complained to the conductor of the car which had just been switched into the car-house, because the conductor had not told him that the car was not going through, and that the conductor, after saying that plaintiff had not asked him if it was going further, and after certain other conversation, assaulted him.

L. M. Child, for plaintiff.

Wm. B. Sprout, for defendant.

Barker, J. If we assume in favor of the plaintiff that, upon the evidence, the jury might find that he had paid his fare through to Prospect Street, and that, in addition to his right to remain unmolested upon the public street, he had the right, upon leaving the car which had been switched into the stable, to inquire of the conductor why the contract to carry him to Prospect Street was not carried out, and to enter the stable to ascertain when and how he could be carried to his destination, yet the verdict for the defendant was rightly ordered. The only reasonable inference to be drawn from the whole evidence is that while waiting in the public street to take one of the defendant's cars, he saw fit to engage in an altercation with a person who was in fact one of the defendant's servants, and received from him an assault which was not made for any purpose which the jury could find to be part of the defendant's business. The defendant had no control over the place where the plaintiff was, and no duty to protect the plaintiff there from any assaults, although it would be responsible to him for assaults committed upon him there, as elsewhere, by its servants in the scope of their employment. The suggestion that it could be found within the scope of that employment for a servant to punish him for asserting his rights against the defendant is of course untenable; nor is there sufficient ground in the suggestion that the assault was for the purpose of putting him out of the defendant's premises to warrant submitting the case to a jury. *Exceptions overruled.*

SECTION III.

Contracts.[1]

PATERSON *v.* TASH.

NISI PRIUS. 1742–43.

[2 *Str.* 1178.]

IT was held by LEE, C. J., that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt.

And the jury found accordingly.[2]

HAZARD *v.* TREADWELL.

NISI PRIUS, PRATT, C. J., 1768.

[1 *Str.* 506.]

THE defendant, who was a considerable dealer in iron, and known to the plaintiff as such, though they had never dealt together before, sent a waterman to the plaintiff for iron on trust, and paid for it afterwards.

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[1] Cases on undisclosed principals are found in Chapter V. — ED.

[2] "It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell, and an authority to mortgage or pledge, is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money, but when those goods are deposited by way of security for money borrowed it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely, that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title, unaccompanied by any indebtedness, to their full equivalent in money." *Per* Lord SELBORNE, in City Bank *v.* Barrow, 5 App. Cas. 664, 670 (H. L., 1880).

In England the doctrine of the principal case has been largely abrogated by the Factors Acts. See 4 Geo. IV. c. 83 (1823); 6 Geo. IV. c. 94 (1825); 5 & 6 Vict. c. 39 (1842); 40 & 41 Vict. c. 39 (1877); 52 & 53 Vict. c. 45 (1889). And so in many of the United States. For examples of the American statutes as to factors and other persons entrusted with possession or with bills of lading, warehouse receipts, and the like, see Public General Laws of Maryland (1888), art. 2 (from Laws of 1825, c. 182, and of 1849, c. 293); Revised Statutes of New York (eighth ed.) 2517–2518 (from Laws of 1830, c. 179); Brightly's Purdon's Digest of Pennsylvania Statutes (twelfth ed.), 867 (from Act of Apr. 14, 1834); Revised Statutes of Ohio (1880), secs. 3214–3220 (from Laws of 1844, p. 49); Public Statutes of Massachusetts (1882), c. 71 (from Statutes of 1845, c. 193). — ED.

He sent the same waterman a second time with ready money, who received the goods, but did not pay for them; and the CHIEF JUSTICE ruled the sending him upon trust the first time and paying for the goods, was giving him credit, so as to charge the defendant upon the second contract.

FENN *v.* HARRISON.

KING'S BENCH, 1790.

[3 *T. R.* 757.]

ON a motion for a new trial, the facts appeared to be these: This was an action for money lent, money paid by the plaintiffs to the use of the defendants, and money had and received by the defendants to the use of the plaintiffs. A bill of exchange was drawn by Livesay and Co. on Gibson and Johnson in favor of one Norman, which came by indorsement to the defendants; who, being desirous of getting it discounted, employed Francis Huet for that purpose, telling him to carry it to market and get cash for it, but that they would not indorse it. F. Huet applied to his brother James Huet to get the bill discounted, informing him that it was the defendants' bill, and that though they did not choose to indorse it, yet he added (as a reason of his own) that, as their number was on the bill, it was equivalent to an indorsement; and that he (F. Huet) would indemnify him if he indorsed the bill. On an application by James Huet to the plaintiffs, and on his indorsing the bill, without which indorsement he could not have got the bill discounted, the plaintiffs discounted it; chiefly relying on the credit of Gibson and Johnson, for at that time they did not know that the defendants had had any concern with the bill. Afterwards however, on the failure of Gibson and Johnson, the plaintiffs, having heard that the bill had passed through the defendants' hands, applied to them for payment, who at first refused, but afterwards promised to take it up; and, on their not doing so, this action was brought to recover the amount of it. Lord KENYON, before whom the cause was tried, after reporting the above facts, said that he had told the jury that, if they were of opinion that James Huet had made himself answerable to the plaintiffs, as agent for the defendants, that was a sufficient consideration for the defendants' promise; and that they were of that opinion, and found a verdict[1] for the plaintiffs.

A rule having been obtained to show cause why the verdict should not be set aside, and another trial granted, on the ground that this was *nudum pactum;*

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[1] This was a second verdict: the plaintiffs had obtained a former verdict; but the Court granted a new trial (without much discussion) for the purpose of having the subject better considered. — REP.

Bearcroft and *Erskine* now showed cause against it; contending that the promise made by the defendants was binding on them, whether considered as given by them when under a moral obligation to pay, or as having received a legal and valuable consideration for it. As to the first; it cannot be denied but that so much money belonging to the plaintiffs has got into the pockets of the defendants, for which they have received no consideration. This therefore was a sum which in conscience and morality the defendants were bound to pay to the plaintiffs; and that alone, though there were strictly no legal debt, is a sufficient consideration on which to raise a promise. But, 2dly, there was also a legal and valuable consideration; because the plaintiffs had a right of action against James Huet, who might have resorted to the defendants for an indemnity for an act done as their agent. For as James Huet, in putting his indorsement on the bill, acted by the direction of his brother, who was the avowed agent of the defendants, even admitting that F. Huet exceeded his authority, yet as he acted within the scope of his employment, which was to raise money on the bill for the defendants, they must be bound by his acts: and they have a remedy over against him. But it does not appear that F. Huet did exceed his authority; for the only restraint imposed on him by the defendants was not to indorse in their names, because they did not wish that their names should appear on the bill, but they did not mean to restrain him from indorsing the bill, or any other person for him, provided the money could not be raised on any other terms; and that turned out to be the case. And whatever doubt there might have been originally whether either of these agents had exceeded his authority, yet the defendants by their subsequent promise have recognized and adopted the acts of their agent, and made themselves immediately answerable to the plaintiffs.

Mingay and *Law*, in support of the rule, insisted that the defendants were under no moral or legal obligation when they made the promise in question, and consequently that it was not binding. The argument of the plaintiffs proceeds on a false foundation: for it supposes that Francis Huet was not circumscribed in his authority; whereas the very reverse of that appears from the facts reported. The substance of the authority given by the defendants to F. Huet was that he should sell the bill; for that they would not make themselves liable either on the bill by their indorsement, or by any other circuitous mode. The very circumstance of their refusing to indorse the bill negatives any idea that they meant to make themselves responsible through the indorsement of any other person for them. As therefore the agent exceeded his authority, the principals (the defendants) are not bound, any more than the owner of a horse would be by the warranty of his servant, whom he authorized to sell it with an express direction not to warrant.[1] Neither were the defendants under any moral obligation to pay; for the plaintiffs took the bill on the credit of Gibson and Johnson, and of J. Huet; and at that time they did not even know that the bill had passed through the hands of the defendants. Therefore the plaintiffs have no more equity than the defendants.

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[1] *Vide* Godb. 361, 2 Rol. Rep. 270, and 1 Rol. Abr. 95, V. pl. 1. — Rep.

Lord KENYON, C. J. This is a question of great nicety; and during the trial of the cause I entertained considerable doubts upon the subject, and even at this moment the utmost that I can say is that the leaning of my mind is in favor of the verdict. It is extremely clear that, if the holder of a bill of exchange send it to market without indorsing his name upon it, neither morality or the laws of this country will compel him to refund the money, for which he has sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter into circulation to impose upon the world, instead of the current coin. In this case, therefore if the defendants had known the bill to be bad, there is no doubt but that they would have been obliged to refund the money. I agree with the defendants' counsel that Francis Huet was circumscribed in his authority; and, if that circumstance would protect the defendants, they would not be answerable in this action. But I am of opinion that that circumstance is not a decisive answer to this action. For I very much doubt the case, alluded to by the defendants' counsel, of the servant warranting the horse against the direction of his master; to such a case I think the maxim, *respondeat superior* applies; and the principal has his remedy against his agent for his misconduct. But the difficulty I meet with is this, this is not an action wherein Francis Huet calls on the defendants for an indemnity; if it were, I admit that, as he exceeded the authority of his principal, he could not recover against him. But here James Huet, who is an innocent man, and not involved in the misconduct of his brother Francis Huet, has a claim on the defendants. When James Huet received this bill, he was informed that it came from the defendants; and, on his asking why they had not indorsed it, he was told by Francis Huet that they had done that which was equivalent to it, for that their number was on it; in this indeed he was mistaken. However he told James Huet that he should be safe, and that he would guarantee him, on which the latter indorsed his name on the bill, and thus indorsed, it got into the hands of the plaintiffs. Then it is clear that the plaintiffs might resort to James Huet for payment: and that brings it to this question, whether James Huet, who took the bill from Francis Huet, knowing him to be the agent of the defendants, has not a right to call on the defendants, who constituted Francis Huet their agent, although that agent exceeded his authority? I think that he has. And if so, that is a good consideration for the promise made by the defendants.

ASHHURST, J. Although I have had doubts upon this case, I am of opinion that the defendants are not liable. If Francis Huet had been the general agent of the defendants, I admit that they would be chargeable with his acts: but it appears from the evidence that he was constituted their particular agent with a circumscribed authority. And that brings it to the case put at the bar of the sale of a horse; where I take the distinction to be, that, if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant:[1] but if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment. And that is like this case: Here F. Huet, who was employed by the defendants to get the bill discounted, was expressly directed by them not to indorse it, which was equivalent to saying that they would not pay it. I agree that F. Huet would be liable to James Huet, either as for money paid to his use, or on the express promise to guarantee: but there it stops; for, as to the defendants, he paid the money in his own wrong, because the authority which they gave was exceeded. Therefore, on the whole, I think that the defendants are neither liable on account of the indorsement made by James Huet, nor on their subsequent promise to pay, because not being under any obligation, it was *nudum pactum.*

Buller, J. I confess that this does not appear to me to be a case of much difficulty; for, when the facts are understood, the consequences follow of course. The result of my opinion is that, as between these parties, the plaintiffs have no conscience or equity, and that the defendants are not under any legal or moral obligation whatever to pay the amount of this bill. I consider this action as a new attempt; and it is difficult to say to what extent it may be carried, if it be encouraged. In the case of a bill of exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself; the acceptor, the drawer, and the indorsers, are all liable in their turns, but they are only liable because they have written their names on the bill. But this is an attempt to make some other persons liable, whose names do not appear on the bill, and that under circumstances very alarming to mercantile houses through whose hands bills of exchange pass. For even indorsers, whose names are on the bill, can only be called on after notice of non-payment, and without delay. But if these defendants be answerable, by what rule are we to be guided; what notice is to be given to them; are they to be liable at any distance of time? I think this is a dangerous attempt, and ought to be discouraged; for in all cases arising on bills of exchange, there should be some limitation of time, beyond which none of the parties should be called on. In this case the defendants said in the most express terms that they would not make themselves liable on the bill; for when they told F. Huet that they would not indorse it, it was the same as if they had told him in terms to sell it. When a person refuses to indorse a bill, it cannot be implied that he means to make himself liable on the bill, much less in a more extensive way than if he had indorsed it. The authority of F. Huet was circumscribed; he was mistaken in what he said to J. Huet; he did not even desire J. Huet to act on the authority of the defendants; he thought that the defendants would be liable; but that was merely his opinion. F. Huet therefore did not pledge the names of the defendants in any way whatever: consequently they were under no obligation whatever to promise, and it is *nudum pactum.* I agree with my brother Ashhurst, that there is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent, constituted so for a particular purpose and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority; for that would be to say that one man may bind another against his consent. There is a class of cases, which have been thought to bear extremely hard upon masters, who are held liable for the misfeasance of their servants in driving their carriages against those of third persons: but those cases have been determined on the ground that it must be presumed that the servants have acted under the orders of their masters. But suppose a master ordered his servant not to take his horses and carriage out of the stable, and the latter went in defiance of his master's orders; there is no authority which says that the master shall be liable for any injury done to another by such an act of the servant: though indeed if the master had ordered the servant to go a particular journey, and in the course of it the latter did an injury to some third person, the authorities, which have been determined, say that the master is liable in that case.

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[1] *Vide* 10 Mod. 109. — Rep.

Grose, J. As I have had great doubts on this case, I am glad to have heard the opinions of my Brothers before I deliver my own. The question is, whether at the time when the defendants made this promise it was *nudum pactum*, or whether there were any legal consideration for it. In the first place, this is a new attempt to make the defendants liable as if they had indorsed the bill, when in fact they refused to indorse it. The substance of the conversation between the defendants and F. Huet was this; they said, "Take the bill, get it discounted, and sell it, but we will not be answerable to the holder of the bill in any way whatever." If that be so, undoubtedly they were not liable to the holder; and then the subsequent promise is without consideration, unless something passed at the time when it was made to raise a consideration. But nothing is stated to show that the defendants received any benefit, or that the plaintiffs renounced any advantage. A strong circumstance in this case is, that at the time of the original transaction the credit of Gibson *v.* Johnson was much relied on. Then there is no pretence to impute fraud to any of the parties; and, if not, the morality follows the law. I consider this as a new and dangerous attempt to make the defendants liable, and that even beyond the extent to which indorsers are; and if we were to make them liable, it would be difficult to say what law attaches on them. As to the distinction between a general and a particular agency; I think it was pointedly put by my Brother Ashhurst, with whom I entirely agree.

Rule absolute.[1]

FENN *v.* HARRISON.

King's Bench. 1791.

[4 *T. R.* 177.]

On the third trial of this cause at the sittings after last term before Lord Kenyon, the same evidence was given as on the second trial, with this difference, that, when the defendants desired F. Huet to get the bill discounted, they did not say that they would not indorse it. The jury found a verdict for the plaintiffs, which the defendants' counsel moved in this term to set aside: but, after arguments at the bar by *Bearcroft*, *Erskine*, and *Baldwin*, in support of the verdict, and *Mingay*, and *Law*, on the other side,

The Court were unanimously of opinion that the rule for setting aside the verdict, and for granting a new trial, should be discharged; on the ground that, as the defendants had authorized F. Huet to get the bill discounted, without restraining his authority as to the mode of doing it, they were bound by his acts: and that, if it were doubtful, from the conversation which passed between the defendants and F. Huet at the time when they applied to him to get the bill discounted, what authority the defendants intended to confer on F. Huet in this transaction, their subsequent conduct, in promising to pay the bill, was decisive. But

Ashhurst, Buller, and Grose, Justices, said that, unless the evidence on this trial had varied from that given before, they should have continued to entertain the same opinion which they delivered on the former occasion.

Rule to grant a new trial discharged.

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[1] Vide *post*, 4 vol. 177, s. c.—Rep.

GARDNER *v.* BAILLIE.

KING'S BENCH. 1796.

[6 *T. R.* 591.]

THIS was an action on a bill of exchange, drawn by the plaintiff on the 4th of September, 1793, for £793 7*s.* 6*d.* on the defendant by the name and description of Mrs. C. Baillie, executrix of J. B., accepted by E. Thornton for and on behalf of the defendant, it being averred that Thornton was duly authorized by the defendant to accept the same on her account.

At the trial before Lord KENYON at the Sittings after the last term it was proved on behalf of the plaintiff that Thornton, who acted under a letter of attorney from the defendant, accepted the bill in question, which was drawn and accepted for a debt due to the plaintiff from the defendant's testator; and evidence was offered to prove that the defendant had paid other bills drawn on her by other creditors of J. Baillie, and accepted on her account by Thornton who on those occasions also acted under this power of attorney, but Lord KENYON thought the evidence inadmissible. A verdict was taken for the plaintiff for the amount of the bill, with liberty for the defendant to move to set it aside and to enter up a nonsuit, if this Court should be of opinion that the plaintiff ought not to recover. The principal question in the cause was, whether Thornton had power under this letter of attorney to accept bills of exchange for the defendant; because, if he had, the verdict was right. By the letter, after reciting that the defendant had been appointed executrix of J. Baillie, who was entitled to considerable sums of money on mortgage bonds, bills, notes, unsettled accounts, &c. the defendant appointed Thornton her attorney, as executrix, to ask, demand, sue for, and receive all sums, &c. "which at the time of J. B.'s death were due to him and which were then due to her as executrix;" in her name, as executrix, to adjust and settle all accounts, differences, &c., wherein she, as executrix, was interested; to submit the same to arbitration (if necessary), and for that purpose in her name as executrix to execute any bond, &c.; to execute for her and in her name, as executrix, assignments of mortgages, receipts, releases, &c.; for her and in her name as executrix and agreeably to the due course and order of law to pay all debts, &c. due from her as executrix, whether on mortgage bond, bill, note, or otherwise; and generally for her, as executrix, to do all such further acts for receiving debts and discharging the powers given by the letter of attorney; and giving full power to do and act "touching and concerning all or any of the said premises as effectually to all intents, constructions, and purposes, whatsoever, as she, as executrix, could, &c."

A motion was accordingly made to set aside the verdict; and it was argued on a former day by

Erskine and *Park* for the plaintiff, and

Gibbs, *Chambre*, and *Giles*, for the defendant;

The former contending that, as Thornton was expressly authorized to receive and pay all sums due to and from the defendant, to refer any matters in dispute between her and any other person to arbitration, and generally to do all further and other lawful and reasonable acts as to him should seem proper, he had power to bind the defendant by accepting the bill in question on her account, it being for a legal debt due from her as executrix. The point, relative to the admissibility of the evidence rejected, was not now insisted on.

For the defendant it was argued that the accepting of this bill by Thornton was an excess of his authority not warranted by the power, because it would charge her in her own right, whereas the letter of attorney only authorized Thornton to bind her as executrix, the letter being cautiously drawn with that view.

The Court said that though they had no doubt about the case, yet as there was a similar cause (said to be) depending in the Court of Common Pleas on the construction of the same letter of attorney, it would be proper not to decide this case until they had had an opportunity of conferring with the judges of that court on the subject. And on this day,

Lord KENYON, C. J., said there was no reason why the Court should any longer suspend their judgment in this case, as they were all clearly of opinion that Thornton had no authority to bind the defendant by accepting the bill of exchange on her account, and consequently that the action could not be maintained. That they had consulted with the judges of the court of Common Pleas, who authorized him to say that they concurred in this opinion respecting the construction of the letter of attorney, but that there were other circumstances in that case.

Rule absolute.

HOWARD *v.* BAILLIE.

COMMON PLEAS. 1796.

[2 *H. Bl.* 618.]

THE facts of this case, and such of the arguments as were material, are stated in the following judgment, which was thus delivered in the name of the Court by the LORD CHIEF JUSTICE: —[1]

A new trial has been moved for in this cause, in which the plaintiffs, being the drawers of a bill of exchange upon the defendant, dated 10th January, 1794, for £290 18*s.* 3*d.* value in account with James Baillie (whose executrix the defendant is), payable upon the 1st of September,

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[1] Sir JAMES EYRE. — ED.

1795, to their own order, and which bill of exchange was accepted by the defendant by Edmund Thornton her procurator, having recovered a verdict for £330 damages. The ground made for this application is, that upon the case in evidence Mr. Thornton was not the procurator for the defendant duly authorized to accept this bill for her. The case was shortly this: Mrs. Colin Baillie, being the sole acting executrix of James Baillie, who died possessed of a large West India and other property, and largely indebted to many persons, and among others to the plaintiffs in the sum of £290 18*s.* 3*d.*, executed a power of attorney to George Baillie and Edmund Thornton jointly and severally to act for her in collecting and getting in the estate of the deceased, and paying his debts. These two persons acted under the power. The business respecting the estate was transacted by one or other of them at the counting-house where James Baillie's business was carried on in his lifetime, and where the business of a new firm, at the head of which was George Baillie, was also carried on after the death of James Baillie. At this counting-house the bill in question was accepted, in the name of the defendant, by Edmund Thornton one of the attorneys, as her procurator, in payment of a debt due from the estate of James Baillie; and this was a mode adopted by the attorneys, [whether with or without the privity of Mrs. Baillie at present I do not stay to inquire] for the payment of the tradesmen's bills due from the estate. For the defendant it is insisted, that the attorneys had no authority to provide for the payment of the testator's debts in this manner, that they were to administer the assets for the executrix, but that they could do no act whereby she should become chargeable with the debts in her own right, and particularly that they were not authorized to give a security for the payment of any debts in her name. This makes it necessary to look into the power of attorney, to view, and to consider the general scope of it, and to examine the different parts of which it consists, as far as they may seem to bear upon the present question. The general scope of it is to put the whole estate into the hands of the attorneys, to commit the collecting of it, and the disposition of it entirely to them, to delegate to them all the authority that the executrix possessed, and to constitute them, as far as it was possible to constitute them, executors in her name. The first part of the instrument respects more particularly the collecting of the estate; and powers more ample could not be devised, nor confidence more unlimited be reposed and expressed. The authority to pay, discharge, and satisfy debts is described in few words and more general terms, and with a qualification properly applicable to this branch of the power, "agreeably to the due order and course of law, to pay, discharge, and satisfy," which I consider as tantamount to saying, in a course of administration. Then follows a general authority to do such further lawful and reasonable acts, for the better performing the powers and authorities intended to be given, as to them should seem meet, the executrix professing to give to them her full and whole power and authority to do and act touching and concerning all or any of the premises, as fully and effectually to all intents, constructions, and purposes, as she as executrix could do if personally present, and undertaking to ratify all that the attorneys should lawfully do in and about the premises. There is also power to appoint attorneys to act in the name of the executrix. The authority to pay debts, upon the first view of it, seems to be more confined and specified than the authority to collect the effects, but if we consider it more attentively, we shall find that the effect of this part of the instrument is to commit the application of the personal estate in payment of debts to those attorneys absolutely and exclusively; and it will also be found, without the assistance of general words, that an authority of this nature necessarily includes medium powers, which are not expressed. By medium powers, I mean all the means necessary to be used, in order to attain the accomplishment of the object of the principal power, which in this case is the paying, satisfying, and discharging the testator's debts. It must occur to every man who reflects upon the nature of this trust, that numberless arrangements would be to be made by those who were to execute it, accounts to be settled, disputed claims to be adjusted, unjust ones to be resisted, suits at law and in equity to be instituted and defended, payments to be postponed or installed, according to the state of the fund, and perhaps if the estate should be discovered to be insolvent, a distribution to be made among the creditors in equal degree, *pari passu*. These and many other subordinate powers, though not expressly given, as in the former part of the instrument, must be understood to be included in this power to pay debts; and I take it to be clear, that in the construction of such powers they are included. Our books say that these kind of authorities are to be pursued strictly; they instance that an authority given to three cannot be executed by a less number than the whole, and the St. of 21 H. VIII. c. 4, was thought necessary to be made, to remedy the inconvenience arising from it in the case of executors, where some have declined to act. But our books also say, that they are to be so construed as to include all the necessary means of executing them with effect. Thus an authority to receive and recover debts includes a power to arrest. In such a case as the present, which is not that of mere ministerial authority capable of being defined and executed strictly, but a case where the whole care of the administration is delegated by the executrix to the attorneys, and all the means of executing the office of executrix put into their hands, I am of opinion that both the particular provisions and the general words ought to receive the most liberal construction, which construction should, as far as possible, place the attorneys where the executrix intended to place them, in her room and stead, invested with all her authority and with all her discretion. Assuming then that this authority to pay debts is larger and more comprehensive in its nature, than the words construed very strictly would import, and that it implies authority to make all necessary arrangements which the executrix herself might make, in order to the payment of the debts, I ask, among the arrangements which it may be necessary for an executrix, or for those to whom she has delegated all her authority touching the payment of the testator's debts, to make, is there one more likely to occur, more useful, in many cases more necessary, than that they should ask and obtain from the creditors of the estate, time for payment of the debts, when the time given may prevent all the vexation and expense of a struggle for priority? That an executrix herself might make this arrangement, no one can doubt: that it is also necessary that they who are to have all the funds in their hands, who know, and are the only persons who can know within what time those funds can be got in, and who have the whole application of them entrusted to their care, who represent the executrix, and in effect are themselves the executors, should have it in their power to make it, is equally clear. The consequence of such an arrangement in either case, and indeed in every one of the instances which I before put, would be, that the executrix might by possibility become personally and in her own right chargeable with debts, as she might become chargeable in a variety of other cases expressly within the power of attorney. But upon whatever ground, and by whatever medium, in the instance of postponed debts, this personal charge is produced, the debt still remains a debt due from the estate, and payable out of the assets. Such an arrangement amounts to an admission, that at the expiration of the credit given, there will be assets sufficient to pay the debt, which still remains a charge upon the executrix as executrix, and only becoming eventually a charge upon her in her own right, if it should turn out that by some unforeseen event there should be a failure of assets, or by misconduct a *devastavit* incurred. If we are to argue from the intent of the instrument, to be collected from the particular wording of it, I ask, Can it be reasonably doubted, whether this executrix who trusted the whole of this large estate in the hands and to the care of these attorneys, under her personal responsibility for every shilling of the amount of it, if they should fail in the collection or application of it, would have hesitated to commit to their discretion, upon their view of the state of the property, and of the time within which it could be realized, the asking and obtaining from the creditors twenty months further time for the payment of their respective debts? I ask, Whether the executrix did not mean to throw all the burden of the administration of the effects upon the attorneys? and, Whether there was not a convenient and necessary discretion to be intrusted to them? When it is objected that the authority given is restrained to an authority to pay in her stead as executrix, and "agreeably to the due order and course of law," I answer, that taking these words to amount to a direction to the attorneys to pay in a course of administration, they were not meant, to control, nor can they control the authority of the attorneys in any thing necessary to that payment, in a course of administration. It is perfectly clear, notwithstanding this direction, that they might take time for the payment of the debts, having assets to pay them when the time came, for then they would pay in a course of administration, and there can be nothing repugnant to that direction in asking for the time, even though the assets should afterwards fail, because it is a step taken upon a conviction that there will be assets to be administered in a due course of law, and to the end that they may be administered. Where the executrix has entrusted all to the care of her attorneys, with a responsibility in herself to the extent of all the property, it is a small circumstance to be observed upon, that though the payment of a debt, not in a course of administration, is within the authority as between the creditor and the executrix, yet that she might be obliged to answer to other creditors as for a *devastavit* in respect of it. In truth, this direction to pay in a course of administration may operate as between her and her attorneys, but as against creditors receiving payment of their debts it seems to me that it can have no operation. Much stress was laid in the argument on there being no express power given to the attorneys to sign acceptances for the executrix, but the objection proves too much. As well might it be argued, that if the cash of the estate was kept at a banker's, the attorneys should not draw for it in her name. The true question appears to me to be, Whether the attorneys under this power have a discretion to agree with creditors for the forbearance of the debts? and that the rest of the difficulty has more of form than substance in it. If the foundation is well laid, the application of the argument to the particular case in question seems obvious and decisive. The acceptance of this bill of exchange is called a security, but is in substance merely a mode of taking twenty months' further time for payment of a debt, due from the testator to these plaintiffs, and payable out of the assets. Had the twenty months' credit been taken by a mere agreement to forbear, and she had been sued as executrix after the expiration of the time given, she could not have pleaded *plenè administravit*, because by taking the credit she admitted assets. There is a formal difference only between that case and the present, the acceptance appears upon the face of the bill to be an acceptance by her as executrix, and the consideration of it is value in account with testator. If she is sued in her own name, and not as executrix, she is so sued upon the same principle upon which assignees of a bankrupt are sued for what they do after they become assignees, for the estate, and at the expense of the estate. The debt is still substantially the debt of the testator, which when paid by her will be carried to the account of the testator's estate. I think she might have been sued as executrix upon this acceptance, but as she could not in that case have availed herself of a plea of *plenè administravit*, it was not necessary so to sue her. In neither case could any defence be made against the demand, and in truth no defence ought to be made, for the creditor who accepts this kind of payment purchases the benefit of it, the estate has had its advantage, and this defendant as executrix has had her advantage of the forbearance. I have hitherto avoided any mention of the particular circumstances of this case, which very strongly imply the knowledge of the defendant and her approbation of the making these acceptances, but here they ought to have their weight, by way of answer to the suggestion of possible inconvenience which the suffering this verdict to stand might produce. I confess that they appeared to me upon the trial, and do now upon the best consideration that I can give to the case, appear to me to be strong enough to raise an implication of a special procuration, if that were thought necessary, from the executrix to her attorneys, to authorize these acceptances, and that the defence now made upon the strict law is against conscience and good faith. I have already taken an opportunity of observing on the case depending in the Court of King's Bench, and what I suppose would be the decision of that court. I will only now repeat, that we understand that it did not appear in that case, that the acceptance was given for the payment of a debt due from the testator, the payment of which had been agreed to be postponed, or indeed that it did in any manner touch or concern the execution of this trust, which is the great and distinguishing feature between that case and the present. We agree that this power cannot authorize the giving acceptances in the name of Mrs. Baillie, which are neither expressed nor proved to be in payment of the testator's debts. The case now in judgment in this court rests on its own particular circumstances, upon which we decide. *Rule discharged.*[1]

BATTY *v.* CARSWELL.

SUPREME COURT OF NEW YORK. 1806.

[2 *Johns.* 48.]

THIS was an action of assumpsit, on a promissory note, alleged to have been made by the defendants. The note was dated the 23d of October, 1801, for the payment of $250, in 60 days. Plea *non assumpsit.* The cause was tried at the Washington circuit, on the 18th of June, 1806, before Mr. Chief-Justice KENT.

On the trial the subscribing witness to the note swore that two or three weeks previous to the date of the note, David Carswell, one of the defendants, applied to Abner Carswell, the other defendant, to be his surety to the plaintiff, on a note for $250, payable in six months, which he consented to do, and directed the witness to sign his name to such a note. A few days afterwards, and before the note was made, David Carswell told the witness that he had informed Abner Carswell that he should not want the money of the plaintiff, as he could do without it. The witness, with the assent of David Carswell, for whom he acted as clerk and agent, but without the privity of Abner Carswell, signed the note, on which the present action is brought, and for which David Carswell received the amount.

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[1] The reporter's abstract of the power of attorney is omitted. The essential parts of the instrument are found in Gardner *v.* Baillie, *ante,* p. 260. — ED.

It appeared that Abner Carswell had admitted in conversation that he had authorized the other defendant to use his name to a note for $250, for the purpose of procuring that sum of the plaintiff, but that he was told by David Carswell that he should not want the money, and did not know that the note had been so given until some time afterwards. The note was then offered to be read in evidence, but objected to by the defendants' counsel, because it had not been proved to have been signed by the defendants; but the objection was overruled. The defendants' counsel then moved for a nonsuit, which was refused. The judge charged the jury that if they believed that the note was made before David Carswell had told the other defendant that he should not want the money, the plaintiff would be entitled to recover, otherwise they ought to find for the defendants; but that those were facts on which they were to decide. The jury found a verdict for the plaintiff.

A motion was now made for a new trial, unless the court should think proper to grant a nonsuit.

Foot, for the defendants.

Crary and *Russell*, *contra.*

LIVINGSTON, J., delivered the opinion of the court. This was a special power, and ought to have been strictly pursued, 3 Term, 762. But the note, to which Abner Carswell authorized the witness to put his name, was to be payable in six months whereas, the one he signed had only sixty days to run. The note, then, as far as it concerned Abner, admitting there was no revocation, was made without his authority. His confession, after the suit was commenced, does not alter the state of the case. It was merely that he had allowed David to put his name to a note. This must have been the one of which the first witness speaks, which was to be payable in six months. There must be a new trial, with costs, to abide the event of the suit.

New trial granted.

WILTSHIRE *v.* SIMS.

NISI PRIUS. 1808.

[1 *Camp.* 258.]

ACTION for not transferring stock.

The only witness was Watkins, the broker in this transaction, who stated that the defendant gave him orders to sell out £500 of the stock of the trustees of the Commercial Road; that on the 27th of August he agreed to sell it to the plaintiff; that as the transfer could not be made till the expiration of a fortnight, when there was to be a meeting of the trustees, the plaintiff paid him for the stock by a promissory note at 14 days; that in taking the note he acted with a view to his employer's advantage, thinking the stock might fall before the transfer could be made; that he paid in the note to his bankers, where it was attached for a debt of his own; and that at the end of the fortnight the defendant refused to make the transfer, as he had received no part of the purchase money.

It was contended for the plaintiff, that the sale of the stock on the 27th of August was binding on the defendant. Watkins was his authorized agent, and had acted *bona fide* for his benefit. He must be supposed to have empowered his agent to sell the stock in the manner most for his interest, and the loss ought to fall upon him, not upon the plaintiff, who had paid for the stock, under the natural impression that Watkins had authority to sell it immediately, though a short time was to intervene before the stock could be transferred in the books of the trustees.

Lord ELLENBOROUGH. When the defendant employed the broker to sell the stock, he employed him to sell it in the usual manner. He made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock being absolutely exchanged for a bill at 14 days? Has a broker in common cases power to give credit for the price of the stock which he agrees to sell? The broker here sold the stock in an unusual manner; and unless he was expressly authorized to do so, his principal is not bound by his acts.

Plaintiff nonsuited.

Garrow, *Park*, and *Lawes*, for the plaintiff.

The *Attorney-General* and *Reader,* for the defendant.

HOGG *v.* SNAITH.

COMMON PLEAS. 1808.

[1 *Taunton*, 347.]

TROVER for two bills of exchange. Upon the trial of this cause at the last sittings at Guildhall, before MANSFIELD, C. J., a verdict was taken for the plaintiff, subject to the opinion of the court upon the following case. The plaintiff, by a power of attorney under seal, constituted English his attorney revocable, for him, in his name, and to his use, to ask, claim, demand, recover, and receive, from the commissioners of His Majesty's navy, or whom else it might concern, all such salary, wages, &c., and all other money whatsoever, as then was or thereafter should be due to him for his service, or otherwise, in any of His Majesty's ships; then followed a general power to receive all demands from all other persons whatsoever; the constituent giving and thereby granting unto his said attorney, his substitutes and assigns, all his authority and lawful power in the premises for receiving, recovering, obtaining, compounding, and discharging the same, as fully and effectually as he himself might or could do being personally present; and acquittances, releases, or any other discharges in his name to make, seal, and deliver, and one attorney or more to substitute, and at pleasure to revoke, with the usual clause of general ratification. By virtue of this power English received from the commissioners for victualling His Majesty's navy, for the use and on the account of the plaintiff, the two bills in question, which were made payable to the plaintiff or his order. Upon each of these bills a clerk in the pay department of the victualling office had written his initials, G. S., with the words "letter of attorney entered, William C. English, attorney," to denote that the power was lodged in the victualling office, and that the proper officer there recognized English as Hogg's attorney. English, without any other authority from the plaintiff than this, being indebted to the defendants, who were his bankers, in the sum of £142, applied to them to discount these bills, which he delivered to them, indorsed "W. C. English, attorney." The defendants discounted, and placed them to the credit of his account. Before the bills were due, the plaintiff gave the defendants notice that he had revoked the power of attorney made in favor of English, and that in case English or any other person should present to them both or either of the bills for discount, or security for money advanced, they should refuse them; he also demanded possession of the bills, which the defendants refused to deliver up. The defendants offered evidence that it was a general usage and practice for attorneys, constituted by, and acting under similar powers, to negotiate bills of this description, by indorsing them in the like manner. The plaintiff objected to the evidence, but MANSFIELD, C. J., admitted it subject to the opinion of the court. And it was proved that powers of attorney lodged at the victualling office were not all in one and the same form, but that this particular power was in the form most commonly used for the last eighteen or nineteen years; before which time victualling bills were not made payable to order, but an assignment, or bill of sale, was necessary to transfer them; that the bills in question, thus indorsed, and thus marked by the clerk, would have been paid at the victualling office, either to English or any other person who should have produced them with the same indorsement, but for the notice to stop the payment, which had been given by the plaintiff. That it was the practice amongst navy agents, acting under similar powers of attorney, to raise money for the use of their principals, by indorsing similar bills in the same way, and delivering them to their bankers, who had continually advanced money upon them and had received the contents from the victualling office, without any other warrant or authority than such indorsement; and that bills so indorsed and marked were frequently negotiated; it being considered that the mark recognizing the appointment of the attorney, and his indorsement, rendered them negotiable. The questions for the opinion of the court were, first, Whether upon the whole evidence, considering it all as admissible, English had sufficient authority to indorse and discount the bills for his own use? and if the court should be of opinion that he had, then, secondly, Whether the evidence objected to ought to have been received? and if the court should be of opinion that it ought not, then, thirdly, Whether, rejecting the evidence of usage, and considering the case apart from the facts found upon such evidence, English had sufficient authority to indorse and discount the bills for his own use?

Best, Serjt., for the plaintiff, contended that no authority was given to English by the power of attorney to discount or negotiate these bills; and so far as his acts exceeded the scope of his authority, they were wholly void, and could not alter the plaintiff's property in the bills. He observed that the power of the attorney was limited to receiving these bills at the navy office; and it then became his duty to deliver them over to the plaintiff; for by the course of the navy office, the delivery of the bills was payment of the debt due from the public to the plaintiff. It would be too great a concession to allow that he could, even at the end of the ninety days, indorse them for the purpose of receiving the money on them for the plaintiff's use. [LAWRENCE, J., interposing, read a short note of the following case, as decisive of the first point. "Hay, Executor *v.* Goldsmidt and Another, B. R., Mich. Term, 45 Geo. III. This was an action brought to recover the money which had been received by the defendants upon a bill of exchange, payable to the plaintiff's testator, Major-General Patrick Duff, or his order, of which bill the defendants had obtained payment under a power of attorney granted by the testator to J. and R. Duff, and authorizing them, for him and in his name, to ask, demand, and receive from the East India Company, or whom it should or might concern, all money that might become due to him on any account whatsoever, and to transact all business, and upon non-payment or non-delivery thereof, for him and in his name to use all such lawful ways and means for the recovery thereof as he might or could do if he was personally present, and did the same; and on payment or delivery thereof, for him and in his name to make and give proper receipts or other discharges for the same; and one or more substitute and substitutes under them to appoint, and again at pleasure to revoke, giving and thereby granting unto his said attorneys and their substitute and substitutes, his full and whole power and authority in the premises; and concluding with the usual clause of ratification. Under this power J. and R. Duff received an India bill for £2920 8*s.* 10*d.*, payable to the testator or his order, which each of them indorsed 'for Major-General Patrick Duff, per procuration, James Duff, Robert Duff.' They discounted the bill with the defendants and raised money on it. The defendants, by their broker, received of the India Company the money due on the bill. At the trial a verdict was found for the plaintiffs; and Erskine, for the defendants, having obtained a rule *nisi* for setting aside the verdict, and entering a nonsuit, the question for the Court of King's Bench was, whether J. and R. Duff had any authority to indorse and discount the bill? The present Attorney-General (Gibbs) and Wilson showed cause, and contended that the power of attorney gave the Duffs authority to receive only, and not to negotiate the bill. Erskine and Gaselee, *contra*, relied on the words, 'to transact all business,' as giving an authority to do more than merely to receive, and contended that the indorsement was only a substitution of other persons for the attorneys themselves, which the power enabled them to make. The cases of Howard *v.* Baillie, 2 H. Bl. 618, and Gardner *v.* Baillie, 6 Term Rep. 592, were referred to in the course of the argument.

"The court was of opinion that the power to transact business did not authorize the Duffs to indorse the bill. The most large powers must be construed with reference to the subject-matter. The words 'all business' must be confined to all business necessary for the receipt of the money. *Rule discharged.*"]

Best. 2. The evidence of the usage, if properly received in the principal case, does not distinguish it from that of Hay *v.* Goldsmidt. It was proved, indeed, that these bills, with this indorsement, would have been paid, except for the notice, and that navy agents are accustomed to raise money upon similar bills for the use of their principals. But here the money was not raised for the use of the principal, but for that of the attorney. But 3, the evidence of the usage ought not to have been admitted at all. The practice of abuses, by what authority soever it may be countenanced, cannot be received to enlarge the operation of a definite written instrument.

Marshall, Serjt., *contra*, admitted that according to Comb's Case, 9 Co. 75, the attorney could regularly do no act unless in the name of his principal. But it was proved that these bills, indorsed in the name of the attorney and not in that of the principal, would have been paid at the victualling office when due. And this usage had now so long prevailed that it induced bankers and others to advance money to a large amount upon this title. It was therefore such an universal practice of a trade as to take the case out of the general rule of law. It is in every day's occurrence that evidence is received of the usage of a particular trade to control the general law; and it was clearly right to receive such evidence in this instance.

MANSFIELD, C. J. It certainly was proved at the trial that navy and victualling bills, indorsed under a power like this, and so registered, currently pass from hand to hand like bank notes; but I was nevertheless of opinion that parol evidence could not be received to vary a written instrument. But if the evidence of the usage had been ten times as strong it would not have authorized this transaction. The banker knew that these bills were not deposited with him for the debt of the plaintiff, but for that of English. This is not at all distinguishable from the case mentioned by my brother Lawrence; English could not possibly pay his own debt to Snaith with this money.

HEATH, J., concurred. This evidence ought not to be received to control the legal import of a known instrument in trade and commerce.

LAWRENCE, J., was of the same opinion.

CHAMBRE, J. This authority is strictly confined to receiving the debt due to the plaintiff from the commissioners of the navy. English, by receiving the bills, performed all that he was authorized to do. He ought afterwards to have kept them in his possession for the plaintiff. However, even supposing that his power extended so far, that if he had kept the bills till they were due, he might have gone to the treasurer of the navy and received the money upon indorsing the bills, still this is clearly a deviation from that usage. But the evidence of the usage ought never to have been received for the purpose of altering the operation of a written instrument.

Let the postea be delivered to the plaintiff.[1]

PICKERING *v.* BUSK.

KING'S BENCH. 1812.

[15 *East*, 38.]

TROVER for hemp. At the trial before Lord ELLENBOROUGH, C. J., at the sittings after Trinity term in London, it appeared that Swallow, a broker in London, engaged in the hemp trade, had purchased for the plaintiff, a merchant at Hull, a parcel of hemp then lying at Symonds' wharf in Southwark. The hemp was delivered to Swallow, at the desire of the plaintiff, by a transfer in the books of the wharfinger from the name of the seller to that of Swallow. Shortly afterwards Swallow purchased for the plaintiff another parcel of hemp, lying at Brown's quay, Wapping, which latter parcel was transferred into the names of Pickering (the plaintiff), *or* Swallow. Both these parcels of hemp were duly paid for by the plaintiff. Swallow, however, whilst the hemp remained thus in his name, having contracted with Hayward & Co., as the broker of Blackburn & Co., for the sale of hemp, and having none of his own to deliver, transferred into the names of Hayward & Co. the above parcels in satisfaction of that contract, for which they paid him the value. Hayward & Co. shortly after became bankrupts; and the plaintiff, discovering these circumstances, demanded the hemp of the defendants their assignees, and upon their refusal to deliver it the present action was brought. His Lordship was of opinion upon this evidence, that the transfer of the hemp, by direction of the plaintiff, into Swallow's name, authorized him to deal with it as owner, with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was thereupon found for the defendants, with liberty to the plaintiff to move to set it aside.

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[1] See Rossiter *v.* Rossiter, 8 Wend. 494 (1832). — ED.

The Attorney-General in the last term accordingly moved for a new trial, on the ground that the principal in this case, by authorizing the transfer to be made into the name of his broker, had done no more than was usual and notorious in the course of that business, and therefore gave no authority to the broker, his agent, to transfer the property without his direction. Where by the ordinary course of trade the possession of goods is left with an agent, he cannot dispose of it as his own, but the purchaser must look to his authority. Such is the case of a factor, who by the usage of trade has authority to sell, but not to pledge. Therefore though he, like the broker in this case, be the apparent owner, yet his pledge will not bind the principal. As in M'Combie *v.* Davies, 6 East, 538, and 7 East, 5, where an assignment of tobacco in the King's warehouse had been taken by way of pledge from the broker who had purchased it there in his own name for his principal, it was held that the pawnee could not retain it against the principal.

The Court now distinguished between that case which was the case of a pledge, and beyond the scope of a broker's general authority; and this, which was the case of a sale, and within his general authority; but they granted a rule to show cause, as the point was of general consequence.

Garrow, *Topping*, and *Taddy*, now showed cause and observed, that Hayward & Co., who purchased the hemp of Swallow, had no means of discovering that the hemp was not the property of the person in whose name it stood, and who took upon him to deal with it as his own. And it would be unjust that, because the broker has turned out to be an unfaithful steward of his employer, the innocent purchasers should suffer rather than the plaintiff, by whose act in suffering the goods to be entered in the broker's name, the latter was enabled to practise the delusion. If the plaintiff had meant to retain his dominion over the property, he should have taken the transfer in his own name instead of the broker's. M'Combie *v.* Davies, 6 East, 538, was the case of a pledge, and only decides that a broker cannot pledge the goods of his principal; which doctrine was before laid down in Patterson *v.* Tash, 2 Str. 1178, in the case of a factor. But here Swallow has made an absolute sale; which he had an apparent authority to do: and according to Parker *v.* Patrick, 5 Term Rep. 175, the owner, who has enabled another person to deal with the goods as his own, must abide the consequence if any loss occur by third persons' dealing with such apparent owner. [BAYLEY, J. That doctrine in its full extent would give the pawnee in all cases a better title than the original proprietor.]

The Attorney-General, *Park*, and *Abbott*, *contra.* The question is whether the property in the hemp passed by the sale and delivery of Swallow. The cases of Paterson *v.* Tash, and M'Combie *v.* Davies, establish the principle, that if an agent go beyond his authority in disposing of the goods of another, that other is not bound by such an excess of authority: on that ground only has it been held that a factor cannot pledge; because his principal has given him no authority to pledge. But he may sell, because his principal entrusts him with an authority to sell. How then can a broker, who has no authority either to sell or pledge, bind his principal by a sale? [Lord ELLENBOROUGH, C. J. If Swallow had not the hemp for the purpose of sale, for what purpose had he it?] For the purpose of safe custody, and for the convenience of the owner. The world had no right to conclude from the circumstance of the goods being in his name, that therefore he had the power of disposing of them. The argument, that the property in goods should follow the possession, might have weight, if the question were whether the law should be altered in this respect: but that such is not the rule of law is clear from the *excepted* case of a sale *in market overt*, by which alone the property of another is bound. If a person entrust his watch to a watchmaker for the purpose of repairing it, and he sell it, the owner is not bound by such sale, because he had given no authority to sell. [Lord ELLENBOROUGH, C. J. In that case the watchmaker is not exhibited to the world as the owner, and the world does not credit him as such merely by reason of his possession of the property. But here Swallow was a common agent for the sale of property of this description.] Unless Swallow had the power of sale expressly given him, no such power can be implied from the mere fact of the goods being entered in his name at the wharfs. It does not follow that he who permits the possession of property by another therefore gives him an authority to dispose of it, though that other may deal in goods of the same kind. If one entrust a chest of tea, for the purpose of safe custody, to a grocer who deals in such commodity, and whom the world therefore might suppose to have the property in the chest, and he sell it; the chest remaining unbroken; without doubt the owner may recover it from the vendee; for the grocer was only entrusted with the custody, and in cases of this kind the rule of *caveat emptor* applies. So where goods are consigned to a merchant from abroad, the consignee cannot go beyond his authority in disposing of them; and yet he may have the full possession of them either by delivery of the goods themselves or of the bills of lading, and may thereby impose on the world. The principle of all which cases is this, that a person who is entrusted with the goods of another can do no more in respect of those goods than what the other has authorized him to do. Whether Swallow had power to sell is a fact, and not an inference of law arising out of the apparent possession: but no such fact was proved or found in this case. The only distinction between this and the case of a factor is that the factor has some authority; that is, to sell; but here Swallow had none. In Wilkinson *v.* King, 2 Camp. N. P. Cas. 335, which was trover for lead, it appeared that the plaintiff had sent the lead to a wharfinger who was accustomed to sell lead; and he sold it to the defendant, who bought it *bonâ fide:* yet it was held that the plaintiff was entitled to recover. [Lord Ellenborough, C. J. That was the case of a wharfinger whose proper business it was not to sell; and to whom the goods were sent for the mere purpose of custody.] The case states that he was accustomed to sell lead.

Lord Ellenborough, C. J. It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe. The case of a factor not being able to pledge the goods of his principal confided to him for sale, though clothed with an apparent ownership, has been pressed upon us in the argument, and considerably distressed our decision. The Court, however, will decide that question when it arises, consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of Paterson *v.* Tash, that doctrine has never been overturned. I remember Mr. Wallace arguing, in Campbell *v.* Wright, 4 Burr. 2046, that the bills of lading ought to designate the consignee as factor, otherwise it was but just that the consignors should abide by the consequence of having misled the pawnees. The present case, however, is not the case of a pawn, but that of a sale by a broker having the possession for the purpose of sale. The sale was made by a person who had all the indicia of property: the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.

Grose, J. The question whether the plaintiff is bound by the act of Swallow, depends upon the authority which Swallow had. This being a mercantile transaction, the jury were most competent to decide it; and if I had entertained any doubt, I should rather have referred the question to them for their determination: but I am perfectly satisfied: I think Swallow had a power to sell.

Le Blanc, J. The law is clearly laid down, that the mere possession of personal property does not convey a title to dispose of it; and, which is equally clear, that the possession of a factor or broker does not authorize him to pledge. But this is a case of sale. The question then is whether Swallow had an authority to sell. To decide this, let us look at the situation of the parties. Swallow was a general seller of hemp: the hemp in question was left in the custody of the wharfingers, part in the name of Swallow, and part in the name of the plaintiff *or* Swallow, which is the same thing. Now for what purpose could the plaintiff leave it in the name of Swallow, but that Swallow might dispose of it in his ordinary business as broker? if so, the broker having sold the hemp, the principal is bound. This is distinguishable from all the cases where goods are left in the custody of persons whose proper business it is not to sell.

Bayley, J. It may be admitted that the plaintiff did not give Swallow any express authority to sell; but an implied authority may be given: and if a person put goods into the custody of another, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them. Swallow was in the habit of buying and selling hemp for others, concealing their names. And now the plaintiff claims a liberty to rescind the contract, because no express authority was given to Swallow to sell. But is it competent to him so to do? If the servant of a horse dealer with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. This case does not proceed on the ground of a sale in market overt, but it proceeds on the principle, that the plaintiff having given Swallow an authority to sell, he is not at liberty afterwards, when there has been a sale, to deny the authority.

Rule discharged.[1]

WHITEHEAD *v.* TUCKETT.

KING'S BENCH. 1812.

[15 *East*, 400.]

IN trover for thirty-seven hogsheads of sugar, which was tried before LE BLANC, J., at Lancaster, a verdict was found for the plaintiffs for £3,000, subject to the opinion of the Court on the following case.

The defendant, a wholesale grocer at Bristol, employed Sill & Co., brokers at Liverpool, to buy and sell on his account great quantities of sugars. The greater part were bought on speculation for resale, and were resold at Liverpool, but some were occasionally sent to the defendant. Sill & Co. usually bought and paid for the sugars in their own names, and in like manner resold and received the purchase-moneys in their own names. They did not draw upon the defendant for the particular amount of each purchase, nor remit to him the particular bill received in payment on each sale; but there was a general running account between them. Sill & Co. never had a general authority to buy for the defendant, but in each instance received his directions for so doing; but when the markets were low, they had sometimes an unlimited authority as to quantity or price. Previously to the transaction which gave rise to the present action, Sill & Co. had not a general authority to sell at their discretion, but received the defendant's directions to sell on each occasion, and were limited as to price; and upon the transaction in question they had no other authority in general than what appears from the letters hereinafter stated. In May, 1810, Sill & Co. bought in their own names fifty hogsheads of St. Croix sugar of Ewart, Rutson, & Co., on account of the defendant, paid for them by their own draft, and reimbursed themselves by drafts on the defendant; not for the particular amount of this purchase, but on the general account running between them. The samples were sent as usual to Sill & Co.'s office, and remained there till the sale to the plaintiffs hereafter mentioned, and the sugars were removed from the warehouse of the sellers to the warehouse of Sill & Co.

The following are extracts from the correspondence between Sill &

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[1] And see Dyer *v.* Pearson, 3 B. & C. 38 (1824); McNeil *v.* Tenth National Bank, 46 N. Y. 325 (1871); Cole *v.* North-Western Bank, L. R. 10 C. P. 354, 364–365, 369 (Ex. Ch., 1875). — ED.

Co. and the defendant. Sill to Tuckett, 7th July, 1810: "We attend to your instructions of selling 1 *a* 200 hogsheads of your sugar as soon as we can get 4*s.* to 5*s.* per cwt. on them, and having an order from C. E. Rawlins, of your place, we have sold him forty hogsheads and two barrels, St. Lucia sugar, belonging to you, at 73*s.*, payable by his acceptance at four months, which, trust will meet with your approbation." Tuckett to Sill & Co., 9th August, 1810: "We are in no hurry to part with the sugars under your care, but whenever your market should advance 3*s.* above the present price, you may sell the whole of the St. Croix sugars,[1] bought in May last, at 68*s.* or 69*s.*; on the best terms to safe men." Sill & Co. to Tuckett, 11th August, 1810: "We shall not offer any more of yours for the present, unless the prices advance further." Tuckett to Sill & Co., 11th August, 1810: "By our B. Sykes's letter to-day, we see he is arrived at Liverpool, and that you have disposed of five of our lots of sugar at 4*s.* profit, which we are sorry for, as our late intention was to hold every cask until the prices got much higher, which we are very confident will be the case within six weeks. N. B. Of course you will not offer any more for sale till further instructions from Bristol." Tuckett to Sill & Co., 27th August, 1810: "Our raw sugar market, though not brisk, continues to keep up, gives some prices, and we are very confident the price will continue to advance; when you can obtain 10*s.* per cwt. on cost, we may be inclined to sell a few of our sugars. Though we are poor, we are willing to suspend a little while longer, being very confident far better prices will be obtained by and by." Tuckett to Sill & Co., 22d September, 1810: "Sugars we are not inclined to sell at present, from an undoubted opinion that they will soon rally again." Tuckett to Sill & Co., 22d October, 1810: "Our sugar market is brisk and advancing. Could there be any possibility of selling the St. Domingo coffee at anything like cost price? Should the sugar market advance about 2*s.* higher, you may sell any of our sugars, when cost price and expenses can be obtained, to men of undoubted safety. We see by your letter that raw sugars are much sought after; and if you can get 1*s.* for these three lots of St. Croix, bought in the fifth month, at 69*s.* 6*d.* you may let them go. The 38 hogsheads of AB.L. that you value at 71*s.* would bring here 74*s.* or 75*s.*, we attend your reply."

On the 15th of October, 1810, Sill & Co. sold the fifty hogsheads of St. Croix sugar to the plaintiffs, at 69*s.* per cwt.; and an invoice was made out and delivered by Sill & Co. to the plaintiffs, headed as follows: "Liverpool, 10th month, 15th, 1810. Whitehead, Whittle and Herd, Bought of James Sill & Co. 50 hogsheads sugar, payment in three months and twelve days, equal to four months cash." Then follows a statement of the numbers and weights, amounting to 634 c. 2 q. 3 lb. nett, at 69*s.*, £2,189 2*s.* 4*d.* The plaintiffs duly paid Sill & Co. for these sugars, according to the contract; and afterwards, on their application, thirteen hogsheads were delivered by Sill & Co. to the plaintiffs, and by them removed; namely, three hogsheads on the 20th, and ten on the 25th of October, 1810. Sill & Co. did not inform the defendant of the sale of these sugars to the plaintiffs, nor of the delivery of those last mentioned, nor did they remit to him the purchase money by them received from the plaintiffs. The remaining thirty-seven hogsheads continued in the warehouse of Sill & Co. until their bankruptcy, when they were taken possession of by the defendant; and upon his refusal to deliver them to the plaintiffs, this action was brought. If the plaintiffs are entitled to recover, the amount of the damages was agreed to be settled by arbitration at Liverpool. The question for the opinion of the Court was whether the plaintiffs were entitled to recover? if they were, the verdict was to stand, or be entered for such sum as should be awarded: if not, a nonsuit was to be entered.

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[1] The sugars in question were part of the St. Croix sugars here mentioned. — REP.

Richardson, for the plaintiffs.

Scarlett, for the defendant.[1]

Richardson in reply.

Lord ELLENBOROUGH, C. J. This is an action brought by the plaintiffs to recover the value of certain hogsheads of sugar purchased by them of Sill & Co., who are brokers at Liverpool, which the defendant claims to retain as his property, as having been improperly disposed of by Sill & Co., to whom he had intrusted them for the purposes of sale under a limited authority, which they had exceeded. Much of the argument in this case has turned upon the question whether Sill & Co. were invested with a general authority to sell the sugars: when that question is discussed, it may be material to consider the distinction between a particular and a general authority; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances; whereas the former is confined to an individual instance. Such was the distinction which governed the decision in Fenn *v.* Harrison, and in the MS. case cited. Now in that sense of the term *general authority*, Sill & Co. were general agents; for they bought and sold in a multitude of instances in their own names, paid and received the money in their own names, and blended their accounts of receipts and payments, without carrying each order to a separate account with the defendant; and although there was a communication between them and the defendant as to the price and time of sale, yet the world was not privy to that communication, and had therefore no means of knowing that their general authority was controlled by the interposition of any check. But even looking to the letters, I find nothing in them to contravene a general power of sale. There are indeed particular allusions as to the price and time of sale, by way of advice and instruction; but I cannot find that they contain any general prohibition to sell, nor any absolute limitation of the terms on which they were to sell. In the letter of the 9th of August, the defendant writes to Sill & Co. "that they may sell the whole of the St. Croix sugars at 68*s.* or 69*s.* on the best terms, to safe men." If these expressions are to be construed into so many restrictions of the power of the brokers, it will follow that they were not only limited as to price, but also as to the terms of sale, which according to the letter were to be the best, and as to the purchasers who were to be safe men; and if in either of these respects the contract made by them should fail, their principal would have a right to reject it. But if this could be done, in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principal. Such communications therefore must not be taken as limitations of their power, however wise they may be as suggestions on the part of the principal. In another letter the defendant, alluding to information which his house had received from Sill & Co., of their having disposed of some lots of sugars, remarks "that they are sorry, as their late intention was to hold every cask until the prices got much higher." Now this is the very language of a person who had given his broker an authority to exercise his discretion upon the subject, and not of one who might have repudiated the contract as being contrary to his instructions. The subsequent letter of the 27th of August to Sill & Co. states, "when you can obtain 10*s.* per cwt. on cost, we may be inclined to sell a few of our sugars," &c. This is a mere communication of speculation and advice from the principal to the brokers, which presumes a general authority in the brokers, with a desire, on the part of the principal, to direct them in the exercise of it. The case of Paterson *v.* Tash[1] is not involved in the decision of this: when that case comes directly before us, we shall take occasion to consider it apart. Looking then at this correspondence (which might perhaps have been more properly left to the consideration of a jury), we find that there was a sale of part of these sugars recognized in one instance by the defendant, and that subsequently there was not any positive prohibition against future sale. Upon the whole, therefore, I think it must be inferred that Sill & Co. had a general authority to sell, and that the sale made by them is valid.

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[1] Scarlett "mentioned a MS. case in 1792 or 1793 to the following effect: A servant was sent with a horse to a fair, with an express order from the master not to sell it under a certain sum; the servant, notwithstanding, sold it for a less sum; upon which the master immediately gave notice and brought trover against the purchaser; and it was *held* that he might recover, because the servant was not his general agent" — REP.

Grose, J. I have had considerable doubts on this question as the argument has gone on: I was inclined at first to think, from the letters stated in the case, and from finding the defendant constantly speaking in them of selling at certain prices, that Sill & Co. had not a general authority to sell; but upon consideration I think the discretion of the brokers was left very much at large in the business; and when that is the case, it would be very dangerous to hold third persons bound by communications passing behind their back between a principal and his broker. I think, therefore, under these circumstances, that the principal was bound by the acts of the brokers.

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[1] *Ante*, p. 253. — Ed.

Le Blanc, J. The plaintiffs are the vendees from Sill & Co. of certain hogsheads of sugars, for which they have paid the value; the defendant is the person who employed Sill & Co.; and the question is whether the Court can collect from the circumstances stated that Sill & Co. had a general authority to sell? In order to determine that question, I think the Court is not to look to the correspondence as it relates to this particular parcel of sugars only, but as it is connected with all the circumstances of the case. It appears then that the goods were left with Sill & Co. for sale; and although they had not a general authority expressly given to them by the letters, yet that in many instances they bought and sold for the defendant in their own names, without making any specific appropriation to the separate account of the defendant either of the moneys received in respect of such sales, or of the moneys expended on such purchases. Thus they appeared acting as general agents for the defendant; and upon one occasion in particular (already alluded to by my Lord), when the defendant received intelligence of their having sold a lot at a lower price than he intended, instead of repudiating the bargain as contrary to his instructions, we find him indeed expressing his sorrow thereupon, but acquiescing in that which had been done. Can the court then say, after these instances of general authority exercised over the goods of the principal, that in this particular instance the authority of Sill & Co. was controlled, so as to invalidate a sale made by them to a *bonâ fide* purchaser? I think it cannot, but that under the circumstances we must hold the defendant to be bound by the general authority thus given to Sill & Co. It is unnecessary to enter into the question whether an agent who exceeds his authority can bind his principal.

Bayley, J. I think the only conclusion to be drawn from the facts stated is that Sill & Co. had a general authority to sell, and that it would be a fraud on the public to hold otherwise. Sill & Co. were common brokers for the sale of sugars; and if the defendant suffered them to buy and sell for him in their own names, and thereby to hold themselves out to the world as the owners of the goods, he must be taken to have given them a general authority. There was nothing to designate him as the owner; neither the bills of sale being in his name nor the price of the goods sold or purchased carried to his separate account; so that in all respects Sill & Co. appeared as the owners. If, therefore, they have abused the confidence reposed in them, the defendant, who intrusted them, and not the plaintiffs, the innocent purchasers, must suffer for it. I agree, therefore, that the plaintiffs are entitled to recover.

Per Curiam, *Postea to the plaintiffs.*

GUERREIRO *v.* PEILE.

KING'S BENCH. 1820.

[3 *B. & Ald.* 616.]

TROVER for twenty-five pipes of wine; plea, not guilty. At the trial before ABBOTT, C. J., at the London sittings after Hilary term, the following appeared to be the facts of the case: The plaintiffs, who were merchants resident at Oporto, in May, 1818, consigned the wines in question for sale to Burmester and Vidal, who were merchants resident in London. They employed one White, a broker, to sell the same; and he, on the 29th October, by their orders, made the two following contracts with the defendants, which were both written on the same sheet of paper: "Bought 29th October, 1818, for Messrs. Burmester and Vidal, of Messrs. Sol. Peile and Son, 65 puncheons of Jamaica rum, of good clear merchantable quality, of average 15 per cent over proof, 4*s.* 1*d.* per gallon; coopered and fitted up free on board; no bill to be drawn; the quality to be approved to-morrow. Sold 29th October, 1818, for Messrs. Burmester and Vidal, to Messrs. Sol. Peile and Son, 25 pipes of port wine, vintage 1815, £53 per 138 gallons, housed and all charges paid; no bill to be drawn; but this being considered a barter transaction for the above 65 puncheons rum, the balance is to be paid in cash: as these wines have not been tasted by Messrs. Peile and Son, this contract to be void if not approved of to-morrow." White did not know that Burmester and Vidal were only factors in this transaction; nor was there any evidence to show that the defendants knew that fact. In pursuance of these contracts, Burmester received the rums, and the defendants the wines, and a balance was paid to the latter upon the two transactions. In February, 1819, Burmester and Vidal became bankrupts, without having accounted to the plaintiffs for the proceeds of the wine. White proved that he had been frequently concerned in similar transactions of barter; and other witnesses proved that it was not an uncommon practice among principals to barter one species of goods for another. It was contended by the plaintiff, that Burmester and Vidal, being merely factors, had authority to sell only in the usual way for money, but not to barter; and consequently that by these contracts no property had passed to the defendants. The Lord Chief Justice told the jury that if they were of opinion that Peile & Co. knew Burmester and Vidal to be factors, they should find for the plaintiff; and supposing that they did not know that fact, if the jury thought that this was a transaction in the ordinary course of trade when parties are dealing with their own commodities, they would find for the defendant. The jury found a verdict for the defendant. Scarlett in last Easter term obtained a rule *nisi* for a new trial, on the ground that the factor in this case had exceeded his authority by bartering, and consequently that no property passed to the vendor; and he cited *Anonymous*, 12 Mod. 514, and *Wiltshire* v. *Sims*, 1 Campb. 258.

The *Solicitor-General*, *Gurney*, and *Puller*, now showed cause. The jury have found that this was a transaction in the usual course of trade; and if so, it is clear that the principal was bound. Although this appears to be a case of barter, it really constitutes two distinct contracts of sale: a sale of the rums by Peile, and a sale of the wines by Burmester and Vidal.

ABBOTT, C. J. My learned Brothers think that I ought to have told the jury upon these facts, that this was a transaction of barter, and that the plaintiff's property was not divested, because a factor has no authority to barter; and I am also of that opinion. This rule must therefore be made absolute.

BAYLEY, J. I am of the same opinion. Burmester and Vidal had authority only to sell, and that for money, to be forthcoming to the plaintiffs. But in this case not one farthing of money would ever be forthcoming to the plaintiffs; for the amount due for the rums exceeded the value of the wine.

HOLROYD, J. I am of opinion that Burmester and Vidal had no authority to barter. In looking at this transaction we must look at the real nature of the thing, not at the color given to it by the parties. If this had been a sale in market overt, the case might have been different; but that not being so, the principle of *caveat emptor* applies, and the person buying is bound by the authority which the person has who sells. Where a factor sells the goods of his principal, it is his duty to keep that sale wholly unconnected, and not to mix other matters with it to the detriment of his principal; and therefore the rule for a new trial must be made absolute. *Rule absolute.*[1]

Scarlett, *Marryat*, and *Parke*, were to have argued in support of the rule.

PECK *v.* HARRIOTT.

SUPREME COURT OF PENNSYLVANIA. 1820.

[6 *S. & R.* 146.]

IN the Court of Common Pleas of Crawford County, to which this was a writ of error, a case was stated for the opinion of the Court, to be considered as a special verdict.[2]

Selden and *Baldwin*, for the plaintiffs in error.

Forward, for the defendants in error.

DUNCAN, J., delivered the Court's opinion.

The plaintiffs in error, being the owners of certain lands in the counties of Erie, Crawford, Warren, and Venango, on the 17th October,

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[1] BEST, J. was absent from indisposition. — REP.

[2] The reporter's statement is omitted. — ED.

1815, constituted one Seth Young, their attorney, in their names to contract for sale, sell, and convey any parts or parcels of the lands, ratifying and confirming all that their said attorney might lawfully do in the premises. On the 29th December, in the same year, Young contracted to sell to the defendants two parcels of the lands. The vendees covenanted to pay the purchase money in four annual instalments, with interest, and make settlements, and certain specified improvements on the land. The first instalment became due on the 29th December, 1816; and in March and April, 1817, the vendees paid Young three hundred and seventy six dollars fifty cents. By this article the vendors, by their attorney, covenanted, on payment of the whole or a satisfactory part of the money and interest, within the specified time, the improvements being completed, that they, or their representative, would execute a conveyance, a good and sufficient warrantee deed in fee, provided such party should, on giving the said deed, give bond and mortgage on the said premises for the consideration money, or so much thereof as should be due.

This action was brought for the whole consideration money, and the question submitted to the Court below was on the validity of the payments. The Court adjudged they were valid, and on this opinion we are now called on to decide.

Every general grant implies the grant of all things necessary to the enjoyment of the thing granted, without which it could not be enjoyed. Every general power necessarily implies the grant of every matter necessary to its complete execution. An attorney who has power to convey has so essentially the power to receive the purchase money, that a voluntary conveyance, without receiving the stipulated price or security for it, would be fraudulent, and either the whole contract might be rescinded by the principal, or the vendee liable for the purchase money. The principal authority includes all mediate powers which are necessary to carry it into effect. The payment of the purchase money was an intermediate act between the articles and the conveyance. The receipt of the purchase money is within the general scope of an authority to sell and convey, as a mediate power, as an act without which the conveyance would be fraudulent. No words could confer a more ample authority, than is conferred by this instrument. He has power to contract for sale, and having so contracted, to convey. All the acts he performs, necessary in the premises, are ratified and confirmed.

I cannot yield to the argument that, having contracted for sale, his power ended, because the language of the power is very explicit, that he has not only power to enter into executory contracts, but that, having entered into them, he has power to execute them by conveyances, and we must not stop at the words contract for sale, and say, that is a distinct power, but must go on with the whole sentence, sell and convey. Articles are the first step usual in the sale of lands; the conveyance, the last act which the attorney is authorized to perform. If he had conveyed on the receipt of the whole purchase money, it is admitted that this would have bound the principal. If he had power to receive the whole, he had power to receive any part, and it surely lies not in the mouth of the principal to say, that because he has not conveyed, he has no right to receive the money; for the same objections would arise, had he received the whole money, and refused to convey. The validity of the payment does not rest on the actual conveyance, but the power to convey; the payment is to precede the conveyance. There is nothing in the nature of the thing to justify such a construction, nor in the words of the instrument, and it is a proposition which never can be maintained, that he had only power to receive the money when he had conveyed, and that it is the conveyance which renders the payment valid; whereas, the conveyance could only be good if the money were paid, if he had power to receive the money and convey. If he has received the money and not conveyed, the payment must, in all reason and justice, be binding on the principal.

That the attorney here did not exceed his authority in making the contract, is admitted by this action calling for its execution. If he did not exceed his authority in making the contract, he had power to carry it into execution by conveyance. In order to enable him to do this, payment of the money, or security, was so necessary an incident, that without it the act would be fraudulent. He had power to convey; to convey without payment would have been a fraud on the principal; to receive the purchase money could not be a fraud.

It is not pretended that the power was revoked; much less, that notice of the revocation before payment was given. It is not made any part of the case, that there was any fraud on the part of the defendants.

The power of attorney is unrestrained as to time, credit, or condition. All the authority that the principals could confer, they did. They substituted Young, with all their powers, to part with their title; to convey the estate in fee; to bind them with covenants of general warranty. He could sell on credit, having the power to sell on credit; he could receive the money from the vendee, unless there was something in the instrument restrictive of this. It would be rather an unusual mode of conducting business, to empower an attorney to sell and convey, and restrain him from receiving the purchase money. Here, he is not so restricted, and the implication would be a constrained one; it would be dangerous for the Court to look for a hidden meaning, where the terms are neither obscure nor equivocal, or to imply a restriction of a power granted in general terms. The power is not required to be executed *uno flatu;* there are several acts to be done, at several times; the last act, the conveyance, not to be immediately executed, not to be executed until all the conditions were complied with by the vendees. The several payments were to come round; and until paid, or a satisfactory part, and mortgage given for the balance, under the general power to contract for sale, and to convey, unrestrained as to the extent of authority, unlimited in its duration, remaining in full force at the time of payment, the Court of Common Pleas decided rightly, in determining these payments to be valid; and the judgment is affirmed. *Judgment affirmed.*

ATTWOOD AND OTHERS *v.* MUNNINGS.

KING'S BENCH, 1827.

[7 *B. & C.* 278.[1]]

ASSUMPSIT by the plaintiffs, as indorsees, against the defendant, as acceptor of a bill of exchange for £1,560. Plea, the general issue. At the trial before Lord TENTERDEN, C. J., at the London sittings after Michaelmas term, 1823, a verdict was found for the plaintiffs, subject to the opinion of this court on the following case.

The plaintiffs were bankers carrying on business in the city of London; the defendant was a merchant engaged in extensive mercantile business, and also in joint speculations, to a considerable amount, with Thomas Burleigh, Messrs. Bridges and Elmer, S. Howlett, and W. Rothery. In the year 1815 the defendant went abroad on the partnership business, and remained abroad till after the bill upon which this action was brought became due. By a power of attorney, dated the 18th of May, 1816, the defendant granted power to W. Rothery, T. Burleigh, and S. Munnings, his wife, jointly and severally for him, and in his name, and to his use, to sue for and get in moneys and goods, to take proceedings, and bring actions, to enforce payment of moneys due, to defend actions, settle accounts, submit disputes to arbitration, sign receipts for money, accept compositions; "indorse, negotiate, and discount, or acquit and discharge the bills of exchange promissory notes, or other negotiable securities which were or should be payable to him, and should need and require his indorsement;" to sell his ships, execute bills of sale, hire on freight, effect insurances; "buy, sell, barter, exchange, export and import all goods, wares, and merchandises, and to trade in and deal in the same, in such manner as should be deemed most for his interest; and generally for him and in his name, place, and stead, and as his act and deed, or otherwise, but to his use, to make, do, execute, transact, perform, and accomplish all and singular such further and other acts, deeds, matters, and things as should be requisite, expedient, and advisable to be done in and about the premises, and all other his affairs and concerns, and as he might or could do if personally acting therein." By another power of attorney, dated the 23d of July, 1817, and executed by the defendant when abroad, he gave to his wife, S. Munnings, power to do a variety of acts affecting his real and personal property; "and also for him and on his behalf, to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require, &c.; and generally to do, negotiate, and transact the affairs and business of him, defendant, during his absence, as fully and effectually as if he were present and acting therein." T. Burleigh corresponded with the defendant, and acted as his agent, both before and after the receipt of this power. The defendant, while abroad, employed part of the produce of the joint speculations in his individual concerns, and during his absence T. Burleigh, for the purpose of raising money to pay to creditors of the joint concern, who were become urgent, drew four bills of exchange for £500 each upon the defendant, dated May 22d, 1819. The proceeds of those bills were applied in payment of partnership debts; they were accepted by the defendant by procuration of S. M., his wife. The bill in question was afterwards, in order to raise money to take up those bills, drawn and accepted in the following form: "Six months after date pay to my order £1,560, for value received. T. Burleigh. — Accepted per procuration of G. G. H. Munnings. S. Munnings." This bill was discounted by the plaintiffs. The defendant returned to England in October, 1821, and he, and each of the partners to the joint speculations, claimed to be a creditor on that concern.

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[1] s. c. 1 M. & R. 66. — ED.

Parke, for the plaintiffs.

Pollock, *contra*.

BAYLEY, J. This was an action upon an acceptance importing to be by procuration, and therefore any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority. The plaintiff in this case relies on the authority given by two powers of attorney, which are instruments to be construed strictly. By the first of the powers in question the defendant gave to certain persons authority to do certain acts for him, and in his name, and to his use. It is rather a power to take than to bind; and, looking at the whole of the instrument, although general words are used, it only authorizes acts to be done for the defendant singly; it contains no express power to accept bills, nor does there appear to have been an intention to give it; the first power, therefore, did not warrant this acceptance. The second power gave an express authority to accept bills for the defendant, and on his behalf. No such power was requisite as to partnership transactions, for the other partners might bind the firm by their acceptance. The words, therefore, must be confined to that which is their obvious meaning, viz. an authority to accept in those cases where it was right for him to accept in his individual capacity. Besides, the bills to be accepted are those drawn by the defendant's agents or correspondents; but the drawer of the bill in question was not his agent *quoad hoc.* The bills are to be accepted, too, "as occasion shall require." It would be dangerous to hold that the plaintiff in this case was not bound to inquire into the propriety of accepting. He might easily have done so by calling for the letter of advice; and I think he was bound to do so. For these reasons, I am of opinion that judgment of nonsuit must be entered.

HOLROYD, J. I agree in thinking that the powers in question did not authorize this acceptance. The word *procuration* gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given. The case does not state sufficient to show that this bill was drawn by an agent in that capacity, but rather the contrary; for it appears that it was drawn to raise money for the joint concern in which the drawer was a partner; it does not, therefore, come within the special power. Then as to the general powers. These instruments do not give general powers, speaking at large, but only where they are necessary to carry the purposes of the special powers into effect.

LITTLEDALE, J. I am of the same opinion. It is said that third persons are not bound to inquire into the making of a bill; but that it is not so where the acceptance appears to be by procuration. The question then turns upon the authority given. The first power of attorney contains an authority to indorse, but not to accept bills; the latter, therefore, seems to have been purposely omitted. Neither is this varied by the general words, for they cannot apply to any thing as to which limited powers are given. The second power gives authority "to accept for me and in my name bills drawn or charged on me by my agents or correspondents, as occasion shall require." The latter words, as to the occasion, do not appear to me to vary the question; and, reading the sentence without them, it authorizes the acceptance of bills drawn by an agent. The present bill was not drawn by Burleigh in his character of agent, and therefore the acceptance was without sufficient authority, and the plaintiff cannot recover upon it.

Postea to the defendant.[1]

MARTIN *v.* GREAT FALLS MANUFACTURING CO.

SUPERIOR COURT OF NEW HAMPSHIRE. 1837.

[9 *N. H.* 51.]

ASSUMPSIT for money had and received.

On the trial, the plaintiff produced the following memorandum in writing, viz.: "Borrowed of Noah Martin, for the Co., one hundred and fifty dollars. C. Cutler. Jan'y 9, 1834." And he proved that, on the date of the memorandum, Cutler, the signer, who had been in the employ of the defendants, as a clerk, made application to him, saying he wanted the money for the company, as they had some settlements to make, and that it should be returned in a few days; and that he thereupon let Cutler have the money, taking the memorandum before mentioned.

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[1] See Alexander *v.* Mackenzie, 6 C. B. 766 (1848). — ED.

It appeared that one Wells was at the time the general agent of the company, I. L. Folsom the general clerk, B. C. Sewell principal clerk in the counting-room for the cotton business, and that Cutler had been a clerk in the latter counting-room for some time before the said 9th of January, 1834, but that for four or five days previous to that date he had absented himself from his business. It did not appear that this fact was known to the plaintiff. On said 9th day of January, after borrowing the money, he absconded, and converted the money to his own use. There was no evidence that Cutler ever had any express authority to borrow money on the credit of the company, or for their use; but in order to show that the company were liable for the loan thus made, the plaintiff introduced the evidence of Z. Crowell, that Cutler had several times borrowed money at the store of Crowell & Wingate, which he said was for the company, and which had been repaid, generally by Cutler himself, but that one loan of $500 thus made, Sept. 13, 1833, for which Cutler gave a paper in which the company's name was mentioned, was repaid by Sewell, and that Sewell made no objection, at the time of the payment, to the authority of Cutler to borrow, and the witness never inquired respecting his authority of any one.

In another instance, six months or a year before he absconded, Cutler borrowed thirty or forty dollars of another person, and gave a due bill, signed with his name and the initials of the company, which was afterwards presented at the counting room, Sewell and Cutler being present, and Sewell paid it, no objections being made.

It appeared further, from the testimony of Sewell, that he had charge of paying all the bills in the cotton department; that he received the money for that purpose from Folsom, the general clerk, to whom he gave receipts, and that he had authority from Folsom to borrow money when necessary, and exercised that authority, and borrowed of the merchants; that the usual pay day was Friday, but that the laborers sometimes left, and were settled with on other days; that Cutler was a clerk in the same counting room, engaged in keeping the books, but had nothing to do in the usual course of his business in paying out money, nor any authority to borrow, and that he never intrusted him so to do; but that Cutler had, perhaps half a dozen times, in his absence, paid out divers sums to the hands, and witness on his return accounted and settled with Cutler for the same; that on one occasion, which he thought was in February, 1833, after he had so accounted and settled with him, Cutler said he had borrowed money of

Crowell & Wingate during his absence, and he wished witness to take the money and pay it, which he did; that he did not know of his having borrowed in the name of the company, and did not recollect how the due bill he took up was signed, but thought it probable it might have been signed as stated; that in July, 1833, Wells, the general agent, said to Cutler that he had heard that he had borrowed money on the credit of the company, and inquired if it was true; and on Cutler's finally acknowledging that it was, Wells forbid him, and all the rest of the clerks in the counting room, except himself, from borrowing. It did not appear that the plaintiff had ever lent any money to Cutler before, or had any knowledge respecting Cutler's borrowing before, or of the prohibition by Wells, as before stated.

Upon this evidence the Court directed a verdict for the defendants, subject to future consideration.

Marston and *Wells*, for the plaintiff.

Christie, for the defendants.

Green, J. The evidence clearly fails to show either that Cutler had a general authority to borrow money on the credit of the company, or that any particular authority was given him to obtain the loan which is the subject of this suit; and unless the conduct of the defendants was such as to create a well founded belief in the plaintiff that he had general or special power for the purpose, the action cannot be sustained. Had Cutler, before the time of effecting the loan in question, frequently borrowed money of the plaintiff, and given assurances in the company's name for repayment, and had the company afterwards discharged the debts without objection, this would have afforded ground for the support of the present action against the company. Such a course of conduct, on the part of the company, must have led the plaintiff to suppose that Cutler was duly authorized to borrow; and, to say the least, it would have been unjust in them to refuse affirming his contract, when he proved unfaithful to his trust. It would, in effect, be sanctioning the doings of their agent when his measures proved beneficial, and denying his authority when they proved otherwise.

Another state of things might perhaps have given the plaintiff sufficient grounds for recovery against the company. Had Cutler been in the habit of borrowing money of any and all the traders in the neighborhood, and pledging the company's name for the payment, and had the company uniformly discharged those claims without objection, and had all this been known to the plaintiff when he made the loan in question, it is by no means certain that the company would not have been answerable.

But the case finds that the loan in question was the only one ever obtained from the plaintiff in the name of the company by Cutler; and although it is in evidence that Cutler, in one or two instances, effected loans in the company's name, of other persons, which were paid by the proper officer of the company, yet it does not appear that these circumstances were known to the plaintiff, and consequently they could form no inducement to him to make the loan in question on the credit of the company.

The company never authorized Cutler to pledge their credit, or recognized his contracts. The other agents of the company had not conferred, and it does not appear that they had power to confer, such authority on him; and the payment, by a sub-agent, of money borrowed by Cutler, and which came to the use of the company, cannot be construed as giving him a credit for that purpose. Besides, the plaintiff did not loan on the faith of those transactions. The necessary requisites are, therefore, wanting to charge the defendants, and let judgment be rendered on the verdict.

Judgment for defendants.[1]

HATCH *v.* TAYLOR.

SUPERIOR COURT OF NEW HAMPSHIRE. 1840.

[10 *N. H.* 538.]

TRESPASS, for taking a horse of the plaintiff, on the 5th of March, 1836.

On the trial it appeared that the defendant, in February, 1836, was the owner of two horses, one black, the other white, usually worked together; and that they were hired by one Asa Clark, for the purpose of drawing a load of goods from Lowell, in Massachusetts, to Thornton, in this State.

While Clark had the horses in Thornton, he exchanged one of them, with the plaintiff, for a mare and colt; the plaintiff supposing that the horses belonged to Clark. The mare died at Concord, while Clark was on his return to Lowell. The other horse, with the colt, was taken by Clark to the defendant, in Methuen, and Clark informed the defendant of the trade. The defendant refused to sanction it, and told Clark to take the colt away. Clark soon afterwards took the colt to Derry; one Emerson, who was present in Thornton when Clark exchanged for the colt, and the defendant, being with him; and Emerson there purchased the colt of Clark, the defendant being present, and making no objection, but furnishing Emerson, who was poor, with money to pay for him. After this purchase the defendant proceeded, with Emerson, to Kingston, where Emerson exchanged the colt with one Orrin Spofford, for a mare, the defendant furnishing money to pay the difference. Emerson sold the mare on the next day to the defendant. Immediately after this the defendant went to Thornton, and took the horse in question from the possession of the plaintiff, denying the right of Clark to make any such exchange.

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[1] Compare Gillman *v.* Robinson, 1 C. & P. 642 (1825); Prescott *v.* Flinn, 9 Bing 19 (1832); Valentine *v.* Packer, 5 Pa. 333 (1847). — ED.

There was evidence, on the part of the plaintiff, tending to show that Clark, when he left Lowell, was empowered by the defendant to sell or exchange this horse. This evidence was derived principally from the declarations of the defendant, subsequent to the time of the exchange, and was somewhat contradictory in stating what he had told Clark he might do respecting a sale or exchange of the horses; in some instances denying that Clark had any liberty to trade away the horses; in others, admitting that he said to Clark he might sell if he had a chance to sell both; and in another stating that he told him he did not intend to have one of the horses put away without the other, and not to put the horses away unless he put off both. One witness stated that the defendant, when he took the horse in question from the plaintiff, in Thornton, said Clark had no business to trade; that he told him not to part the span; that he told him if he could put them away and get a good five year old horse and boot enough, he might; instead of which he had got a little shark of a colt, and a mare he had not seen, Clark having left her at Concord, on his way down.

The defendant offered evidence tending to show that he never gave Clark any authority to dispose of the horses; or that, if he had any authority, it was a permission to sell them if he could get a good price, and could sell both, but not to sell either alone; and he contended that, if Clark was empowered to sell, that would not authorize him to exchange; and further, that if Clark was authorized to sell, or exchange, on condition that he should sell or exchange both, and not otherwise, his act in disposing of one was void, because not in pursuance of his authority.

The plaintiff contended, that there was sufficient evidence that Clark was authorized to make the exchange; and further, that the purchase of the colt by Emerson was a pretence, being for the benefit of the defendant; and that what was thus done was a ratification by the defendant of the act of Clark in making the exchange.

The Court instructed the jury, that, when an authority is given to an agent to make a sale, it must be strictly pursued in order to bind the principal; that an authority to sell would not authorize the agent to barter or exchange, and if he undertook to do so his act would be void; but that there was a distinction between an authority to act for the principal, and instructions as to the mode of executing the authority; and that if, in this case, Clark had authority to sell or exchange both horses, coupled with directions to dispose of both or neither, and he disobeyed the instructions in this particular, and exchanged one without the other, that was a matter between him and his principal, and the principal would be bound by his act.

The court further directed the jury, that, if Clark had no previous authority to make the exchange, the defendant might ratify it afterwards, and such ratification would bind him; that his standing by and seeing Clark sell the colt, without taking any part, and making no objection, would not amount to such ratification; but that if he had any agency whatever in the sale of the colt by Clark to Emerson, or afterwards in the exchange of him by Emerson with Spofford, that would amount to a ratification of the contract between Clark and the plaintiff, and bind the defendant; that it would be a fraud in the defendant to assist in disposing of the colt, and then claim the horse; that it was quite enough that he might be permitted to look on and see Clark sell the colt, without interfering to prevent him; that if he went beyond this and took any active agency in disposing of him, he was then bouud by the exchange which Clark had made; and that in such case, whether Clark had any previous authority or not, the plaintiff was entitled to recover.

The jury having returned a verdict for the plaintiff, the defendant excepted to the foregoing instructions, and moved for a new trial.

Bell and *Quincy*, for the defendant.

Bartlett and *Rogers*, for the plaintiff.

PARKER, C. J. It cannot be known, from the case before us, whether the jury found that Clark did not exceed his authority in making the exchange; or whether the verdict was based upon a ratification of the transaction by the acts of the defendant afterwards. If, therefore, the instructions to the jury were not substantially correct upon either of these points, there must be a new trial.

There was sufficient evidence to warrant a finding that Clark, when he received the horses from the defendant, had an authority of some description given him respecting a sale or exchange of one or both of them. What this authority was, whether to sell or exchange, and what were the limitations upon it, or the instructions of the defendant relative to the manner of its execution, did not very clearly appear; the authority itself having been conferred verbally, and the evidence establishing its existence, and what was said about it, being derived mainly from the subsequent, and in some instances contradictory, declarations of the defendant himself.

The instructions to the jury take a distinction between the authority given to an agent, which he is not only bound to pursue in duty to his principal, but a deviation from which will render his act void, (unless he has been held out, or enabled to hold himself out, as having a different authority,) and the instructions or directions which he may receive from his principal, relative to the manner in which he is to execute his authority, which are matters between the principal and agent, so that a disregard of them by the latter, although it may make him liable to the principal, will not vitiate the act, if it be done within the scope of the authority itself.

It is very apparent that such a distinction must exist in some cases of agency, the particular instructions from the principal relative to the circumstances under which the agent is to act being intended as directions for his guidance, but not operating as limitations upon the authority which is conferred. Thus in case of a general agent, authorized to transact all business of a particular kind, although he can bind his employer only by acts within the scope of his authority, yet that authority is distinct from private orders or instructions relative to the mode in which it is to be executed; and the latter cannot limit or impair the authority, or affect the rights of a party dealing with the agent, unless he had knowledge of such private instructions. The books so uniformly concur in establishing this principle, that it is unnecessary to cite authorities in support of it. Strangers cannot look to the private communications that may pass between a principal and his agent. 15 East, 43, 408; 5 Bing. 442 (E. C. L. R. 500).

But whatever was the extent of Clark's authority in the present case, he was not a general, but a special agent, authorized to make a sale, or exchange, of one or two horses only; and the question arises how far the same rule is applicable to agencies of that character.

To a very considerable extent the principles applicable to general agencies apply also to those of a special and limited character. Thus the general principle, that the acts of the agent, within the scope of his authority, bind his employer; and that his acts beyond that point are void, unless the principal has held him out, or enabled him to hold himself out, as having more enlarged powers than he actually possessed, or unless the employer ratifies his acts, is applicable to all classes of agencies.

It is contended, however, that the distinction between authority and instructions does not apply in cases of special agents; and the defendant's counsel rely particularly upon a treatise on Agency, recently published, which, it must be admitted, in some measure sustains their position. Speaking of the nature and extent of the authority of agents, the author refers to "the distinction commonly taken between the case of a general agent, and that of a special agent; the former being appointed to act in his principal's affairs generally, and the latter to act concerning some particular object;" and says: "In the former case the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending or prohibiting the exercise of such authority under particular circumstances. In the latter case, if the agent exceeds his special and limited authority conferred on him, the principal is not bound by his acts; but they become mere nullities so far as he is concerned; unless, indeed, he has held him out as possessing a more enlarged authority." Story on Agency, 115. The phraseology of this last clause is similar in substance to that of other elementary writers. 2 Kent's Com., Lecture 41; 1 Livermore on Agency, 108. Taken strictly, as it stands, there can be no doubt of the correctness of the rule. If a special agent exceed his special and limited authority, without doubt the principal is not bound by his acts, unless he has held him out, or enabled him to hold himself out, as possessing a more enlarged authority. But from its connection with the preceding clause, and from its general connection with the context, this clause is understood as asserting that if a special agent exceeds the special and limited private instructions or directions which are given him by the principal, limiting or qualifying, suspending or prohibiting the exercise of his agency under particular circumstances, the principal will not be bound, unless he has held the agent out as possessing a more enlarged authority than the right to act, coupled with the instructions, would give him. In other words, that instructions or directions to a special agent, notwithstanding they are private or secret, if intended to operate upon, and limit, qualify, suspend, or prohibit the action of the agent under certain circumstances, become part and parcel, and of the essence of the authority itself, so that the agent will not be acting within the scope of his authority, or apparent authority, if he disregard them. So it seems to be understood by the defendant's counsel; and upon a subsequent page it is stated that if a common person, not a factor, should be employed to make a sale, "and he should violate his private instructions, and deviate from his authority in the sale, the principal would not be bound." Story on Agency, 122.

If this is so, there can be, ordinarily, no such thing as instructions, contradistinguished from authority, in the case of a special agent; as whatever directions he receives respecting the mode and manner in which he is to perform his duties will partake of the nature of authority, or qualification of authority, and limit or suspend his right to act, and to bind the principal, unless there has been some holding out of the agent as having an authority beyond the import of such directions.

But it is, we think, apparent enough, that all which may be said to a special agent, about the mode in which his agency is to be executed, even if said at the time that the authority is conferred, or the agency constituted, cannot be regarded as part of the authority itself, or as a qualification or limitation upon it. There may be at all times, upon the constitution of a special agency, and there often is, not only an authority given to the agent, in virtue of which he is to do the act proposed, but also certain communications, addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution. These communications may, to a certain extent, be intended to limit the action of the agent; that is, the principal intends and expects that they shall be regarded and adhered to in the execution of the agency; and should the agent depart from them he would violate the instructions given him by the principal, at the time when he was constituted agent, and execute the act he was expected to perform in a case in which the principal did not intend that it should be done. And yet in such case he may have acted entirely within the scope of the authority given him, and the principal be bound by his acts. This could not be so, if those communications were limitations upon the authority of the agent. It is only because they are not to be regarded as part of the authority given, or a limitation upon that authority, that the act of the agent is valid, although done in violation of them; and the matter depends upon the character of the communications thus made by the principal, and disregarded by the agent. Thus where one person employs another to sell a horse, and instructs him to sell him for $100, if no more can be obtained, but to get the best price he can, and not to sell him for less than that sum, and not to state how low he is authorized to sell, because that will prevent him from obtaining more, such a private instruction can with no propriety be deemed a limitation upon his authority to sell; because it is a secret matter between the principal and agent, which any person proposing to purchase is not to know, at least until the bargain is completed. And if no special injunction of secrecy was made, the result would be the same; for from the nature of the case such an instruction, so far as it regards the minimum price, must be intended as a private matter between the principal and agent, not to be communicated to the persons to whom he proposed to make a sale, from its obvious tendency to defeat the attempt to obtain a greater sum, which was the special duty of the agent. It will not do to say that the agent was not authorized to sell, unless he could obtain that price. That is the very question, whether such a private instruction limits the authority to sell.

It seems very clear that any one who proposes to deal with a special agent has the right, in the first place, to know what authority he possesses, and all the limitations upon it. He deals with him at his peril, because he is bound to inquire into the nature and extent of the authority conferred. Snow *v.* Perry, 9 Pick. R. 542; Schimmelpennick *v.* Bayard, 1 Peters' S. C. R. 264; Story on Agency, 124.

The principal is not to be bound by the acts of the special agent beyond what he has authorized, because he has not misled the confidence of the party dealing with him, or enabled the agent to practise any deception; has never held the agent out as having any general authority whatever in the premises; and if the other party trusts without inquiry, he trusts to the good faith of the agent, and not to that of the principal. Story, 125.

But to what purpose is the party dealing with the agent to inquire respecting that which he is not to know, and what duty exists upon him to know that which by the express direction of the principal, or from the nature of the case, is to be concealed from him? Or how can it be said that he trusts the agent, respecting the limit at which he is authorized to sell, or purchase, when, if he asks respecting that limit, the principal has precluded him from ascertaining what it is? Who, in fact, places confidence in the agent in a case like that above stated, and who has enabled the agent to practise deception, if deception takes place?

So far as a party dealing with a special agent is bound to inquire respecting his authority, so far he is entitled to a definite and distinct answer. And so far as he is bound to inquire and to know, it is bad faith and fraud to conceal anything from him. But would it be deemed bad faith in the agent to say nothing as to the price at which he was instructed to sell, if the market would afford him no better? It may very safely be asserted that this is not usually practised, either by general or special agents; and a great change in the ordinary mode of dealing must take place before the morality of contracts could be considered as requiring such a disclosure. It would certainly not be required of the owner of property, in making a sale, to state what was the lowest price he had determined to receive, if the party proposing to purchase would give no more; and it is as little expected of an agent, who is employed to get the best price he can obtain, but directed not to sell for less than a certain sum.

So in the case of a person employed to purchase, if the employment be to purchase an article at the best possible price, with private directions that he may give a certain sum, but no more. The permission to give this sum, and the direction not to exceed it, are not ordinarily to be communicated to those with whom he negotiates for a purchase, although intended to control the action of the agent himself. The employer trusts the agent.

No man is at liberty to send another into the market to buy or sell for him as his agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from those instructions, to say that he was a special agent; that the instructions were limitations upon his authority; and that those with whom he dealt in the matter of his agency acted at their peril, because they were bound to inquire, where inquiry would have been fruitless, and to ascertain that of which they were not to have knowledge. It would render dealing with a special agent a matter of great hazard. If the principal deemed the bargain a good one, the secret orders would continue sealed; but if his opinion was otherwise, the injunction of secrecy would be removed, and the transaction avoided, leaving the party to such remedy as he might enforce against the agent.

From this reasoning we deduce the general principle that where private instructions are given to a special agent respecting the mode and manner of executing his agency, intended to be kept secret, and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid, and bind his employer.

It is unnecessary to multiply instances in which the principle is applicable. It may be added, that instructions which are not to be communicated to the other party are, justly, no more to be regarded as limitations upon the authority of the agent, than instructions not to sell unless the agent can obtain a good price, or not to purchase without he can obtain the property cheap; or, as stated by some of the evidence in this case, not to exchange "unless he could get a good five year old horse, and boot enough;" in which cases the instruction is not a limitation upon the authority, and the transaction to be held void unless the principal, or a jury, should consider that the agent had complied with the direction. The principal in such cases trusts the agent, who has a discretion in the matter, (Hicks *v.* Hankin, 4 Esp. R. 114.) and it would be most mischievous to hold such direction as a condition, upon a compliance with which depended the validity of the act.

It may be otherwise if the principal directs his agent to offer his horse for sale at the sum of $100, and to take no less; or to purchase ten bales of cotton, if to be had at a certain sum, and to give no more; for in those cases the whole matter would be open to the knowledge of any one proposing to purchase, or sell, and the direction may stand as part and parcel of, and a limitation upon, the authority itself.

The view we have thus taken is strongly supported by the doctrine in relation to agencies, where there is a written authority. Mr. Justice Story, in another part of his work, speaking of agencies of that description, says: "We are, however, carefully to distinguish, in all such cases, between the authority given to the agent, and the private instructions given to him as to his mode of executing that authority. For, although where a written authority is known to exist, or is, by the very nature of the transaction, presupposed, it is the duty of persons dealing with the agent to make inquiries as to the nature and extent of such authority, and to examine it; yet no such duty exists to make inquiries as to any private letter of instructions from the principal to the agent; for such instructions may well be presumed to be of a secret and confidential nature, and not intended to be divulged to third persons. Indeed, it may perhaps be doubted if upon this subject there is any solid distinction between the case of a special authority to do a particular act, and a general authority to do all acts in a particular business. Each includes the usual and appropriate means to accomplish the end. In each case the party ought equally to be bound by the acts of his agent, executing such authority by any of those means, although he may have given to the agent separate, private, and secret instructions of a more limited nature." Story on Agency, 70. But he adds, in a note, "The case intended to be put in the text is that of an authority distinct, and not derived from, the instructions; for, if the original authority is restricted and qualified, the restrictions and qualifications constitute a part of the power itself, and govern its extent."

It is undoubtedly true that "if the original authority is restricted and qualified, the restrictions and qualifications constitute a part of the power itself, and govern its extent." But the question is, when is it so restricted and qualified; and it is not easy to distinguish the difference in principle between a written authority, with a private letter of instructions of a secret and confidential nature, and not intended to be divulged, and a verbal authority, with verbal instructions of a secret and confidential nature, which also are not intended to be divulged.

There is another view of the case, which perhaps ought not to be omitted, leading to the result at which we have already arrived. In the case of general agents, the principal will be bound by the acts of his agent, within the scope of the general authority conferred upon him, although he violates by these acts his private instructions and directions. He is acting within the scope of his authority, or apparent authority. So a special agent who has private instructions for his government, but which are not to be communicated to those dealing with him, is acting within the scope of his authority, or apparent authority, when he is acting within the scope of what he is to communicate, and what only the party dealing with him is authorized to know, or is to know if he inquires.

In fact, there seems to be, in such case, a holding out of the agent, or an authorization to him to hold himself out, as having an authority beyond the private instructions intended to limit his action upon the subject matter; and upon that principle the employer should be bound. "The principle which pervades all cases of agency, whether it be a general or special agency, is this: The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess; although he may have given him more limited private instructions unknown to the persons dealing with him." Story, 118, note. "For I am bound by the contracts which my agent makes in my name, if they do not exceed the power with which he was ostensibly invested; and it will not avail me to show that I have given him secret instructions to the contrary, which he has not pursued." 1 Livermore on Agency, 107. When the principal sends his agent into the market with directions to sell for him ten bales of cotton, or a horse, and says to him that he may sell for a certain sum, if he cannot obtain more, but not to sell for less than that, and to get as much more as he can, he has not only enabled, but directed, the agent to hold himself out as having authority to sell. That matter is to be communicated to any one to whom he proposes to make a sale; and he is acting within the scope of the authority, which he is thus held out as possessing, when he makes the sale, notwithstanding he may disregard the secret limit upon the price which he was directed to require.

It is believed there is little in the cases conflicting with the views now expressed. In some of them there is a mere statement of the general principle, that if a special agent exceed his authority, his act is void. In others, the instruction was not private, or there was a clear excess of authority. 2 Kent's Com. 484, Lect. 41; Jeffrey *v.* Bigelow, 13 Wend. R. 520; Rossiter *v.* Rossiter, 8 Wend. R. 494; Munn *v.* The Commission Co., 15 Johns. R. 54; Andrews *v.* Kneeland, 6 Cowen's R. 357; 1 Peters' S. C. R. 264; 9 Pick. R. 542; Denning *v.* Smith, 3 Johns. Ch. R. 344; Fenn *v.* Harrison, 3 D. & E. 760; East India Co. *v.* Hensley, 1 Esp. R. 112; Runquist *v.* Ditchell, 3 Esp. R. 65; Batty *v.* Carswell, 2 Johns. R. 48; Gibson *v.* Colt, 7 Johns. R. 390; Beals *v.* Allen, 18 Johns. R. 363; Thompson *v.* Stewart, 3 Conn. R. 183. *Sed vide* 11 Wend. R. 90; 15 East, 467.

In the present case, there was some contradiction in the evidence, whether any authority was given to Clark; or if any was given, what it was. It became necessary, of course, to submit a question upon that to the jury. And from the uncertainty respecting what was said by the defendant, and how it was said, it was also left to the jury to find, in case an authority was given, how far it extended, and whether what was said about not parting with one horse unless both were disposed of, was said in a way to be a limitation upon the authority, or as mere instructions and directions. It does not seem to have appeared, distinctly, whether what was said about disposing of one only, if anything of that kind was in fact said, was a private direction to Clark, or was in fact incorporated into, and part of, the authority itself. If Clark had an authority to exchange, and the defendant told him, as he himself afterwards stated, "not to part the span," but "if he could put them away, and get a good five-year-old horse, and boot enough, he might," this declaration, so far as it relates to a good horse, and boot enough, cannot be held to be a limitation on the authority; and if this is regarded as instructions, what was said in connection with it, about parting the span, might well partake of the same character. The principle now settled, that whatever is not to be communicated to the person with whom the agent may deal, is not to be regarded as a limitation upon his authority, was not adverted to. But no objection is taken that the matter was not properly submitted to the jury, on the evidence before them, if there may be instructions to a special agent, given at the same time with the authority, which are not limitations upon his authority to execute the agency, but private directions, intended to limit his action in the matter, and a disobedience of which may make him liable to his principal, but will not avoid the act done. It is apparent that in some cases the evidence may be of such a character that it must be submitted to a jury to determine, in effect, how far the authority, so called, extended, by finding what in fact was said by the principal, and what was intended as mere private instructions to the agent; and this seems of that description. On the view we have taken, therefore, there is nothing in the instructions upon this point on which to set aside the verdict.

The instructions to the jury respecting a ratification were fully warranted by the evidence reported. That evidence is quite sufficient to authorize a belief that when the colt was sold, and the defendant furnished the money to make the payment to Clark, and when he was afterwards exchanged by Emerson with Spofford for the mare, and he furnished the money to pay the difference, Clark and Emerson were puppets in his hands, moving as he pulled the wires. Emerson was poor, and the mare was immediately sold, as it was called, to the defendant. Upon this part of the case the jury ought to have found for the plaintiff, if there had been no evidence of any previous authority in Clark to make the exchange. 1 Livermore on Agency, 45; Codwise *v.* Hacker, 1 Caines' R. 526; Ward *v.* Evans, 2 Salk. 442; Story on Agency, 247, and authorities cited. Having been active in the sale of the colt, the defendant's declaration that he would not sanction the trade cannot avail him. Cornwall *v.* Wilson, 1 Livermore, 395; 1 Ves. Sr. 509. *Judgment on the verdict.*

HAWTAYNE *v.* BOURNE.

EXCHEQUER. 1841.

[7 *M. & W.* 595.]

DEBT for money lent, and on an account stated. Plea, *nunquam indebitatus.* At the trial before MAULE, J., at the last Cornwall Assizes, the following appeared to be the facts of the case: —

The defendant, who resides at Liverpool, was the holder of 100 shares in a company established for the working of a mine called the Trewolvas Mine, in the parish of St. Columb Major, Cornwall. The mine was managed by an agent, appointed by the directors of the company for that purpose. In March, 1839, in consequence of the shareholders not having paid up the calls regularly, the concern fell into difficulties, and the agent, from want of funds, became unable to pay the laborers; a considerable number of whom, their wages being in arrear, applied to the magistrates, and obtained warrants of distress upon the materials belonging to the mine. The agent, finding that these warrants were about to be put into execution, applied in the name of the company, but in fact upon his own responsibility, and without the knowledge of the shareholders, to the St. Columb Branch of the Western District Banking company, for a loan of £400 for three months, which was advanced accordingly, and placed by the bank to the credit of the company, and out of it the arrears of wages were discharged. To recover the balance of that sum the present action was brought. There was some evidence of a conversation between the defendant and the agent, in which the former had asked whether they could not get money from the bank to keep the concern going: but this evidence was not left to the jury. The learned judge, in summing up, stated to the jury, that although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal, so as to bind him, yet if it became absolutely necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so, to the extent of that necessity; and he left it to the jury to say whether the pressure on the concern was such as to render the advance of this money a case of such necessity. The jury found for the plaintiff.

In Michaelmas Term, *Erle* obtained a rule *nisi* for a new trial, on the ground of misdirection.

Bompas, Sergt., and *Cockburn*, now showed cause.

Crowder (with whom was *Erle*), in support of the rule, was stopped by the court.

Parke, B. This is an action brought by the plaintiffs, who are bankers, to recover from the defendant, as one of the proprietors of the Trewolvas Mine, a mine carried on in the ordinary way, the balance of a sum of £400, advanced by them to the agent appointed by the company of proprietors for the management of the mine. Now the extent of the authority conferred upon the agent by his appointment was this only, — that he should conduct and carry on the affairs of the mine in the usual manner; there is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking; and certainly no such authority could be assumed. There are two grounds on which it is said the defendant may be made responsible: first, on that of a special authority given to the agent to borrow money; and secondly, on the assumed principle, that every owner who appoints an agent for the management of his property must be taken to have given him authority to borrow money in cases of absolute necessity. There certainly was, in the present case, some evidence from which a jury might have inferred that a power to borrow money, for the purposes of the mine, had been expressly given to the agent; but that evidence does not appear to have been left to the jury, and therefore the verdict cannot be supported on the first ground. Then as to the second ground, it appears that the learned judge told the jury that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity, to raise money for that purpose. I am not aware that any authority is to be found in our law to support this proposition. No such power exists, except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honor of the drawer. The latter derives its existence from the law of merchants; and in the former case the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is that the law invests the master with power to raise money, and, by an instrument of hypothecation, to pledge the ship itself if necessary. If that case be analogous to this, it follows that the agent had power not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am therefore of opinion that the agent of this mine had not the authority contended for. Whether he had or had not, was a question for the jury; but, on the general principles of law, it seems to me that the ruling of the learned judge cannot be supported, and therefore that the rule for a new trial must be made absolute.

ALDERSON, B. I am of the same opinion. There is no rule of law that an agent may, in a case of emergency suddenly arising, raise money, and pledge the credit of his principals for its repayment; and even if it were so, in this instance there was ample time and opportunity for him to have applied to his principals. Several cases have been cited as analogous to the present, but they have been already satisfactorily distinguished by my brother Parke. Lamb *v.* Bunce, 4 M. & S. 275, may appear to be a case similar to the present, but it is very distinguishable, for there is an original liability in parish officers to support the poor in their parish; and it appears, moreover, that the parish officers in that case were aware of the surgeon being in attendance on the pauper, and made no objection. Those were circumstances from which a jury might well infer a contract on their part to pay his bill. In the present case there was no such evidence.

ROLFE, B., concurred. *Rule absolute.*[1]

NORTH RIVER BANK *v.* AYMAR.

SUPREME COURT OF NEW YORK. 1842.

[3 *Hill*, 262.]

ERROR to the Superior Court of the city of New York. The action in the court below was by the North River Bank against Aymar and Embury, executors, &c., of Pexcel Fowler deceased, on eleven promissory notes; six of which purported to have been made on behalf of the defendants' testator, and were signed thus: "Pexcel Fowler — Jacob D. Fowler, att'y." Of these six notes, four were payable to the order of David Rogers & Son, and by them indorsed; and the other two were payable to the order of Jacob D. Fowler, and were indorsed by him, and by D. Rogers & Son. The remaining five notes purported to have been made by Jacob D. Fowler, payable to the order of Pexcel Fowler, and were indorsed in the same form in which the other six notes were signed — viz.: "Pexcel Fowler — Jacob D. Fowler, att'y" — and were also indorsed by D. Rogers & Son. The case, as it further appeared on the trial, was this: The defendants' testator, in his lifetime, executed to Jacob D. Fowler a letter of attorney in these words: "Know all men, &c., that I, Pexcel Fowler, of, &c., have made, &c., Jacob D. Fowler, of, &c., my true and lawful attorney, for me and in my name, place, and stead, and to my use, to ask, demand, &c., all such sum and sums of money, debts, &c., which are or shall be due, owing, &c., to me, &c. I do further authorize and empower the said Jacob D. Fowler to draw all checks or drafts upon any of the banks in the city of New York for all moneys deposited in my name, to indorse any promissory note or notes, bills of exchange or drafts, to accept all bills of exchange or drafts, or in my name to draw any note or notes, to enter merchandise at the custom house, &c., and to manage and negotiate any business from time to time in the same manner as if I was personally present. Giving and granting unto my said attorney full power and authority in and about the premises, &c. In witness," &c. About the time this power was executed, Pexcel Fowler and Jacob D. Fowler called together at the banking-house of the plaintiffs and left it in their possession, where it had ever since remained. The notes in question were all made during the life of the defendants' testator, and after the execution of the power. Nine of them were not made or indorsed in the business of the defendants' testator, nor for his use or benefit, but for the accommodation of David Rogers & Son, under an agreement between them and the firm of Fowler, Gordon, & Co. (of which Jacob D. Fowler was a member) for the mutual exchange of accommodation paper. Fowler, Gordon, & Co. failed in business, leaving unpaid a large number of notes made and indorsed under this agreement, on which D. Rogers & Son were liable, and which had been discounted by the plaintiffs. The notes in question were procured by D. Rogers & Son for the purpose of relieving themselves from such liability, and were passed by them to the plaintiffs in exchange for the said notes of Fowler, Gordon, & Co. At the time the notes in question were received by the plaintiffs, Samuel D. Rogers, a member of the firm of D. Rogers & Son, and who was also one of the directors of the bank, declared the notes to be business paper, given for goods sold. The defendants admitted that the plaintiffs were entitled to recover on two of the eleven notes; and, in respect to the others, the court charged the jury that Jacob D. Fowler exceeded his authority, — that the power being special, the plaintiffs were affected by the excess, and were not therefore entitled to recover. The plaintiffs excepted. The jury rendered a verdict for the amount of the two notes in favor of the plaintiffs, who, after judgment, sued out a writ of error. Some other facts necessary to a more full understanding of the case will be found stated in the following opinions.

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[1] As to the authority of the master of a ship to pledge the owner's credit, see Arthur *v.* Barton, 6 M. & W. 138 (1840); Beldon *v.* Campbell, 6 Ex. 886 (1851).

As to emergencies, compare Toledo, St. L., & K. C. Railroad Co. *v.* Mylott, 6 Ind. App. 438 (1893). — ED.

S. G. Raymond, for the plaintiffs in error.

J. W. Gerard, for the defendants in error.

COWEN, J. As the notes in question were received by the plaintiffs in exchange for the notes of Fowler, Gordon, & Co., the former are entitled, so far as their rights are in question on this writ of error, to be considered *bona fide* holders in the fair course of trade and for a valuable consideration.

That the power conferred by the letter of attorney was limited to notes in the proper business of the testator, and that it would have been so independently of the words to his use, there can be no doubt. Stainer *v.* Tysen, 3 Hill, 279; Nichol *v.* Green, Peck's Rep. 283; Butcher *v.* Tysen, U. S. Circ. Court, Nov. 1840, 4 Hunt's Merch. Mag. 456. To fulfil this purpose of the power, it was essential that the making and indorsing should be upon a consideration passing to Pexcel Fowler, the testator. There is nothing in the nature or effect of such a power which authorizes the attorney to use it for his own benefit or the benefit of any one excepting the principal. And if this limitation be such that an appointee would be bound to notice the fact that the attorney overstepped it, then these plaintiffs were properly cut off by the court below from their claim upon the contested notes and indorsements.

The general rule, that when an attorney does any act beyond the scope of his power, it is void even as between the appointee and the principal, has always prevailed, and is indeed elementary in the doctrine of powers. The ground on which the rule rests is familiar. The appointee need not deal with the attorney unless he choose; and it is very reasonable that he should be bound to inspect the power, when in writing, or to learn its language in the best way he can, when it is by parol. On becoming acquainted with it, he shall be holden to understand its legal effect, and must see, at his peril, that the attorney does not transgress the prescribed boundary in acting under it. I say in *acting* under it; for it is easy to compare the act with the words to which it must conform; and so far, there is nothing unreasonable, — nothing impossible or even difficult. In speaking of the attorney's acts, I certainly mean to include his declarations made at the time, or in the business which he transacts under the power; for his declarations are a part of the *res gestæ*, and bind his principal equally with the act to which they relate. They are always received as evidence against the principal. I authorize a man to borrow a sum of money for me. The power being limited, he has no authority to borrow for himself or his neighbor. He goes to the lender and borrows in my name, showing him my written power, and declaring at the same time that he takes the loan on my account. Both his acts and declarations are evidence against me.

A question often arises upon this and the like cases, how far the appointee is responsible for the agent's fidelity. Take it, in the instance supposed, that his acts and professions make out a case within the terms of his authority; is the man who advances his money accountable for the truth or the good faith of a transaction which, so far as he can see and has reason to believe at the time, is in honest conformity with such authority? Take it that the attorney comes with a falsehood, meaning the loan for his own use, or the use of another whom he desires to accommodate; must the appointee lose his money? He brings his action against the principal, and proves the letter of attorney and the loan as stated; is it necessary to do more? or can the principal turn round upon him and show that his attorney was false to his interest, and so infer that the man who trusted to his letter and made a loan apparently according to its purview, must himself be visited with the consequences of the fraud? I confess that, until I heard the argument in this cause, I had supposed the mere statement of such a case furnished its own answer; and that to allow such a defence would be pushing the duty of inquiry on the part of the appointee far beyond the principle on which it is founded, — indeed to an extent absolutely impracticable.

The case I have instanced is, in principle, the one now before us. The plaintiffs were apprised that Jacob D. Fowler had power to make and indorse notes in the business of the testator; and notes actually made and indorsed by the attorney, and purporting to have been so made and indorsed in conformity with the power, were presented to and, in effect, discounted by the plaintiffs. This act was equivalent to an express declaration that the notes were made and indorsed in the business of the testator. A man gives a power to sell land, and the attorney executes a deed in the name of the principal. The transaction imports the same thing as a recital or express declaration referring to the power; and the principal is equally estopped to deny that the authority has been pursued.

There are a few general principles entirely settled and universally acted upon, especially in dealing with negotiable paper, which it may be well to remember. One was laid down in Hern *v.* Nichols, 1 Salk. 289. The defendant's factor, being authorized to sell silk, defrauded the vendee; and Holt, C. J., held, that the principal was liable for the deceit; "for," said he, "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger." See also Bowles *v.* Stewart, 1 Sch. & Lef. 222; The Monte Allegre, 9 Wheat. 644. An application of this principle to men who had authorized an agent to indorse for them, was made in Putnam *v.* Sullivan, 4 Mass Rep. 45; a case coming very near if not quite up to the one before us. The defendants, who were merchants, having occasion to be absent, left their names with a clerk on blank paper, to be filled up by him and advanced on the sale of goods by the house upon commission, or to renew the notes of the house when due at the banks. On some he was authorized to bind them as makers, and on others as indorsers. A man obtained one of the latter from the clerk by false pretences, wrote and signed a note on the other side, and got money upon it for his own use on the credit of the indorsement, the lenders having no notice of the fraud. The defendants were held liable. The plaintiffs were informed too that it was a blank indorsement which had been left with the clerk, to be used in the business of the defendants. Parsons, C. J., said: "Here one of two innocent parties must suffer. The indorsees confided in the signature of the defendants; and they could have no reason to suppose that it had been improperly obtained.

On the other hand, the loss has been occasioned by the misplaced confidence of the indorsers in a clerk too young or inexperienced to guard against the arts of the promisor." Looking at the fact that the plaintiffs knew the clerk was limited to use the note in the business of his principals, the power was the same in respect to them, as that of Jacob D. Fowler here in respect to the bank. They found, as the bank did, that the agent had delivered out the note to the promisor, but not that he had exceeded his power, though he had done so in fact. Why not require them to stop and ascertain whether it had been delivered out upon a consideration passing to the defendants? The answer is, that they had put their agent in a condition which enabled him to impose upon strangers by apparently pursuing his authority. They had given him a discretion to speak for them, both by words and actions. The neglect or falsehood of their agent, therefore, was legally imputable to them. The paper being issued without consideration, whether by their agent or themselves, was indeed void as between the original parties; but there being in each case a power to issue paper valid in form, it could not be impeached in the hands of a *bona fide* holder. Everybody knows that a partner who issues a note of the firm for his own benefit, exceeds his power; but the firm cannot avail themselves of the objection as against a *bona fide* holder. Another case is that of Prescott *v.* Flynn (reported in Chitty on Bills, 35, note, Am. ed. of 1839). In that case it was proved by circumstances that the clerk of the defendants was authorized to indorse for them in their business. Availing himself of that authority, he indorsed their names on two bills of exchange which he procured to be discounted for his own benefit, and absconded with the money. It was hardly pretended that the plaintiff was bound, though he knew of the limitation, to inquire whether in truth the money was intended for the principals. Indeed, when the case came to be reported in 9 Bing. 19, the reporter thought the fraud to be so entirely immaterial that he did not even mention it. According to both reports, the court took it for granted that the agent acting for himself, instead of his principals, could make no difference as between them and the plaintiff. It was enough that he had power to act in the defendants' business, and did apparently so act. In Newland v. Oakley, 6 Yerg. 489, an attorney having power to assign notes for his principal, did so; but embezzled the money which he got. That he thus assigned for his own benefit, was held not to affect the right of a person to whom one of the notes came in the course of trade.

These cases respecting the limited powers of agents to make indorsements, accord with the proposition concerning powers in general as it was submitted to us by the counsel for the plaintiff in error, viz.: "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority." Such a rule was substantially laid down by Lord Ellenborough, C. J., in Pickering *v.* Busk, 15 East, 38, 43. He says: "I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject matter; and there would be no safety in mercantile transactions, if he could not." Andrews *v.* Kneeland, 6 Cowen, 354, 357, 358, and the books there cited; Rossiter *v.* Rossiter, 8 Wend. 498, 499, and the cases there cited.

How were the plaintiffs in the case before us to ascertain whether Jacob D. Fowler had acted in good faith towards his principal? On their agent asking one of the payees, Samuel D. Rogers, of the firm of David Rogers & Son, he answers that the notes were business paper, given for goods sold; and this is another circumstance tending to perfect the parallel with Putnam *v.* Sullivan.

The only adjudged case cited on the argument for the defendants in error, giving color to the idea that the appointee must look behind the power, is Attwood *v.* Munnings, 1 Mann. & Ryl. 66; 7 Barn. & Cress. 42, s. c. The power in that case was extremely limited, being tied up to the acceptance of bills particularly described. The words were: "For me, and on my behalf, to pay and accept such bill or bills, &c., as shall be drawn, &c., on me by my agents or correspondents, as occasion shall require." The bill there in question was drawn by Burleigh, a partner of the defendant, for the benefit of the joint concern; and, as the court held, he was neither a correspondent nor agent within the meaning of the power. There was indeed no need of giving effect to the bill by an acceptance under the power; for Burleigh was authorized to bind the defendant as his partner. The court held that, as the power described the persons whose names must appear upon the bill, the authority was overstepped if the names were not there. In other words, a power to accept a bill drawn by an agent, did not extend to a bill drawn by one who was not an agent. Here the power contains no such limitation. The case cited accords with one of the most familiar rules for the construction of powers; but it does not apply. If the principal will describe the particular condition on which a bill shall be accepted, however idle, even to the writing of it with a steel pen, it must be fulfilled. There it was to be drawn by a correspondent or agent; and not being so drawn, but by one who was a principal, the condition failed. The appointee was admonished to see at his peril that all the prescribed requisites were combined. The principal would not trust the attorney, even to judge of the parties. There was another clause in the power which, as Bayley, J., inclined to think, also amounted to a condition. The bills were to be drawn as occasion should require. It was not necessary to say that the plaintiff was bound on this clause to see the occasion did require; and a majority of the judges who spoke to the question (Holroyd and Littledale, JJ.) did not say so. The two reporters do not entirely agree. In 7 Barn. & Cress., both of the two latter judges are made to discuss the question: in 1 Mann. & Ryl., Littledale, J., is represented as having given a naked assent to what Holroyd, J., said; but in neither does it appear that any but Bayley, J., considered the actual occasion of accepting as a condition. The report of his argument is substantially the same in both, though in Barn. & Cress. he seems to have thought it sufficient to have called for the letter of advice. Littledale, J., in Barn. & Cress., thought the words "as occasion shall require" did not vary the question; and that the power should be read without them. This was conceding the ground taken by counsel, that the attorney had a discretionary power to judge of the occasion. I have looked into some authoritative books on agency to find how this case has been considered by learned writers who had studied the subject. It is introduced into the late edition of Paley on Agency (p. 192) by a simple statement of the case, with the opinion of Bayley, J.; or rather, as illustrating the general remark, that all written powers are to receive a strict interpretation, the authority never being extended beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect. Judge Story mentions the case several times in his work on agency (pp. 22, 65 to 67, 69), but evidently considers it as holding no more than that the appointee is bound to see the proper parties introduced. He is evidently of opinion, with Littledale, J., that the words "as occasion shall require" were no more than what the nature of such a power would imply without them, viz. an authority in the agent to govern himself according to the emergencies of business. The necessity mentioned by Mr. Justice Bayley of calling for the letter of advice was, I think, virtually denied by what Best, C. J., and the whole court afterwards held as to letters of instruction in Withington *v.* Herring, 5 Bing. 492; 3 Moore & Payne, 30 S. C. Such letters are often confidential between the parties, and contain matters not fit to be divulged. He said, all that was necessary for the plaintiffs to inquire for, was the authority. The case of Atwood *v.* Munnings was mentioned by Park, J., and he, like Judge Story, understood it, not as imposing the duty to inquire into the state of the principal's affairs, but only as to the character of the drawers. Indeed, there is hardly any rule better settled or of more universal application, than that the appointee need not inquire as to matters in their own nature private or confidential between the agent and principal. It may be doubted, says Mr. Justice Story, if upon this subject there is any solid distinction between a special authority to do a particular act, and a general authority to do all acts in a particular business. Each includes the usual and appropriate means to accomplish the end. (Story on Agency, 70.) Is it among those means that the appointee shall lose his money, because the attorney happens to betray the interests of his principal?

Would not such a rule rather be a means to make the power utterly unavailable? No prudent man would advance his money under such a responsibility. The rule supposes a degree of capacity to look into the affairs and even the private intentions of others, which no human being possesses.

In the case at bar, the principal was much abroad, and had left this letter of attorney with the bank for the very purpose of obtaining credit there. It had been repeatedly and for a long time acted upon, the testator having an account at the bank, and the power of Jacob D. Fowler never having been drawn in question. This very case admits the validity of two out of the eleven notes in question. Such circumstances, even without the letter of attorney, should bind the testator's estate. In Prescott *v.* Flynn, the defendants' clerk having been introduced as confidential, drawn bills, and on one occasion only been empowered to indorse in their business, they were, from that circumstance alone, held liable on his subsequent indorsement of their names for his own benefit. Here we have a stronger case. Both the testator and Jacob D. Fowler came with the letter of attorney, and deposited it with the plaintiffs; the attorney had drawn and indorsed through a course of five or six years; the testator, a shipmaster, being frequently at home, and knowing and approving every act nearly up to the time of the making and indorsing now in question.

In Nichol *v.* Green, Peck's Rep. 288, the attorney, under a power like the present, dealt directly with the plaintiff, purchasing on his own account, as the plaintiff knew; and then, under the power, made and indorsed the note in question. Haywood and Peck, JJ., held what we have just now decided in Stainer *v.* Tysen (3 Hill, 279), on the distinction between taking the note with or without knowledge of the fraud. One judge dissented, and one took no part in the cause. It does not appear how it was finally decided. The case of Butcher *v.* Tysen, which was before the Circuit Court of the U. S., in November term, 1840 (4 Hunt's Merch. Mag. 456), decides the same point the same way. The plaintiff cannot complain that the defendant clothed his agent with the means of perpetrating a fraud when none has been actually committed. The difference rests entirely upon that fact. In the cases cited, the question in debate was, whether, by authorizing the agent to issue notes in the name of the principal, without words expressly restricting the issue to his own business, he did not confer the power of issuing them for the benefit of everybody, even including the attorney. That the power is to be thus construed, was contended in the case before us, and in Stainer *v.* Tysen. We have arrived at the conclusion without much difficulty, that to give the power so great an effect, the principal must go farther, and expressly declare his meaning that the attorney may use his notes for the benefit of others beside the principal.

On the distinction which I have endeavored to establish in favor of a *bona fide* holder, I am of opinion that, in the case at bar, the court below erred when they charged that the attorney had exceeded his power in that sense which avoided these notes in the hands of the plaintiffs. As against his principal, he did exceed his power; but the executors must look to him, not the plaintiffs, for their indemnity.

The point that the bank had notice through Samuel D. Rogers, the director, does not arise. There was indeed evidence that he had notice and acted as director in respect to nearly if not quite all the notes. If these things finally turn out to be so, of course the plaintiffs cannot recover on those notes in respect to which they were thus affected with notice. Bank of the United States *v.* Davis, 2 Hill, 451. But the question was entirely excluded, by the charge, from the consideration of the jury; and, for aught we can see, the court laid no stress upon it. They put the case on the naked independent question of authority; and, under the charge given, the jury were bound to find for the defendants, although they believed the plaintiffs were *bona fide* holders. I have, therefore, as in duty bound, considered them such. No doubt they were so in fact. If not so constructively, owing to one of their agents having had notice, they must fail; but they are none the less entitled to have the question tried and disposed of upon that issue.

Some other minor points were mentioned on the argument by the counsel for the defendants in error; but the same answer applies. They were not passed upon in the court below. On the whole, I am of opinion that the judgment should be reversed; a *venire de novo* to go from the court below, the costs to abide the event.

Bronson, J. concurred.

Nelson, C. J., dissenting.[1] *Judgment reversed.*[2]

MUSSEY *v.* BEECHER.

Supreme Judicial Court of Massachusetts. 1849.

[3 *Cush.* 511.]

This was an action of assumpsit for goods alleged to have been sold and delivered by the plaintiff to the defendant, through the latter's agent, William Pierce.

The case having been referred to an auditor, he reported in favor of the plaintiff, for goods sold and delivered between the 10th of March, 1842, and the 25th of May, 1843; and for the balance of two notes, one for $207, dated March 9th, 1842, signed "W. Pierce, agent of L. S. B.;" and the other for $250, dated August 8th, 1841, and signed in the same manner. The balance found due by the auditor on the notes was $214.15, and for goods sold, after deducting a set-off, $890.25, making in the whole $1104.40. The jury returned a verdict for the plaintiff for $660.57.

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[1] This dissenting opinion, relying upon Attwood *v.* Munnings, *ante*, p. 286, is omitted. — Ed.

[2] This decision was reversed in the Court of Errors; but there is no formal report of the reversal. The doctrine of the Supreme Court was approved in later cases. See Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125, 138–139, 142–143, 154 (1857); Bank of Batavia *v.* N. Y., L. E. & W. Railroad Co., 106 N. Y 195, 199 (1887). — Ed.

The cause was tried in this court before WILDE, J., by whom it was reported for the consideration of the whole court.

The report was as follows: —

It appeared that the plaintiff was a bookseller and publisher in Boston, and that Pierce carried on a bookseller's shop in Andover, as the agent of Leonard Woods, until the 1st of January, 1842, at which date his agency for Woods ceased, and he thenceforth carried on the same business and purchased goods, under a written authority from the defendant. The following is a copy of this instrument: —

> Know all men by these presents, that I, Laban S. Beecher, of Roxbury, in the county of Norfolk, (doing business in Boston), leather dealer, do hereby constitute and appoint William Pierce, of Andover, in the county of Essex, bookseller, my sufficient and lawful attorney, for me, in my behalf and as my agent, to purchase books, paper, and stationery, for the purpose of carrying on business in said Andover; and the same to sell again, for my benefit and on my account, on such credit and at such prices as he may deem meet; to collect, recover, demand and receive all debts and sums of money due and receivable for and on account of the sales of said goods and merchandise, and generally to do and perform such matters and things as are necessary and proper for the carrying on and conducting of said business.
>
> Provided, however, that said Pierce shall not make purchases or incur debts exceeding in amount at any one time the sum of two thousand dollars, and also that this power or agency shall not extend for a period of time more than one year from the date hereof, or beyond the 1st day of January, A. D. 1842. Hereby ratifying and confirming whatsoever my said attorney may do in the premises. In testimony whereof, I have hereunto set my hand and seal this first day of January, in the year eighteen hundred and forty-one.
>
> E. N. BADGER, witness. LABAN S. BEECHER (seal).
>
> BOSTON, Jan. 1, 1842.
>
> The foregoing instrument is hereby continued in force for twelve months from this date.
> LABAN S. BEECHER.

This paper, it was admitted, was exhibited by Pierce to the plaintiff, Mussey, prior to the sale and delivery of any of the goods, out of which this controversy arose; and it was proved that the plaintiff subsequently sold and delivered to Pierce the goods which were charged on the plaintiff's books to Pierce, and bills of which were rendered to Pierce in his, Pierce's, name.

Pierce was called as a witness by the plaintiff, and testified to the custody, execution, and delivery of the instrument creating the agency, which the defendant was notified to produce, and which, upon the cross-examination of this witness, was produced. On such cross-examination Pierce testified, among other things, that, in fact, the amount of his purchases of various persons, during the period from March 1st to September 1st, 1842, exceeded, at all times, the sum of $2000; that his suspicions were aroused on this point in July and August, but that he did not go into any particular investigation until August; that, before the 27th of August, he had investigated the matter sufficiently to satisfy himself that the agency was full; that, on the 27th of August, he applied to the plaintiff to purchase a bill of goods amounting to $168.23, which was included in the auditor's report; that the plaintiff inquired of him whether the agency was full, and if there was no danger of his buying beyond; that the witness replied, that it was full, and that the bill must be sold to him on his own credit; to which the plaintiff replied, that payments would be making, by and by, which would reduce the amount, and then it would come within the agency, and that he, the plaintiff, should be willing to trust the witness $300 to $400 on his own responsibility. The witness also testified, that, from time to time, during the summer, the plaintiff inquired of him, when he went in to purchase, whether his agency was full; that the witness had sometimes replied that it was nearly full; that at another time witness thought (but was uncertain) that it was probably full; that, during his agency, he from time to time furnished the defendant with the data respecting the amount of his indebtedness; that the defendant knew in August that the amount far exceeded the sum named in the written authority; and that he knew it in September; witness was more doubtful as to the defendant's knowledge in July, but testified that it was probable that he also knew it in July; that in October the defendant required the witness to notify formally two or three parties he was dealing with, that the agency was at an end, and that among others he notified the plaintiff; that in August, the defendant complained to the witness, that the agency was full, and this led the witness to make the investigation previously referred to, and he communicated the result to the defendant.

It was contended by the plaintiff, that there was evidence tending to show, that the limitation, both of amount and time, had been extended or waived by the defendant; but this was wholly denied by the defendant. The plaintiff also contended that Pierce was mistaken in his statement, that in August he gave notice to the plaintiff that the agency was full, and that the purchase then made was upon his own personal credit; and, for that purpose, he offered in evidence certain schedules purporting to set forth his debts, subscribed, sworn to and filed, and afterwards amended by Pierce, in November and December, 1842, in the District Court of the United States, in the proceedings under his petition to be declared a bankrupt, and for a discharge from his debts, to show that in the schedules no debt was set forth as due from him to the plaintiff. To the admission of this evidence the defendant objected, but the court admitted the same. The defendant contended, that the burden of proof was on the plaintiff, to show that the goods sought to be recovered were sold to Pierce as agent for the defendant, under the power above referred to, and that as such power was limited, the plaintiff must also show that the goods were sold within the limits and provisions of the power, and that if he, Pierce, had already purchased goods to a greater amount than $2000, under the power, the plaintiff could not recover of the defendant in this case.

But the court instructed the jury, that the plaintiff must show that the goods were sold under the power to Pierce as the defendant's agent, and not upon the personal credit of Pierce; and that although the power was limited, and such limitation was known to the plaintiff, yet that the defendant would be liable for Pierce's purchases, even though he had already exceeded the amount authorized by the power, if the jury were satisfied, from the evidence, that, at the time of the purchases, Pierce represented that by such purchases he would not exceed his limit.

The court further instructed the jury, that if they were satisfied that Pierce notified the plaintiff that the agency was full, that from the time of giving such notice the plaintiff could not recover, if such agency was in fact full, or he trusted Pierce on his own credit; and, also, that if afterwards the plaintiff had inquired of Pierce about the agency, and had been informed by him that it was not full, and the plaintiff had no reason to suspect the truth of Pierce's declaration, and if the plaintiff then sold goods to Pierce as agent, as aforesaid, the defendant would be liable for such goods, even though the agency was then full.

If either of the foregoing rulings or refusals of the court was erroneous, a new trial is to be granted, otherwise judgment is to be rendered on the verdict.

W. Brigham, for the defendant.

S. Bartlett, for the plaintiff.

The opinion of a majority of the court was delivered by

SHAW, C. J.[1] The former part of this instruction, that it must appear that the goods were not sold on the personal credit of Pierce, is unquestionably correct; but, in regard to the latter part, which makes the defendant responsible for the veracity and accuracy of Pierce, a majority of the court are of opinion that it was not correct in point of law.

This power of attorney, which is in the nature of a letter of credit, is precise and limited in amount; and though it contains some expressions intimating that the attorney is the general agent of the constituent to purchase and sell goods, yet this is controlled by the *proviso* and express condition; and, taken all together, as every written instrument must be, it is an authority to purchase in the name and on the credit of the author of the power, to the amount of $2000 and no more.

The precise point is this, whether, if Pierce, through design or mistake, represented to the plaintiff that when he made the purchase in question, he had not purchased on the credit of his principal to the amount of $2000, when, in truth, his purchases exceeded that sum. the defendant was bound by it. It is unquestionably true that the statements and representations of an agent, in transacting the business of his principal within the scope of his authority, are as binding on his principal as any other acts done within the scope of his authority; they are *res gestæ*, and are acts. But an agent cannot enlarge his authority any more by his declarations than by his other acts; and the rule is clear that the acts of an agent not within the scope of his authority do not bind the principal. It is often said, indeed, that one is bound by the acts of a general agent, though done against his instructions. This is because the acts are within the scope of his authority; and the violation of his instructions, in the execution of such authority, is a matter solely between himself and his principal, which cannot affect a stranger dealing with him without express notice.

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[1] After stating the case. — ED.

The argument is, that the defendant ought to be bound, because Pierce was his agent, and he, by his letter of attorney, had put it in his power to make such purchase. This, it appears to us, assumes the very point to be proved. The plaintiff knew that he was limited to $2000; he knew, therefore, that if he had purchased to that amount, his power, by its own limitation, was at an end. If it were otherwise, a power to purchase to the amount of $2000, would operate as a power to purchase to an unlimited amount. But it is urged that, upon this construction, no one could safely deal with the agent. This objection, we think, is answered by the consideration that no one is bound to deal with the agent, whoever does so is admonished of the extent and limitation of the agent's authority, and must, at his own peril, ascertain the fact upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent, who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. To this extent, the seller of the goods trusts the agent, and if he is deceived by him, he has no right to complain of the principal. It is he himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and, therefore, the maxim, that where one of two innocent persons must suffer, he who reposed confidence in the wrong-doer must bear the loss, operates in favor of the constituent, and not in favor of the seller of the goods. Parsons *v.* Armor, 3 Pet. 413; Stainer *v.* Tysen, 3 Hill, 279; Attwood *v.* Munnings, 7 Barn. & Cr. 278. The case of Putnam *v.* Sullivan, 4 Mass. 45, was decided on the ground that the defendants, by leaving blank indorsements with their clerk, had authorized him by his act to bind them as indorsers.

On the whole, a majority of the court are of opinion that the verdict must be set aside, and a new trial granted.

WILDE, J. I have been unable to agree with my learned brethren in the decision of the question raised at the trial of this cause, although I fully admit the principles on which the question has been decided.

In my judgment, with great deference to the opinion of my brethren, these principles are not applicable to the present case. The question, as it seems to me, turns on a well-established principle of law, which I am not aware has ever been disputed.

The principle is this, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. . . .[1]

Now, in my judgment, these instructions are not liable to any well-founded exception. I admit that the plaintiff was bound to inquire into the agent's authority, and whether the sales to him, on the credit of the defendant, would not exceed the amount limited in his power of attorney. But of whom was he to inquire? He certainly had no means of knowing; and if he might not rely on the representations of the agent, the consequence would be that no sale could safely be made on credit under the power. But the power was given to be used for the benefit of the defendant, and if given in such a form as to enable the agent to perpetrate a fraud, by obtaining credit by false representations, and credit was so obtained, and a loss occurred, it should be sustained by the defendant, and not by the plaintiff, who dealt with the agent in good faith, without knowing, or having any means of knowing, that he was exceeding his authority.

I am therefore of opinion, upon the authorities, and upon the principle of law to which I have referred, that the instructions given to the jury were correct.

Verdict set aside, and new trial granted.[2]

UPTON v. SUFFOLK COUNTY MILLS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1853.

[11 *Cush.* 586.]

ASSUMPSIT for breach of a warranty that certain flour should keep sweet during a voyage to California. The defendants, a corporation established for the manufacture and sale of flour, among other grounds of defence, not necessary to report, denied that they undertook and warranted as set forth in the declaration. At the trial in this court, before BIGELOW, J., it appeared that the plaintiff, being a merchant engaged in the California trade, on the 19th of January, 1850, obtained from the agent of the defendants the following memorandum of agreement in writing, namely: "I am to furnish Mr. Upton 4,000 qrs. bbls. of flour, in good tight packages, on or before the 18th February next. The flour to be of such a character as will insure its keeping sound on a voyage to San Francisco. For S. C. Mills, W. W. Allcott. January 19th, 1850."

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[1] Citing Lickbarrow *v.* Mason, 2 T. R. 63, 70, *per* ASHHURST, J.; Hern *v.* Nichols, *ante*, p. 90, *per* HOLT, C. J.; Putnam *v.* Sullivan, 4 Mass. 45, 54, *per* Parsons, C. J.; and North River Bank *v.* Aymar, *ante*, p. 303, *per* COWEN, C. J.; and restating the principal case. — ED.

[2] Compare Lowell Five Cents Savings Bank *v.* Winchester, 8 Allen, 109 (1864). — ED.

On the 18th of February, 1850, the flour having been made at the defendants' mills, and delivered to the plaintiff for shipment, the said Allcott made out and delivered to the plaintiff the following bill of parcels, receipt, and memorandum of warranty: "Boston, Feb. 18th, 1850. Mr. Geo. B. Upton, Bo't of W. W. Allcott [flour described]. Rec'd pay't, Feb. 18th, 1850, by notes payable in 6 months. William W. Allcott. The above flour is warranted to keep sweet during voyage to California. Witness, Geo. B. Upton, Jr."

The warranty, receipt, and signature, on the above bill of parcels, were in the handwriting of said Allcott. The residue of the bill of parcels was written by a clerk. The plaintiff also offered evidence tending to show the injury to the flour on the voyage to California, but the evidence upon this point became immaterial in the final decision of the cause.

For the defendants, said W. W. Allcott, among other things, testified as follows: "In January, 1850, I held the office of superintendent and general agent for the Suffolk County Mills (the defendants). My duties were confined to manufacturing and selling on commission. I have been a director for some time. I had no special instructions in regard to making sales. No authority was ever given me by the company to enter into such a warranty as in the bill of parcels. I never represented to Mr. Upton that I did not have such authority. I never mentioned to the directors that I had given such a warranty until the claim was made by Mr. Upton. I return the proceeds of sales from day to day to the treasurer. My agency in selling is limited to selling and paying over the proceeds. I think no extra price was paid for the warranty. I never stated to Mr. Upton that this was my contract, and not that of the company. I made this sale for a commission, on account of the Suffolk County Mills, and as their property. I entered the sales as agent of the company, in books belonging to the company, but not the warranty." Upon this and much other evidence in the case, which finally became immaterial, the case was taken from the jury under an agreement of the parties, that if the court should find upon the evidence that the contract of warranty was not originally binding upon the defendants, or had not been ratified by them, the plaintiff was to become nonsuit; otherwise the case was to be referred to assessors.

G. T. Curtis and *C. P. Curtis, Jr.*, for the plaintiff.

C. G. Loring and *J. W. Thornton*, for the defendants.

METCALF, J. The court have not found it necessary to form an opinion upon a question which was ably argued, namely, whether the contract declared on legally purports to be a contract between the plaintiff and the defendants. Assuming that it does, yet we are all of opinion that the defendants are not bound by it, because Allcott had no authority to bind them by such a contract. It appears from his testimony that he was their general selling agent, and had no special instructions in regard to making sales; that no authority (by which he doubtless means express authority) was ever given to him by the defendants to make such a warranty as that on which this action is brought; that no extra price was paid for the flour by reason of the warranty; that though the sale was entered on the defendants' books, yet that the warranty was not entered there; and that the defendants had no notice of the warranty until they were called upon by the plaintiff to answer for a breach of it.

The single question which we have examined is, what is the extent of the implied authority of a general selling agent? The answer is, it is the same as that of other general agents. And it is an elementary principle that an agent employed generally to do any act, is authorized to do it only in the usual way of business. Smith's Merc. Law (Amer. ed. 1847), 105 (5th ed.), 129; Woolrych on Com. & Merc. Law, 319; Jones *v.* Warner, 11 Conn. 48. A general agent is not, by virtue of his commission, permitted to depart from the usual manner of effecting what he is employed to effect. 3 Chit. Law of Com. & Man. 199. When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner, in which goods or things of that sort are sold. Story on Agency, § 60. See also Shaw *v.* Stone, 1 Cush. 228. The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured. Hence, a general selling agent has authority to sell on credit, and to warrant the soundness of the article sold, when such is the usage. Goodenow *v.* Tyler, 7 Mass. 36; Alexander *v.* Gibson, 2 Campb. 555; Nelson *v.* Cowing, 6 Hill, 336; 2 Kent Com. (6th ed.) 622; Russell on Factors, 58; Smith on Master & Servant, 128, 129. But as stocks and goods sent to auction are not usually sold on credit, a stock-broker or auctioneer has no authority so to sell them, unless he has the owner's express direction or consent. Wiltshire *v.* Sims, 1 Campb. 258; 3 Chit. Law of Com. & Man. 205; 1 Bell Com. 388. And it was said by Mr. Justice Thompson (9 Wheat. 647) that auctioneers have only authority to sell, and not to warrant, unless specially instructed so to do.

As there is no evidence nor suggestion of a usage to sell flour with the hazardous warranty that it shall keep sweet during a sea voyage, in which it must twice cross the equator, we deem it quite clear that nothing short of an express authority, conferred on Allcott by the defendants, would empower him to bind them by such a warranty. See Cox *v.* Midland Counties Railway Company, 3 Welsb. Hurlst. & Gord. 278. *Plaintiff nonsuit.*

TEMPLE *v.* POMROY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1855.

[4 *Gray*, 128.]

ACTION OF CONTRACT against Daniel Pomroy and Francis T. Swan, describing them as late partners in the butchering business under the firm of Pomroy & Swan, on a negotiable promissory note signed with their individual names. Swan was defaulted. A trial was had in the Court of Common Pleas at August term, 1855, before MELLEN, C. J., who signed the following bill of exceptions: —

"It appeared that the signature of the defendant Pomroy was not affixed to the note by himself, nor in his presence. The plaintiff offered evidence to show that it was affixed by Swan, acting as Pomroy's agent. The defendant Pomroy objected to parol proof that the name was affixed by an agent, that fact not appearing on the face of the paper. The evidence was admitted by the court, the court ruling that it was competent to show that the signature of Pomroy was put to the note by an agent thereto duly authorized, though no words of procuration appeared on the face of the note; and the court left the question of fact to the jury to find, whether Swan, by whom it was proved Pomroy's name was written on the note, had authority to sign Pomroy's name to the note without naming his agency.

"There was evidence tending to prove that Swan was employed by Pomroy as his agent to manage the butchering business in the town of Shelburne from May, 1853, to September, 1853. The plaintiff introduced evidence tending to show that Pomroy succeeded one Martin in the prior firm of Swan & Martin, who carried on the business of buying and selling meat and slaughtering. And the books and acts of the defendant Pomroy; and his dealings; books of account kept in his own name, containing credits of cattle purchased by said Swan for the business, while it was going on, and, in two or three instances, notes entered and charged in payment of the same accounts opened with each, also showing the small amount of moneys advanced by Pomroy to carry on the business, compared with the exigencies of the business carried on; and the fact that, in some other instances, notes were signed in the same way, in similar transactions, — were offered in evidence to show in the first instance an authority in Swan to bind Pomroy by note, as a partner, and in the next place, as agent, under an authority express or implied from Pomroy as principal.

"The counsel for the defendant Pomroy requested the court to instruct the jury that no implication of authority to sign the note arose from the fact that Swan was an agent to carry on the business, as shown by the evidence; and that such authority was not to be implied from the nature of the business. The court declined so to give the instructions, as matter of law, but left it to the jury, upon all the evidence in the case, to find whether Swan was authorized by Pomroy to sign his name to the note in suit without naming his agency.

"There was evidence tending to show that another note to one Hall, signed similarly to that in the present action, had been paid by Pomroy under protest, and upon receiving security which he deemed to be sufficient from Swan.

"The defendant's counsel asked the court to instruct the jury that the payment of a single note under these circumstances could, at the most, prove nothing more than that the defendant misunderstood or was willing to waive his real rights. But the court declined so to rule, as a matter of law, and instructed the jury that this was a question of fact for them to determine, how far this evidence, under the circumstances, tended to prove an agency in Swan to sign the note in suit. And the judge further charged the jury, that if they should find that the giving of notes was necessarily incident to the management of the business Swan was authorized by Pomroy to conduct for him, the agency would imply an authority for that purpose.

"To these refusals and rulings the defendant excepts."

C. Allen, for Pomroy.

C. P. Huntington, for the plaintiff.

MERRICK, J. The plaintiff does not contend that Swan was expressly authorized by Pomroy to put his signature to the note in suit. As a general rule, a special agent, or one who is employed to make purchases for his principal, has no authority, unless it is directly conferred, to bind him by a negotiable note or bill of exchange. But such a power is a necessary implication from his employment, whenever its exercise is indispensable to the discharge of the duties to be performed. Paige *v.* Stone, 10 Met. 168; Tabor *v.* Cannon, 8 Met. 458, 459. To the general instructions, therefore, of the presiding judge, that if the giving of notes in the name of his principal was necessarily incident to the management of the business which he was to conduct for Pomroy, his agency would imply an authority for that purpose, there appears to be no valid ground of objection. But in reference to particular questions which arose in the progress of the trial, and to which the attention of the court was requested by the defendant, the rulings and instructions given to the jury are not equally satisfactory.

1. Evidence was adduced by the plaintiff, tending to show, and which may now be considered as sufficient to prove, that on some other occasion a note similar to the one in suit, and signed in the same manner, had been made by Swan, in the course of his dealing in the business of Pomroy, payable to a person of the name of Hall, which was afterwards paid by Pomroy, though under protest, and not until he had received from Swan what he considered satisfactory security to indemnify him for doing so. His counsel contended, in substance, that the payment to Hall, under such circumstances, implied no authority in Swan to make other notes, or the note in suit, in his name; and that, in short, it proved nothing more than that he might in this instance have mis-

understood or was willing to waive his rights. But the court declined to rule to this effect, as matter of law, and instructed the jury that they were to determine how far this evidence tended to prove the authority of Swan, as the agent of Pomroy, to put his signature to the note in suit. This instruction cannot be sustained. It imported that it was competent for the jury to infer from this evidence the lawful authority of the agent to bind his principal, in another instance and upon another occasion, by a promissory note. This was erroneous, because such an authority is never to be assumed or inferred, unless it results as a necessary implication from the facts established. And surely the transactions concerning the note to Hall afford no ground for such an implication. It does not appear that Pomroy had any knowledge of its existence until the time of its maturity. He paid it then under protest; that is, as we understand it, denying the authority of Swan to make it, and his own liability to be bound by it. And he fortified this denial by persisting in his refusal to pay until he received from Swan security for the reimbursement of the money he should advance for that purpose. All this evidence concerning the note to Hall may have been inadvertently admitted upon the trial, but since it was received, the jury should have been guarded, as the defendants' counsel desired that they should be, from giving it an effect to which it was not legally entitled.

2. The counsel for Pomroy further requested the court to instruct the jury that no implication of authority to sign the note in suit arose from the fact that Swan was an agent to carry on the business, as shown by the evidence, and that such authority could not be implied from the nature of the business. The evidence referred to in this request is so imperfectly detailed and exhibited in the bill of exceptions that it is very difficult, and perhaps impossible, to appreciate exactly the question proposed to the court, or the ruling which was made upon it. Nor is this necessary, since it is apparent that the instructions given to the jury in relation to it were not accompanied by the necessary qualifications and restrictions. It was left to them, in indefinite terms, to find, upon all the evidence in the case, whether Swan was authorized to sign his name to the note in suit without naming his agency. The question of fact, which was in issue in relation to that authority, it was undoubtedly their duty to determine; and so far they were rightly advised by the court. But under the special requests submitted by the counsel for the defendant, they should also have been advised that, though an agent employed to make purchases for his principal may undoubtedly bind him by a contract of sale, he cannot ordinarily, without express authority, bind him by a negotiable promissory note; and that the single exception to this positive rule is in relation to agencies, the objects and purposes of which cannot be accomplished without the exercise of such a power. If the instructions which were given in reply to this request of the defendant had been connected with or limited by those which were given apparently at a later stage in the trial or charge,

though the occasion which induced the later explanation, or the precise evidence to which it was applied, is not developed in the bill of exceptions, they might have been held to be sufficient. But without such limitations they cannot be considered as having been sufficiently guarded to secure to each of the parties the legal rights to which they were respectively entitled. *Exceptions sustained.*

SEIPLE *v.* IRWIN.

SUPREME COURT OF PENNSYLVANIA. 1858.

[30 *Pa.* 513.]

ERROR to the District Court of Philadelphia.

This was an action of *assumpsit* by Seiple & Erdman against Irwin, Shultz, & Peiper, to recover the amount of a bill of goods sold and delivered to the defendants.

On the 13th November, 1854, the defendants purchased in plaintiffs' store, on the usual credit, a bill of goods amounting to $173.02. The bill was purchased from one John Wilson, a salesman in the plaintiffs' store, employed to sell goods on commission. On the 23d November, 1854, the defendants paid the bill to Wilson, with a deduction of five per cent for cash, and took his receipt for the amount, as agent for the plaintiffs. No authority to Wilson was shown to collect money for the plaintiffs.

The court below (HARE, J.) charged the jury as follows: —

"The question for your determination is one merely of authority on the part of John Wilson, to collect money for the plaintiffs. The evidence shows Wilson to have been a salesman for plaintiffs, or that he was employed by them to sell goods. The defendants' counsel contends, and the fact no doubt is, that the goods charged defendants in this suit were sold by John Wilson to defendants. The defendants have offered in evidence John Wilson's receipt, dated a few days after the sale, for the amount of the bill. Where a person is employed to sell goods, and is intrusted with the possession and disposal of them by the owners, and sells for cash, payment to him by the purchaser will be good; and it may well be so, when he sells on credit; but on the other hand, when the person is merely employed to sell goods, and sells on a credit, without having the possession or disposal of them, a payment to him will not be good without some other evidence of authority. Take, for instance, a sale of goods across a counter, — there the person selling the goods has the actual possession and disposal of them, and a payment to him at the time will be good. It does not follow that he can collect the money afterwards. And I do not conceive that a clerk's having the authority to sell goods for his employers for credit, carries with it an authority to collect the money for the goods. It is for the purchaser to see to whom he pays his money, and if he pays the clerk or salesman who effects the sale, without sufficient proof of his authority, it is at his risk. If Wilson actually delivered the goods to defendants, or had the control of them for the purpose of delivery, payment might safely be made to him; or if the defendants had shown that, although Wilson was merely employed for the purpose of selling goods, yet that the plaintiffs had allowed him to collect money for them at any time, or had kept him in their employ after he had made such collections, that would be sufficient to imply an authority from plaintiffs to Wilson to collect money, and defendants' payment would have been valid. The question of Wilson's authority to collect the amount of this bill is properly for your determination. Nevertheless, I will say to you, that the mere fact that the goods were sold by Wilson to the defendants, and that they, the defendants, afterwards paid Wilson for them, does not constitute a good defence to the plaintiffs' claim in this case, unless you find some authority from the plaintiffs other than that necessarily implied in their authorizing him to make sales for them as a salesman."

The defendants excepted to the latter part of this charge; and a verdict and judgment having been given for the plaintiffs for $173.02, they removed the cause to this court, and here assigned the same for error.

J. M. Arundel, for plaintiffs in error. The power vested in an agent to sell goods for his principal, carries with it the power to receive payment for them. Capel *v.* Thornton, 3 C. & P. 352; 6 Johns. 70; 1 Caine, 527; 3 Johns. Cas. 36; 1 Caine, 324.

Marshall and *Budd*, for defendants in error. The alleged payment to Wilson was not a part of the same transaction. It was separate, distinct, independent, and irregular. It was not in accordance with the usual and customary course of business.

If payment is not in the usual and customary course of business, and is made under circumstances fairly giving rise to the presumption that the agent was acting *mala fide*, and received the money with intent to appropriate it to his own use in fraud of the principal, the payment is not a valid payment. Addison on Contracts, 1108. Whoever deals with a special agent is bound to acquaint himself with the limitation and extent conferred upon him, and acts at his own peril. Story on Contracts, § 134. Though payment to a factor for goods sold by him be valid, the principal may control the collection and sue for the price in his own name; and it is immaterial whether the agent was an auctioneer or a common factor. Girard *v.* Taggart, 5 S. & R. 19.

The cases of Pratt *v.* Willey, 2 Carr. & Payne, 350, and Gilman *v.* Robinson, 1 Carr. & Payne, 642, are referred to, as being especially applicable. Want of authority in John Wilson to collect the claim of plaintiffs below, appears both in the evidence and by the verdict of the jury.

The opinion of the court was delivered by

Porter, J. The extent of the agent's authority was properly submitted to the jury as a question of fact. The point drawn into dispute is the qualifying remark, that the defence would be incomplete, unless the jury found some delegation of authority from the plaintiffs to the agent other than that necessarily implied in authorizing him to make sales as a salesman. This is ground to be cautiously trodden. It is undeniable that an agent to whom merchandise has been intrusted, with authority to sell and deliver it, is authorized to receive the price; otherwise the fraud on the purchaser would run into cruelty. This agent's powers were not embraced in that description. He was employed only to make sales. As a check, his employers seem to have retained in their own hands the delivery of the goods and the appointment of the terms of sale. The goods in question were so delivered as to inform the defendants sufficiently of the character of the agency. When the agreement had been made for payment in six months, the contract was complete. The subsequent acceptance of cash, with a deduction of five per centum from the bill, was a new and totally unauthorized arrangement on the agent's part. In making payment, the defendants took the risk of his integrity, and they must bear the loss which his unfaithfulness imposed. *Judgment affirmed.*

SMITH *v.* McGUIRE.

Exchequer. 1858.

[3 *H. & N.* 554.]

Declaration. That, by charter-party between the plaintiff and the defendant, it was agreed that the ship "Mahtoree," being tight, staunch, and strong, and every way fitted, would, at Limerick, load a full cargo of oats for London, after discharging her timber from Quebec, at the rate of 2*s.* per imperial quarter, with 8⅞ per cent primage; the said ship to discharge in the stream in London; twelve days for loading the ship in Limerick, and the usual time for discharging in London, say three Mondays' markets; if longer detained, to pay by the affreighters or their assigns three guineas per day demurrage, &c.; ship to be reported at Limerick by Mulloch and Sons or their agents at the port of discharge. And the defendant, by the said charter-party and agreement, agreed to load the said ship in accordance with the terms of the said charter-party. Breach: that though all things had happened, &c., and all time, &c., had elapsed, and plaintiff had been ready and willing, &c., and although the ship was before the breach tight, stanch, and strong, yet the defendant would not load the ship; whereby, &c. There was also a count for demurrage.

Pleas to the first count: First, denial of the agreement; secondly, that the ship was not ready to receive the cargo at the time and place agreed on; third, to the second count, never indebted.

The defendant took out a summons for particulars of demand. This was opposed by the plaintiff before a judge at Chambers, but was ordered, it being alleged that it was intended to pay money into court. A summons to plead a plea of payment into court was afterwards taken out, but was abandoned, and the above pleas pleaded.

The particulars of demand were as follows: The plaintiff seeks to recover £122 17*s.* for demurrage for detaining the ship mentioned in the first count from the 1st January, 1858, to the 9th February in the same year. And the plaintiff also claims the sum of £68 8*s.* 9*d.* for loss in chartering and letting the ship for hire during the time it was agreed to be hired by the defendant for a less sum of money, namely, sixpence for each quarter of oats that the defendant had agreed to pay for the use of the ship, and the proportion of primage thereon.

At the trial, before MARTIN, B., at the Middlesex Sittings in last Easter Term, it appeared that the charter-party, on which the action was brought, bearing date the 3d of August, 1857, was signed by Martin M'Guire, "per proc. of Thomas M'Guire." In order to show that Martin M'Guire was the agent of the defendant, it was proved that the defendant had carried on business at Limerick as a corn merchant till about three years previous to the signing of this charter, when he left Limerick and went to London, leaving Martin M'Guire, who was his brother, to conduct the business, which consisted in buying up corn for shipment. It was proved to be usual and prudent to charter vessels beforehand for the purpose of forwarding corn, and that Martin M'Guire had on previous occasions hired ships and signed charter-parties "per proc." for the defendant. On the 19th of December, Messrs. Mulloch, who acted as brokers for the charterers, wrote to inform the plaintiff that the charterer could not load the vessel. On the 1st of January, 1858, the vessel was ready to receive her cargo, of which due notice had been given on the previous day to Martin M'Guire. The ship having lain twelve days, according to the charter, notice was given on the 13th of January that she was on demurrage pursuant to the charter. The ship lay till the 9th of February, when she was chartered by several persons, of whom the defendant was one, to carry a cargo of oats to London at 1*s.* 6*d.* a quarter. Martin M'Guire signed this charter-party for the defendant "per proc." The captain stated that he could not get a charter sooner.

The defendant's case was that Martin M'Guire had no general authority to charter vessels for him. The defendant proved that on former occasions he had sent special instructions to Martin M'Guire as to chartering vessels, and that he never authorized him to sign this particular charter. As to the damages, it was proved that the plaintiff might have got a cargo at an earlier period if the captain would have allowed the broker, Mulloch, to fix a cargo on the 26th of January. This the captain refused to do without consulting the plaintiff.

The learned judge asked the jury whether Martin M'Guire was permitted and allowed by the defendant to act as his general agent at Limerick, and told them that if so it was not material what the private arrangement between them was. With respect to the damages, his lordship told the jury that the claim in the particulars was not a proper estimate of the damage; that the legal damage was the loss which had arisen from the breach of the contract; that from the amount of freight which the ship would have earned if the charter-party had been performed, there ought to be deducted the expenses which would have been incurred in earning it, and also any profit which the ship earned between the expiration of the lay days and the time when the employment of the ship under the charter-party would have ended. The jury found a verdict for the plaintiff, with £191 5*s.* damages, being the £122 17*s.* for demurrage for thirty-nine days, at £3 3*s.* a day, and £68 8*s.*, the difference between the freight earned under the second charter and that which would have been receivable under the first.

Shee, Serjt., in the following term, obtained a rule *nisi* for a new trial, on the ground that the learned judge had misdirected the jury in telling them that they were at liberty to infer, from the fact that Martin M'Guire had for a long time signed charter-parties for the defendant, and acted as his agent, that he had authority to sign this charter-party; or why the damages should not be reduced to £68 8*s.*, or such other sum as the court should think fit, on the ground that the plaintiff was not entitled to compensation for the detention of the ship during the lay days, or for the interval between the expiration of the lay days and the 9th of February.

Prentice and *Gordon Allan* now showed cause.

Shee, Serjt., in support of the rule.

POLLOCK, C. B. With respect to the application for a new trial, I am of opinion that the direction of my brother Martin was perfectly correct. I think that questions of this kind, whether arising on a charter-party, a bill of exchange, or any other commercial instrument, or on a verbal contract, should be decided on this principle, — Has the party who is charged with liability under the instrument or contract authorized and permitted the person who has professed to act as his agent, to act in such a manner and to such an extent that, from what has occurred publicly, the public in general would have a right to reasonably conclude, and persons dealing with him would naturally draw the inference, that he was a general agent? If so, in my judgment, the principal is bound, although, as between him and the agent, he takes care on every occasion to give special instructions; and I think it makes no difference whatever, whether the agent acts as if he were the principal, or professes to act as agent, as by signing "A. B., agent for C. D." The expression "per procuration" does not always neces sarily mean that the act is done under procuration. All that it in reality means is this: "I am an agent not having any authority of my own." Alexander *v.* M'Kenzie, 6 C. B. 766, was chiefly founded on the case of Attwood *v.* Munnings, 7 B. & C. 278, where the agent was the defendant's wife, and no doubt the authority was quite special. It was not the authority which a tradesman gives to his shopman to sell goods during his absence, and possibly carry on his trade while he is abroad, but it was a particular authority to perform certain acts for certain specified objects; and the court (particularly HOLROYD, J.) expressed itself with reference to that circumstance. It frequently happens that, where a judgment is delivered either by the court or a judge, expressions are used which apply to a particular state of facts, and, in order to know what was decided, it is not sufficient merely to look at the judgment, but the facts and circumstances of the case must also be regarded. Now, in Attwood *v.* Munnings, HOLROYD, J., said, "I agree in thinking that the powers in question did not authorize this acceptance. The word 'procuration' gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given." If a person professes to convey an estate as trustee, the party taking the conveyance from him is bound to ascertain that he had authority, as trustee, to convey it; but the same principle does not apply to commercial dealings. It would be most inconvenient if a person could not go into a shop and purchase an article without first asking the shopman whether he has authority to sell it. It may be that he was merely employed to sweep the shop; but it would be absurd to apply to the general business of life the doctrine as to the necessity of ascertaining whether an agent is acting within the scope of his authority, — indeed, the business of London could not go on. In Attwood *v.* Munnings, LITTLEDALE, J., said: "I am of the same opinion. It is said that third persons are not bound to inquire into the making of a bill; but that is not so where the acceptance appears to be by procuration." Therefore, if a person for the first time meets with a bill accepted "per procuration," and chooses to take it without making any inquiry, the loss will fall on him if the acceptor had no authority. But the practical questions are, What is the extent of inquiry which ought to be made? and what answers may be deemed satisfactory, so as to protect from loss, though it should turn out that the authority has been exceeded? It is true, that if a bill is accepted by A. on behalf of B., and it is known that B. has accepted bills for A., many persons would take it for granted that there was neither forgery nor fraud in the matter, and that they might safely take it; but if the law is complied with, and an inquiry made, to what extent is it to go? I think that the holder is not bound to go to the acceptor and say, "Have you a power of attorney, or other authority, to accept this bill?" When he has ascertained that the person who has accepted the bill as agent or by procuration, is a clerk in the house, and, in the course of his employment, has from day to day accepted bills of that sort, that is enough, and he need not ask for his power of attorney or authority, nor whether that particular bill is on account of the firm. When you find him in the house acting and recognized as the agent of the firm, you need not make any further inquiry; and yet it may turn out that he has never accepted a bill without a schedule being laid before him in the morning of all bills that were to be accepted by him on that day. Persons are supposed to carry on their business according to the ordinary arrangement of mankind generally. If a person conducts his business, as the defendant did, by an agent who acts in his absence, in my judgment it is a question for the jury whether, according to the ordinary mode in which business is carried on, the reasonable conclusion to be drawn from these circumstances is not that he had authority as a general agent; and, if so, the principal is bound, though it should turn out that he had limited the extent of the agency by certain rules and regulations. The cases cited by my brother Shee do not apply. If a man, by his conduct, holds out another as his agent, by permitting him to act in that character and deal with the world as a general agent, he must be taken to be the general agent of the person for whom he so acts, and the latter is bound, though, in a particular instance, the agent may have exceeded his authority. It is so even in the case of a special agent; as, for instance, if a man sends his servant to market to sell goods, or a horse, for a certain price, and the servant sells them for less, the master is bound by it. There, even the violation of a particular authority does not render the sale null and void. Upon these grounds, it appears to me that the direction of my brother Martin was in conformity with the law, and that the verdict was right; but, unless the parties come to some arrangement, there must be a new trial, on the ground that the damages are not properly assessed.[1] *Rule accordingly.*

BRADY *v.* TODD.

COMMON PLEAS. 1861.

[9 *C. B.* N. S. 592.]

THIS was an action for the breach of a warranty on the sale of a horse, that it was quiet in harness. The defendant by his pleas traversed the alleged warranty, and averred that the horse at the time of the sale was quiet in harness.

The cause was tried before Cockburn, C. J., at the last Summer Assizes at Maidstone, when the following facts appeared in evidence. The defendant, who was a potato salesman in London, and who had a farm in Essex which was under the care of a farm bailiff named Greig, had in the month of February, 1860, purchased a horse which he sent to the farm for the bailiff's use. The plaintiff, an attorney, being desirous of purchasing a horse, had employed one Hart, a veterinary surgeon, to look out for one for him. Hart inquired of Greig whether the defendant would sell his horse; and (according to the plaintiff's evidence) after some correspondence, the plaintiff went to the farm to see the horse, and in the course of a conversation with Greig on the subject, the latter, in reply to the plaintiff's inquiry whether the horse was quiet to drive, said, "He is perfectly quiet both in saddle and harness. He is an honest horse. I assure you he is as quiet as a horse can be." Upon this representation, after having had two trials, the plaintiff bought the horse for thirty guineas. The horse turned out to be not quiet in harness, but, on the contrary, extremely vicious; whereupon the present action was brought.

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[1] Concurring opinions by WATSON and MARTIN, BB., are omitted. — ED.

The defendant swore that he had not authorized his bailiff to warrant the horse; and Greig also swore that he was not authorized to give any warranty, and that he did not in fact give any.

It appeared that Greig had on two or three occasions sold horses for the defendant, but whether with or without warranty did not appear.

On the part of the defendant, it was objected that, the authority of Greig to warrant being negatived, the plaintiff was not entitled to recover; for that there could be no *implied* authority to warrant unless perhaps in the case of a servant of a *horse-dealer*.

For the plaintiff it was insisted that an authority to an agent to sell and deliver a horse, or any other chattel, imports an authority in him to warrant; and that the representations of Greig in law amounted to a warranty.

His lordship left it to the jury to say whether there was any warranty, telling them that it was not necessary that the word "warrant" should be used, and whether Greig had authority in point of fact to warrant, — reserving the question of implied authority for the court.

The jury having returned a verdict for the plaintiff, —

Montagu Chambers, Q. C., in Michaelmas term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, pursuant to leave reserved, "on the ground that there was no evidence of authority in Greig to warrant, and that without express authority he had none, and that there was evidence to prove that Greig had no such authority;" or for a new trial "on the ground that the verdict was against the evidence on the question of unquietness and on the question of warranty."

Hawkins and *Barnard* showed cause.

Montagu Chambers, Q. C., and *Denman*, in support of the rule.

Cur. adv. vult.

Erle, C. J., now delivered the judgment of the court: —

Upon this rule to set aside the verdict for the plaintiff and enter it for the defendant on the plea denying the warranty of a horse, the question has been whether the warranty by the defendant was proved.

The jury have found that Greig, in selling the horse for the defendant, warranted it to be sound and quiet in harness. The defendant stated, and it must on this motion be taken to be true, that he did not give authority to Greig to give any warranty. The relevant facts are, that the plaintiff applied to the defendant, who is not a dealer in horses, but a tradesman with a farm, to sell the horse; and that the defendant sent his farm-bailiff, Greig, with the horse, to the plaintiff, and authorized him to sell it for thirty guineas.

The plaintiff contends that an authority to an agent to sell and deliver imports an authority to him to warrant.

The subject has been frequently mentioned by judges and text-writers; but we cannot find that the point has ever been decided. It is therefore necessary to consider it on principle.

The general rule, that the act of an agent does not bind his principal unless it was within the authority given to him, is clear. But the plaintiff contended that the circumstances created an authority in the agent to warrant, on various grounds, — among others he referred to cases where the agent has by law a general authority to bind his principal, though as between themselves there was no such authority, such as partners, masters of ships, and managers of trading business; and stress was laid on the expressions of several judges, that the servant of a horse-dealer or livery-stable keeper can bind his master by a warranty, though, as between themselves, there was an order not to warrant: see Helyear *v.* Hawke, 5 Esp. N. P. C. 72; Alexander *v.* Gibson, 2 Campb. 555; Fenn *v.* Harrison, 3 T. R. 757. We understand those judges to refer to a general agent employed for a principal to carry on his business, that is, the business of horse-dealing; in which case there would be by law the authority here contended for. But the facts of the present case do not bring the defendant within this rule, as he was not shown to carry on any trade of dealing in horses.

It was also contended that a special agent, without any express authority in fact, might have an authority by law to bind his principal; as, where a principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is concluded from denying this authority, as against the party who believed what was held out, and acted on it: see Pickering *v.* Busk, 15 East, 38. But the facts do not bring the defendant within this rule.

The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that in the usual course of selling is required to complete a sale; and that the question of warranty is in the usual course of a sale required to be answered, and that therefore the defendant by implication gave to Greig an authority to answer that question, and to bind him by his answer. It was a part of this argument that an agent authorized to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point also the plaintiff has in our judgment failed.

We are aware that the question of warranty frequently arises upon the sale of horses; but we are also aware that sales may be made without any warranty, or even an inquiry about warranty. If we laid down for the first time that the servant of a private owner intrusted to sell and deliver a horse on one particular occasion is therefore by law authorized to bind his master by a warranty, we should establish a precedent of dangerous consequence: for the liability created by a warranty extending to unknown as well as known defects is greater than is expected by persons unexperienced in law; and, as everything said by the seller in the bargaining may be evidence of warranty to the effect of what he said, an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master. We therefore hold that the buyer taking a warranty from such an agent as was employed in this case, takes it at the risk of being able to prove that he had the principal's authority; and, if there was no authority in fact, the law from the circumstances does not in our opinion create it.

When the facts raise the question, it will be time enough to decide the liability created by such a servant as a foreman alleged to be a general agent, or such a special agent as a person intrusted with the sale of a horse in a fair or other public mart, where stranger meets stranger, and the usual course of business is for the person in possession of the horse, and appearing to be the owner, to have all the powers of an owner in respect of the sale. The authority may under such circumstances as are last referred to be implied, though the circumstances of the present case do not create the same inference. It is unnecessary to add, that, if the seller should repudiate the warranty by his agent, it follows that the sale would be void, there being no question raised upon this point. *Judgment for the defendant.*[1]

EDMUNDS *v.* BUSHELL AND JONES.

QUEEN'S BENCH. 1865.

[*L. R.* 1 *Q. B.* 97.]

THIS was an action commenced under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict., c. 67). The defendant Bushell had not appeared, and judgment had been signed against him.

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[1] Compare Howard *v.* Sheward, L. R. 2 C. P. 148 (1866).

As to power to warrant in case of sale of personalty, see also Dingle *v.* Hare, 7 C. B. N. S. 145 (1859); Herring *v.* Skaggs, 62 Ala. 180 (1878); Perrine *v.* Cooley, 42 N. J. L. 623 (1880); Dayton *v.* Hooglund 39 Ohio St. 671 (1884); Wait *v.* Borne, 123 N. Y. 592 (1890).

As to power to warrant in case of sale of realty, see Peters *v.* Farnsworth, 15 Vt. 155 (1843); Le Roy *v.* Beard, 8 How. 451, 465–469 (1850); Schultz *v.* Griffin, 121 N. Y. 294 (1890). — ED.

The declaration was against Jones, as acceptor of a bill for £184, dated 1st of February, 1865, at four months after date, drawn by one Britten to his order, and indorsed by him to Taylor, and by Taylor to the Birmingham and Midland Banking Company, of which the plaintiff was the public officer.

Plea, that the defendant Jones did not accept the bill.

The cause was tried at the last Surrey Summer Assizes, before CROMPTON, J., and the following facts were proved. The defendant Jones was a wholesale straw hat manufacturer, who carried on business at Luton, in Bedfordshire, and also until May, 1865, had a branch establishment in Milk Street, London. The business in London was carried on under the name of "Bushell & Co." By an agreement between the two defendants it was agreed that Bushell should enter Jones's service as manager of the establishment in London, and that he should be paid for his services quarterly an amount equal to one-half of the net profit to be derived from the business carried on in London. Jones opened an account in the name of "Bushell & Co.," at the London and County Bank, into which account Bushell was to pay all sums which he received to the amount of £5. He had authority from Jones to draw checks in the name of Bushell & Co. for the purposes of the business, but he had no authority to draw or accept bills. In July, 1864, Bushell accepted a bill in the name of Bushell & Co., dated 9th of April, 1864, drawn upon Bushell & Co., and made payable at the London and County Bank. This bill was paid at maturity, and Jones did not know of the transaction until he saw the amount entered in his pass-book as a payment. Jones then told Bushell he had no authority to accept bills, and forbade him to do so. Bushell, however, accepted three other bills, dated in November and December, 1864, which fell due in February and March following, and were paid at the London and County Bank, and charged to Jones. These four bills were given to persons with whom "Bushell & Co." had dealings in the way of business. In consequence of these irregularities Bushell was dismissed in May, 1865.

The acceptance to the bill sued upon was in the style of "Bushell & Co.," and was proved to be in the handwriting of Bushell. The bill was taken by the banking company from Taylor, a customer, for a good consideration, the company knowing nothing of Bushell & Co.

The jury found a verdict for the plaintiff, for £185 17*s.*, leave being reserved to move to enter a verdict for the defendant, if the Court should be of opinion that there was no reasonable evidence of the defendant Jones's liability.

Joseph Brown, Q. C., moved accordingly. There is no evidence to make Jones liable. In order to make him liable, either he must have held himself out to the company as a partner, or have publicly held himself out as connected with the firm; Jones's name did not appear on the bill, nor was it shown that the company were aware of his connection with the business, for he had never had a transaction with them. In Young *v.* Axtell, cited in Waugh *v.* Carver, 1 Sm. L. C. 734, it is said if a person suffers his name to be used in a business, and holds himself out as a partner, he will be certainly liable, though a creditor of the firm does not at the time of dealing know that he was a partner, or that his name was used. But this is questioned in the note,[1] and Dickenson *v.* Valpy, 10 B. & C. 140, is cited to show that a nominal partner to be made liable must have held himself out, not to the world, for that is a loose expression, but to the creditor. The banking company did not take the bill on the faith of Jones's apparent responsibility. He is not liable unless it can be shown that he represented himself to the banking company as a partner. In Carter *v.* Whalley, 1 B. & Ad. 11, a person was held not to be liable as a partner unless the creditor had dealt with him in the character of a partner, or he had held himself out so publicly to be one as that the creditor must have known of it.

[COCKBURN, C. J. This is not a case of nominal partners: here the actual owner of the business employs Bushell in the business as his manager and ostensible principal: it is a question of agency.]

Jones never held Bushell out as a partner to the banking company, and is not bound by his acts; he has never in any way deceived the company.

COCKBURN, C. J. In this case there ought to be no rule. The defendant carried on business both at Luton and in London. In London the business was carried on in the name of Bushell & Co., Jones at the same time employing Bushell as his manager; Bushell was therefore the agent of the defendant Jones, and Jones was the principal, but he held out Bushell as the principal and owner of the business. That being so, the case falls within the well-established principle, that if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority. It is clear, therefore, that Bushell must be taken to have had authority to do whatever was necessary as incidental to carrying on the business; and to draw and accept bills of exchange is incidental to it, and Bushell cannot be divested of the apparent authority as against third persons by a secret reservation. I think Jones was properly held to be liable on the bill.

MELLOR, J. I am of the same opinion. The case differs from those in which the question turns upon the fact whether A or B is a partner in the same firm. Here Jones puts forward Bushell as a principal, and it is in the name of Bushell & Co. that the business is carried on. It is not a question of partnership, but whether Bushell, who has been held out to everybody as a partner, has authority to bind Jones. It would be very dangerous to hold that a person who allows an agent to act as a principal in carrying on a business, and invests him with an apparent authority to enter into contracts incidental to it, could limit that authority by a secret reservation. I see no reason for disturbing the verdict.

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[1] 1 Sm. L. C. 747. — REP.

Shee, J. The leave reserved in this case was to enter a verdict for the defendant, if the Court should be of opinion that there was no reasonable evidence on which the jury could find for the plaintiff, and, in my opinion, there was reasonable evidence to sustain the verdict. I think we are not in any danger of disturbing the cases which relate to the law of partnership. In this case it appears that Jones carried on two distinct businesses. The business in London was carried on for his benefit, and with his sanction, in the name of Bushell & Co., and was a business in which a partner would be presumed to have authority to accept bills; and the natural inference, when a person allows an agent to carry on a particular business as an ostensible principal, is that he clothes him with every authority incidental to a principal in the business. *Rule refused.*[1]

BAINES v. EWING.

Exchequer. 1866.

[4 *H. & C.* 511.[2]]

Declaration on a policy of insurance on the ship "City of Brisbane." The declaration was in the ordinary form, and averred that the defendant subscribed the policy for the sum of £150.

Plea. That the defendant did not subscribe the policy, and did not become an insurer as alleged. Issue thereon.

At the trial, before Lush, J., at the last Liverpool Spring Assizes, the following facts were admitted by counsel. In July, 1861, the defendant, who resided at Richmond, near London, authorized Messrs. North, Ewing & Co., insurance brokers at Liverpool, to underwrite policies on marine risks in his name, to the extent specified in the written authority sent to them, which was as follows: —

"Messrs. North, Ewing, & Company.

"Gentlemen,

"I hereby authorize you, in my name, on my behalf, to underwrite policies of insurance against marine risks not exceeding £100 by any one vessel; and I authorize you to hold and retain all premiums received for me as a fund to answer losses, it being understood that all accounts between us are to be settled according to the usual course of transacting business between an underwriter and a broker, as customary in Liverpool; separate deposit account to be kept at the bank, and accounts to be rendered half yearly.

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[1] See *In re* Adansonia Fibre Co., L. R. 9 Ch. 635, 647, 648 (1874). — Ed.

[2] s. c. L. R. 1 Ex. 320. — Ed.

"I remain, &c.,

"WILLIAM EWING.

"Richmond, 26th July, 1861."

At Liverpool there is an Underwriters' Association, and when a person desires to become an underwriter he authorizes a broker to underwrite for him. The broker submits the name of his principal to the Underwriters' Association, and, if no objection is made to it, the name is entered in their book, and then the broker underwrites in the name of his principal. From the time that the defendant gave to Messrs. North, Ewing & Co. the above authority to underwrite for him, they signed policies in his name. It is well known in Liverpool that in almost all cases, if not in all, a limit is put to the amount for which the broker can sign his principal's name. The principal allows the broker to sign for a fixed sum on each of any number of ships, and on any terms he pleases; but when the principal's name is given to the Association that limit is not mentioned, and it is in fact known only to the broker and his principal. The plaintiffs did not know of the limit imposed by the defendant, nor that it had in this case been exceeded; neither was the defendant aware until afterwards that the limit had been exceeded, nor did he subsequently ratify the act of his broker. On the 2d October, 1862, and whilst the above authority was in force, the policy on which this action was brought was underwritten by Messrs. North, Ewing & Co. in the defendant's name for £150. The ship was totally lost. By consent a verdict was entered for the plaintiffs for £150, leave being reserved to the defendant to enter a nonsuit or a verdict for him, or to reduce the damages to £100.

Edward James, in last Easter Term, obtained a rule nisi accordingly, on the ground that there was no evidence of authority given by the defendant to underwrite the policy; against which

Brett and *Quain* now showed cause. First, the defendant is liable on this policy to the extent of £150. He held out the brokers as his agents, to underwrite for him; and although they were not general agents for all purposes, they were for the particular purpose of signing policies in his name. A general agent is a person whom a man puts in his place to transact all his business of a particular kind. Smith's Mercantile Law, p. 128, 7th ed. In the case of a general agent "the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances." Story on Agency, § 126, p. 151, 4th ed. The business of an underwriter could not be carried on if the assured was bound on every occasion to inquire into the extent of the agent's authority. Of whom is he to inquire? If the agent says that he is authorized to underwrite for £150, must inquiry be made of the principal in London whether that is true? The restrictions to which the agent is subject, even where he exceeds his authority, do not avoid the policy unless the assured had knowledge of them. If the restrictions are private and confidential, they are, as against third persons, inoperative and void, unless disclosed. Duer on Marine Insurance, §§ 49, 50, p. 346, note (*b*), p. 347. Then the question is, What are the usual incidents of an agency to underwrite in the principal's name? One of them is to underwrite for different amounts according to the agent's discretion. Is that altered by the fact that it is well known in Liverpool that in almost all cases the agent's authority is limited, but the limit is not made known to the public? The authority of a general agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him. Smith's Mercantile Law, p. 128, 7th ed. In Story on Agency, § 127, p. 153, 4th ed., it is said that, "if a person is held out to third persons, or to the public at large, by his principal, as having a general authority to act for and to bind him in a particular business or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting that authority." If the limit is not disclosed, it is the same as if there was none. Where a factor has private instructions from his principal not to sell under a certain sum, and he sells for less, the principal is bound. This case is within the law, as laid down in Story on Agency, § 131, p. 185, 4th ed.

Secondly, the defendant is liable, at all events, to the extent of £100, because he has authorized his agents to underwrite for that amount. "Where a man does less than the authority committed to him, the act is void; but where he does that which he is authorized to do and something more, it is good for that which is warranted and void for the rest." Co. Litt. 258 a. [Bramwell, B. I can well understand that if a man is authorized to make a feoffment of one acre and he makes a feoffment of two, it is good for the one and void as to the other; but a contract is an entire thing and indivisble. Martin, B. If the defendant is bound at all, he was bound when his agent signed the policy.]

Edward James, *Mellish*, and *Holland* appeared to support the rule, but were not called upon to argue.

Martin, B. As to the last point, I think it scarcely arguable. This is an entire and indivisible contract to pay £150, and it is not valid because the broker had authority only to make a contract to the extent of £100.

With respect to the other point, it seems to me clear. A contract was made by an agent on behalf of his principal; and an action having been brought against the principal upon that contract, it became necessary for the plaintiff to prove the agent's authority to make it. Accordingly he produced and proved this document: "I hereby authorize you, in my name, on my behalf, to underwrite policies of insurance against marine risks *not exceeding* £100 by any one vessel." That authority was produced to prove a declaration which alleges that a policy was subscribed by the defendant for £150. If it had stood there, it would be obvious that the agent made a contract which he had no authority to make. But then it is said that there is a course of business in Liverpool by which brokers acting on behalf of underwriters make valid contracts in the names of their principals. But it is well known that a limit is placed upon the amount for which the broker can sign his principal's name. In this case the broker could sign for £100 on any number of ships. When the name of the underwriter is given to the Underwriters' Association the limit is not disclosed, and it is known only to the broker and his principal. Now, the plaintiff having produced the written authority, by which the contract contained in this policy was certainly not authorized, it is contended that, by reason of the course of business in Liverpool, there was virtually an authority to underwrite for £150, because it is well known that there is some limit, and therefore every man who makes a contract of this kind has notice that he is dealing with an agent who has only a limited authority. But when a principal has put a limit to his agent's authority, and a person contracts with knowledge that there is always some limit, how can it be said that the agent may bind his principal to a greater extent than the limit? This view is in accordance with common sense, and no refinements of text writers can alter it.

Bramwell, B. I am of the same opinion. The actual authority given to the agent cannot be relied on, and therefore the counsel for the plaintiff are obliged to rely upon a supposed authority which the agent had not, that is to say, that the principal held out the broker as his agent, having authority to sign policies in his name for more than £100. But that is not true. The utmost that can be said is that the principal held out the broker as having that authority which a Liverpool broker ordinarily has. It seems to me almost a matter of logical demonstration that the plaintiff's proposition is erroneous. What would have been the case if there had been no limitation upon Liverpool brokers in general it is unnecessary to say, and it might give rise to a question of some difficulty.

Reference has been made to Story on Agency, § 131, where it is said that the distinction between general agents and limited or special agents may be illustrated by the case of a factor who has a general authority to sell; and if in selling he violates his private instructions, the principal is nevertheless bound. Amongst others, the case of Fenn *v.* Harrison, 3 T. R. 757, 762, is cited, but it does not warrant the proposition. I can well understand that, if a factor is simply employed to sell, he has a general authority to sell in the usual way; but I doubt whether when a factor is authorized to sell at a particular price he can bind his principal by a sale at a less price. I do not think that any of the authorities referred to by Mr. Justice Story warrant such an inference.

Again, we are asked how is the business of an underwriter to be carried on if the assured is bound on every occasion to inquire into the extent of the broker's authority. The answer is twofold: first, the business is carried on; and, secondly, it will and ought to be carried on by the assured trusting to the honesty of the broker that he is not telling an untruth when he assumes not to exceed his authority. Generally speaking, the trust is well founded; for although brokers sometimes pledge the credit of their principals beyond what is right, they do not usually exercise an authority which they do not possess.

CHANNELL, B. I am of opinion that so much of the rule as seeks to set aside the verdict for the plaintiff and enter a nonsuit ought to be made absolute. With respect to the other branch of the rule, which seeks to reduce the damages, it only becomes important in one point of view, for if the defendant is right in his contention the plaintiffs cannot sever the amount and maintain their verdict with £100 damages.

The question is, therefore, whether the defendant is liable on the policy declared on. Now, the express authority given by the plaintiff not only does not establish a liability, but negatives it. But then it is said that we ought not to look at that authority *simpliciter*, but in connection with the fact that the limit is never disclosed; and it is contended the authority given to a general agent cannot be limited by secret instructions from his principal inconsistent with that authority. I do not wish to interfere with that as a general rule of law; nor do I think that in order to apply that rule the agent must be a general agent for all purposes. Perhaps the expression is incorrect, but there may be a special general agent; for instance, an agent to sign bills of exchange or subscribe policies of insurance; and although his authority does not extend to other matters, it may be general as to the particular business in which he is employed. But looking at the facts of this case, and the admission that it is well known in Liverpool that there is a limit to a broker's authority to underwrite policies, although the precise amount is not disclosed (which I think makes no difference), I am of opinion that the broker was not in the situation of a general agent so as to make applicable the rule of law relied on in the argument for the plaintiffs.

For these reasons I agree that the rule to enter a nonsuit ought to be absolute. *Rule absolute for a nonsuit.*[1]

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[1] See Thomas *v.* Joslin, 30 Minn. 388 (1883). Compare Brocklesby *v.* Temperance Building Society, [1895] A. C. 173. — ED.

WARD *v.* SMITH.

SUPREME COURT OF THE UNITED STATES. 1868.

[7 *Wall.* 447.]

ERROR to the Circuit Court of Maryland.

In August, 1860, William Ward, a resident of Alexandria in Virginia, purchased of one Smith, of the same place, then administrator of the estate of Aaron Leggett, deceased, certain real property situated in the State of Virginia, and gave him for the consideration money three joint and several bonds of himself and Francis Ward. These bonds, each of which was for a sum exceeding four thousand dollars, bore date of the 22d of that month, payable, with interest, in six, twelve, and eighteen months after date, "at the office of discount and deposit of the Farmers' Bank of Virginia, at Alexandria."

In February, 1861, the first bond was deposited at the bank designated for collection. At the time there was indorsed upon it a credit of over five hundred dollars; and it was admitted that, subsequently, the further sum of twenty-five hundred dollars was received by Smith, and that the amount of certain taxes on the estate purchased, paid by the Wards, was to be deducted.

In May, 1861, Smith left Alexandria, where he then resided, and went to Prince William County, Virginia, and remained within the Confederate military lines during the continuance of the civil war. He took with him the other two bonds, which were never deposited at the Farmers' Bank for collection. Whilst he was thus absent from Alexandria, William Ward deposited with the bank to his credit, at different times between June, 1861, and April, 1862, various sums, in notes of different banks of Virginia, the nominal amount of which exceeded by several thousand dollars the balance due on the first bond. These notes were at a discount at the times they were deposited, varying from eleven to twenty-three per cent. The cashier of the bank indorsed the several sums thus received as credits on the first bond; but he testified that he made the indorsement without the knowledge or request of Smith. It was not until June, 1865, that Smith was informed of the deposits to his credit, and he at once refused to sanction the transaction and accept the deposits, and gave notice to the cashier of the bank and to the Wards, obligees in the bond, of his refusal. The cashier thereupon erased the indorsements made by him on the bond.

Smith now brought the present action upon the three bonds to recover their entire amount, less the sum credited on the first bond when it was deposited, the sum of twenty-five hundred dollars subsequently received by the plaintiff, and the amount of the taxes paid by the defendants on the estate purchased.

The court below instructed the jury that, if they found that the defendants executed the bonds, the plaintiff was entitled to recover their amounts, less the credit indorsed on the first one, and the taxes paid by defendants, and the subsequent payment to the plaintiff, with interest on the same. The plaintiff recovered, and the defendants brought the case to this court by writ of error.

Messrs. Brown and *F. W. Brune*, for the plaintiffs in error.

Messrs. R. J. and *J. L. Brent*, *contra.*

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows.

The defendants claim that they are entitled to have the amounts they deposited at the Farmers' Bank in Alexandria credited to them on the bonds in suit, and allowed as a set-off to the demand of the plaintiff. They make this claim upon these grounds: that by the provision in the bonds, making them payable at the Farmers' Bank, the parties contracted that the bonds should be deposited there for collection either before or at maturity; that the bank was thereby constituted, whether the instruments were or were not deposited with it, the agent of the plaintiff for their collection; and that as such agent it could receive in payment, equally with gold and silver, the notes of any banks, whether circulating at par or below par, and discharge the obligors.

We do not state these grounds in the precise language of counsel, but we state them substantially.

It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar only one bond was deposited with the Farmers' Bank. That institution therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds.

But even as agent of the payee of the first bond, the bank was not authorized to receive in its payment depreciated notes of the banks of Virginia. The fact that those notes constituted the principal currency in which the ordinary transactions of business were conducted in Alexandria, cannot alter the law. The notes were not a legal tender for the debt, nor could they have been sold for the amount due in legal currency. The doctrine that bank bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.

In Ontario Bank *v.* Lightbody, 13 Wendell, 105, it was held that the payment of a check in the bill of a bank which had previously suspended was not a satisfaction of the debt, though the suspension was unknown by either of the parties, and the bill was current at the time, the court observing that the bills of banks could only be considered and treated as money so long as they are redeemed by the bank in specie.

That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge. Story on Promissory Notes, §§ 115, 389; Graydon *v.* Patterson, 13 Iowa, 256; Ward *v.* Evans, 2 Lord Raymond, 930; Howard *v.* Chapman, 4 Carrington & Payne, 508.

The objection that the bonds did not draw interest pending the civil war is not tenable. The defendant Ward, who purchased the land, was the principal debtor, and he resided within the lines of the Union forces, and the bonds were there payable. It is not necessary to consider here whether the rule that interest is not recoverable on debts between alien enemies during war of their respective countries, is applicable to debts between citizens of States in rebellion and citizens of States adhering to the national government in the late civil war. That rule can only apply when the money is to be paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receive the money, will violate the law by remitting it to his alien principal. "The rule," says Mr. Justice Washington, in Conn *v.* Penn, "can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him, and not to the person paying him the money." 1 Peters's Circuit Court, 496; Denniston *v.* Imbrie, 3 Washington do. 396. Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor. It was so held in Paul *v.* Christie, 4 Harris & McHenry, 161.

Here the principal debtor resided, and the agent of the creditor for the collection of the first bond was situated within the Federal lines and jurisdiction. No rule respecting intercourse with the enemy could apply as between Marbury, the cashier of the bank at Alexandria, and Ward, the principal debtor residing at the same place.

The principal debtor, being within the Union lines, could have protected himself against the running of interest on the other two bonds by attending on their maturity at the bank, where they were made payable, with the funds necessary to pay them. If the creditor within the Confederate lines had not in that event an agent present to receive payment and surrender the bonds, he would have lost the right to claim subsequent interest. *Judgment affirmed.*[1]

STEWART *v.* WOODWARD.

SUPREME COURT OF VERMONT. 1877.

[50 *Vt.* 78.]

BOOK account. The auditor reported substantially as follows. The account upon which the plaintiff seeks to recover, is for a suit of clothes, and various articles of clothing. The defendant did not deny the receipt of any of the articles charged, except a vest and a box of cuffs, and those items I disallowed for want of proof. The plaintiffs, I find, are entitled to recover for the remainder of the account, unless the Court should be of opinion, upon the following statement of facts, that the defendant is not liable. In January, 1874, the plaintiffs, who reside in Concord, N. H., and are there engaged in business as merchant tailors, started a branch house in Montpelier. Neither of the plaintiffs personally superintended the business there, but they employed Fred. R. Stevens to assist in selling goods, and especially to look after the furnishing department, and A. S. Currier, whom they had before employed as a general agent, who was to do the cutting, and order, sell, and superintend the making up of the goods, and draw checks on the bank, in Montpelier, where the firm kept a deposit, to pay the current expenses of the firm. The agreed price for Currier's work was $18 per week. Soon after Currier commenced work he and his family fell ill, and he employed the defendant, who was a physician, until his bill was greater than the account in suit. Currier solicited the defendant to take his pay out of the store, and to have a new suit of clothes, and told him that the goods he took should apply in payment of his bill for medical attendance. The defendant took the goods, relying on what Currier told him, supposing that Currier had authority to dispose of the goods in that way, and supposing that he was getting pay for his account against Currier; otherwise he would not have taken the goods. At the time the goods were taken, they were charged to the defendant on the plaintiffs' books, and at the time the plaintiffs' business was closed in Montpelier, in July, 1874, had not been transferred thereon to the account of Currier. The plaintiffs made no question but that Currier had the right to use enough of their funds to pay himself his wages. At the time plaintiffs closed out, owing to sickness, or other causes, Currier had taken from plaintiffs' funds more than the amount of his wages, and he took more than the amount of the account against the defendant, after the goods were bought. The defendant offered evidence tending to show that Currier had agreed to pay, and had paid, other of his private bills out of the store, to which the plaintiffs objected; but the auditor received it, subject to legal objection, and finds therefrom only that such agreements and payments were made. If, upon the foregoing facts, the Court should be of opinion that the plaintiffs are entitled to recover, I find due the plaintiffs, with interest to date, $61.73. The defendant also offered evidence tending to show that one of the plaintiffs, before the house was established at Montpelier, had a conversation with the defendant in which he informed him that Currier was to have an interest in the business; but I do not find that, after looking up the business and deciding to establish the branch house, the plaintiffs ever held out that Currier was anything but an employee. The defendant also offered evidence tending to show that Currier often told different parties that he had an interest in the concern, to which the plaintiffs objected, but which was received subject to legal objection. I find therefrom that some parties, including the defendant, understood him to mean that either he was a partner in the firm or had some interest beyond that of an employee, although I do not find that Currier ever gave that explanation of what he said; and that that phrase is just as consistent with the idea that his interest was only that of an employee. The sign at the store was, "T. W. & J. H. Stewart, A. S. Currier, cutter"; and they advertised under that name in one or more papers published at Montpelier. I do not find that Currier, as the general agent of the plaintiffs, had, in the management of the business, authority co-extensive with that of either of the partners; but I do find that Currier, as such agent, had authority to do all things necessary and proper to be done, and that could legitimately be done, in running the business established in Montpelier. The Court, at the March term, 1877, REDFIELD, J. presiding, rendered judgment, *pro forma*, on the report for the defendant; to which the plaintiffs excepted.

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[1] Compare Oliver *v.* Sterling, 20 Ohio St. 391 (1870). — ED.

Gleason and *Field*, for the plaintiffs.

Heath and *Carleton*, for the defendant.

The opinion of the Court was delivered by

POWERS, J. The report of the auditor states that Currier was the general agent of the plaintiffs in the conduct of their business at Montpelier. His authority there empowered him to do all things usual and useful to conduct the business of merchant-tailors. A general agency is, however, a restricted service. The agent cannot go outside the proper scope of his principal's business. So far as the business of his principal is concerned, he may do all that his principal could do. He cannot steal his principal's goods, nor appropriate them to his own use. He can only appropriate them to the use and profit of the principal. Persons dealing with a general agent are bound to measure the scope of his authority, as they are in dealing with a special agent. Although the compass of authority in the one case is wider than in the other, still it is to be understood that it has its limits. It is to be understood that it is an agent, not a principal, who acts. Lapoint *v.* Scott, 36 Vt. 608.

The defendant's good faith in the transaction avails him nothing. It does not cure Currier's bad faith.

The plaintiffs have not misled the defendant. They notified everybody that Currier was an agent, authorized to sell their goods. Purchasers understood they were buying goods of the plaintiffs through Currier as their salesman, and that the pay went, or should go, to the plaintiffs.

The defendant purchased the goods sued for, and attempted a mode of payment which he was bound to know was unauthorized. He has had the goods and converted them to his own use, never having paid the plaintiffs for them. The implied promise arising from taking the benefit of the delivery of them, is sufficient to warrant a recovery in this action.

Judgment reversed, and judgment on the report for the plaintiffs.[1]

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[1] See Holton *v.* Smith, 7 N. H. 446 (1835); Benny *v.* Rhodes, 18 Mo. 147 (1853); Benny *v.* Pegram, 18 Mo. 191 (1853); Aultman *v.* Lee, 43 Iowa, 404 (1876); Williams *v.* Johnston, 92 N. Car. 532 (1885); Dowden *v.* Cryder, 55 N. J. L. 329 (1893). — ED.

BENTLEY *v.* DOGGETT.

SUPREME COURT OF WISCONSIN. 1881.

[51 *Wis.* 224.]

APPEAL from the Circuit Court for Grant County.

Action to recover $50, with interest, upon an account for livery furnished in February and May, 1875, to one I. C. Otis, a servant and agent of the defendants, which livery, it is alleged in the complaint, "was used and employed by the said I. C. Otis in and about the business of the said defendants, and at their special instance and request." The account attached to the complaint was made out against Otis. The facts shown by the evidence, and the exceptions relied upon by the defendants, are thus stated by Mr. Justice TAYLOR: —

"The plaintiff kept a livery stable in Platteville, in this State, and in February and May, 1875, he let one I. C. Otis have horses and carriages to transport said Otis and his trunks from place to place, and the value of the use of the horses and carriages was the sum of $50, of which an itemized account is given. Said Otis was at the time in the employ of the defendants, a firm of merchants in the city of Chicago, and was travelling for them, selling goods by sample and collecting bills for goods sold by him for said firm; the livery was furnished to Otis to transact his legitimate business for said firm; such livery was necessary and convenient for the transaction of the business of said Otis; and he had failed to pay therefor. The evidence also shows that Otis was paid a fixed salary by the defendants, and his expenses whilst travelling for them.

"On the trial, the defendants offered to prove that they always furnished Otis, as they did all their other travelling salesmen, sufficient money to pay all their expenses; that he was so furnished with sufficient money at the time this bill was made; that he had no authority to incur any liability whatever against the firm; and that subsequently to the making of this bill by Otis, and without any knowledge that the plaintiff had any such bill against them or Otis, they had settled with said Otis, and allowed him in such settlement the amount of plaintiff's bill, as money expended by him in their employment. The evidence further shows that the charges made on the plaintiff's books for said bill were all made against I. C. Otis, and not against these defendants, and that no demand was made of the defendants for the payment of the bill until after this action was commenced. The defendants offered to prove on the trial that it is a general custom, and was when this bill was made, among the commercial houses in the city of Chicago, in sending out travelling agents to sell goods for their employers, to furnish them with sufficient money to pay all their hotel bills and travelling and other expenses, and that in no instance are such agents permitted to pledge the credit of their principals or incur any liability against their employers. This evidence was objected to by the plaintiff, and excluded.

"Upon the close of the evidence the defendants requested the Court to submit the following questions to the jury, in the way of a special verdict: (1) Was the credit given by the plaintiff to the defendants Doggett, Bassett & Hills, or was it given to I. C. Otis, at the time the livery was furnished him? (2) Did or did not the defendants furnish I. C. Otis with sufficient money with which to pay his travelling expenses at the time and prior to his starting out on these trips to sell the goods of the defendants? (3) Did or did not the defendants give any authority to I. C. Otis to obtain livery on credit? The Court declined to submit to the jury the second and third questions proposed, and submitted the first; and in answer to that question the jury found as follows: 'We, the jury, find that the livery was furnished upon the credit of Doggett, Bassett & Hills.'

"There was no question made as to the amount of the plaintiff's bill, nor as to the facts that it was unpaid, and that the livery was used by I. C. Otis in the pursuit of his business as a commercial agent in the employ of the defendants. The defendants offered to show upon the trial that they had furnished Otis with sufficient money to pay all his expenses and livery bills, and that he had no authority and was forbidden by them to pledge the credit of the defendants for such bills; but they did not offer to show that these facts were known to the plaintiff when he furnished the livery to their agent, Otis. The court below held that, a knowledge of these restrictions upon the power of their agent not having been brought home to the plaintiff at the time he furnished the livery to the agent, Otis, they were not material to the issue, and should be disregarded by the jury in making up their verdict; and it entirely withdrew them from their consideration, by refusing to submit the second and third questions propounded by the defendant for a special verdict."

The jury found specially that the livery was furnished upon the credit of defendants, and also rendered a general verdict in favor of the plaintiff; defendants' motion for a new trial was denied; and they appealed from a judgment on the verdict.

For the appellants there was a brief by *W. H. Beebe*, their attorney, with *A. R. Bushnell*, of counsel, and oral argument by *Mr. Beebe*.

William E. Carter, for the respondent.

TAYLOR, J. It is clearly shown by the evidence that it was not only convenient but necessary for the agent, Otis, to have the use of horses and carriages in order to transact the business he was employed to transact; and the only question is whether he could bind his principals by hiring them upon their credit. Otis was the agent of the defendants for the purpose of travelling about the country with samples of their merchandise, contained in trunks, which rendered it necessary to have a team and carriage to transport him and his samples from place to place, with full authority to sell their merchandise by sample to customers, and direct the same to be delivered according to his orders. The defendants not having furnished their agent the necessary teams and carriages for transportation, he clearly had the right to hire the same and pay their hire out of the funds in his hands belonging to them. This is admitted by all parties. The real question is, Can the agent, having the money of his principals in his possession for the purpose of paying such hire, by neglecting to pay for it, charge them with the payment to the party furnishing the same, such party being ignorant at the time of furnishing the same that the agent was furnished by his principals with money and forbidden to pledge their credit for the same?

There can be no question that, from the nature of the business required to be done by their agent, the defendants held out to those who might have occasion to deal with him that he had the right to contract for the use of teams and carriages necessary and convenient for doing such business, in the name of his principals, if he saw fit, in the way such service is usually contracted for; and we may, perhaps, take judicial notice that such service is usually contracted for, payment to be made after the service is performed. It would seem to follow that, as the agent had the power to bind his principals by a contract for such service, to be paid for in the usual way, if he neglects or refuses to pay for the same after the service is performed, the principals must pay. The fault of the agent in not paying out of the money of his principals in his hands cannot deprive the party furnishing the service of the right to enforce the contract against them, he being ignorant of the restricted authority of the agent. If the party furnishing the service knew that the agent had been furnished by his principal with the money to pay for the service, and had been forbidden to pledge the credit of his principals for such service, he would be in a different position. Under such circumstances, if he furnished the service to the agent, he would be held to have furnished it upon the sole credit of the agent, and he would be compelled to look to the agent alone for his pay. We think the rule above stated as governing the case is fully sustained by the fundamental principles of law which govern and limit the powers of agents to bind their principals when dealing with third persons. Judge Story, in his work on Agency, § 127, says: "The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him." In § 133 he says: "So far as an agent, whether he is a general or special agent, is in any case held out to the public at large, or to third persons dealing with him, as competent to contract for and bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions." And again, in § 73, in speaking of the power of an agent acting under a written authority, he says: "In each case the agent is apparently clothed with full authority to use all such usual and appropriate means, unless upon the face of the instrument a more restricted authority is given, or must be inferred to exist. In each case, therefore, as to third persons innocently dealing with his agent, the principal ought equally to be bound by acts of the agent executing such authority by any of those means, although he may have given to the agent separate private and secret instructions of a more limited nature, or the agent may be secretly acting in violation of his duty." In the case of Pickering *v.* Busk, 15 East, 38–43, Lord ELLENBOROUGH, speaking of the power of an agent to bind his principal, says: "It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject-matter; and there would be no safety in mercantile transactions if he could not." These general principles have been illustrated and applied by this and other courts in the following cases: Young *v.* Wright, 4 Wis. 144; Whitney *v.* State Bank, 7 Wis. 620; Long *v.* Fuller, 21 Wis. 121; Houghton *v.* Bank, 26 Wis. 663; Kasson *v.* Noltner, 43 Wis. 646; Smith *v.* Tracy, 36 N. Y. 79; Andrews *v.* Kneeland, 6 Cow. 354.

In this view of the case it was immaterial what the orders of the principal were to the agent, or that he furnished him money to pay these charges, so long as the person furnishing the service was in ignorance of such facts. In order to relieve himself from liability, the principal was bound to show that the plaintiff had knowledge of the restrictions placed upon his agent, or that the custom to limit the powers of agents of this kind was so universal that the plaintiff must be presumed to have knowledge of such custom. Under the decisions of this court, the custom offered to be proved was not sufficiently universal to charge the plaintiff with notice thereof. See Scott *v.* Whitney, 41 Wis. 504, and the cases cited in the decision, and Hinton *v.* Coleman, 45 Wis. 165. And there being no proof of actual notice to the plaintiff, the only issue left in the case, which was not clearly disposed of in favor of the plaintiff by the evidence, was submitted to the jury, viz.: whether the credit was, in fact, given by the plaintiff to the agent or to the firm. The jury found against the defendants upon this issue. From reading the evidence in the record, I should have been better pleased with a different verdict upon this issue; but as there is some evidence to support the verdict, and as this court has held substantially in Champion *v.* Doty, 31 Wis. 190, that charging the service in the plaintiff's books to the agent is not conclusive that the credit was given to him, but might be explained, it was the province of the jury to say whether the explanation given by the plaintiff was reasonable and satisfactory. We cannot, therefore, set aside the verdict as against the evidence.

BY THE COURT. The judgment of the Circuit Court is affirmed.[1]

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[1] See Huntley *v.* Mathias, 90 N. Car. 101 (1884). — ED.

CAMDEN SAFE DEPOSIT AND TRUST CO. *v.* ABBOTT.

SUPREME COURT OF NEW JERSEY. 1882.

[44 *N. J. L.* 257.]

ON rule to show cause.

Argued at February term, 1882, before Justices DIXON, REED, and MAGIE.

Chas. T. Reed, for the rule.

Samuel H. Grey, *contra.*

The opinion of the court was delivered by

DIXON, J. This suit was brought upon a promissory note drawn to the order of J. R. Abbott, signed with the defendant's name by Jesse R. Abbott, who acted under a power of attorney of the following tenor: —

"SIR: This is to certify that J. R. Abbott . . . is this day appointed with power of attorney, and authorized by me to sign my name to any paper or papers, notes, &c.

"T. ABBOTT.

"Dated Sept. 18th, 1878.

"Witness present, WILLIAM J. WESTCOTT."

On the trial a question was raised whether the words "notes, &c." were not added fraudulently after the defendant had executed the instrument, but the jury found against this proposition. Such an inquiry seems scarcely important, for the language of the power, without those words, is so general that it is hardly possible to interpret them in such manner as to exclude an authority to sign notes on proper occasions.

But in whichever form the instrument was delivered, it did not justify the signing of notes for purposes outside of the principal's business. Gulick *v.* Grover, 4 Vroom, 463; Stainer *v.* Tysen, 3 Hill, 279.

The note in suit was given for such a purpose, it having been put forth for the personal benefit of the attorney, who converted its proceeds to his own use. It was therefore issued under an apparent authority, but in fraud of the principal. The holders of such notes can recover of the principal only on showing that they took them for value, before maturity, and *bona fide.* North River Bank *v.* Aymar, 3 Hill, 262; Duncan *v.* Gilbert, 5 Dutcher, 521; Hamilton *v.* Vought, 5 Vroom, 187; Bird *v.* Daggett, 97 Mass. 494.

The only evidence touching this matter, in the record before us, is that the attorney received the amount of the note, but when, from whom, and under what circumstances, do not appear.

The verdict for the plaintiff must therefore be set aside, and a new trial granted.

QUINLAN, APPELLANT *v.* PROVIDENCE WASHINGTON INSURANCE COMPANY, RESPONDENT.

COURT OF APPEALS OF NEW YORK. 1892.

[133 *N. Y.* 356.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 7, 1891, which affirmed a judgment in favor of defendant entered upon an order nonsuiting plaintiff on trial at Circuit.

This action was upon a policy of fire insurance on a dwelling-house at Cape Vincent, Jefferson County.

The policy was issued by one Kelsey, an agent of the defendant, having power to countersign and issue policies furnished in blank by the company, within the territory covered by his agency. It was a standard policy in the form, and containing the printed conditions prescribed by the Act of 1886. It is dated July 12, 1887, and insured for three years a dwelling-house of the plaintiff in the sum of $500. The plaintiff had insurance on other property in different companies, and by an arrangement between him and the agent of the defendant, his policies were left in charge of the latter, who was to attend to the plaintiff's interests in case of any loss by fire. The defendant's policy contained, among other conditions embraced in the standard policy, a condition that it should be void, unless provided by agreement indorsed on or added to the policy, "if, with knowledge of the insured, foreclosure proceedings be commenced, or notice of sale of any property covered by the policy by virtue of any mortgage or trust deed." Also a provision that in case of fire the "insured shall give immediate notice of any loss thereby, in writing, to the company, . . . and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company in writing, signed and sworn to by the insured," containing certain particulars enumerated.

By the concluding clause in the policy it was provided that "no officer, agent, or other representative of the company shall have any power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement, indorsed hereon and added hereto, and as to such provisions or conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The part of this clause relating to added conditions or provisions is not material here, as none were added to the policy in question. After the policy was issued, and before the fire, the plaintiff mortgaged the premises on which the property insured was situated, in connection with other premises, for $3,500. A foreclosure of the mortgage was commenced by process served on the plaintiff May 27, 1889, twenty days before the fire which destroyed the insured premises, which was on June 16, 1889. The company had no notice of this foreclosure. The policy of insurance was, at the request of plaintiff, delivered by Kelsey the agent, who issued it, to the mortgagee upon the execution of the mortgage, and there was indorsed thereon a clause making the loss, if any, payable to him.

In February thereafter (1889) the policy, then in possession of the mortgagee, was burned in the burning of a building in which it was deposited, and no duplicate policy was applied for or issued. In August, 1888, about ten months before the fire, Kelsey ceased to act as agent for the defendant, and one Block was appointed agent in his place, who, before the fire, issued to the plaintiff a policy in the defendant's company on other property, and Block kept the policy with others issued to the plaintiff in his possession, apparently under an arrangement similar to that previously had with Kelsey.

The plaintiff never served any notice of loss on the company. Kelsey, the former agent of the defendant, on July 19, 1889, thirty-three days after the fire, addressed a letter to the company, saying that he had just discovered, in looking over his account with the plaintiff, that the defendant had a risk on the property, and adding, "Not knowing anything further, whether reported by your agent, or whether adjusted and paid, I take the trouble to make this report, feeling then as if I had done my duty." The company replied that the matter had already "had our attention." The letter of Kelsey was not written in behalf of the plaintiff, or with his knowledge at the time, but he testified that Kelsey informed him about a month after the fire that he had written the company, and that they informed him they were paying attention to the matter. "He said he thought it would be all right; that he could collect it." No proofs of loss were served on the company until January 8, 1890, about seven months after the fire. The company refused to accept the proofs and returned them. The witness Kelsey testified that, in case of loss, he would notify the company, and it would send an adjuster who would prepare proof of loss and settle the claim. But it appeared that only one loss had occurred during his agency for the defendant, and that it involved a few dollars only and was adjusted by a special agent. The plaintiff testified that he did not read the policy, and was ignorant of its conditions.

The trial judge refused to permit proof that Kelsey knew of the commencement of the foreclosure proceedings, and assured the plaintiff at the time that no harm could come to him therefrom. The court, at the close of the whole case, directed a nonsuit.

D. G. Griffin, for appellant.

A. H. Sawyer, for respondent.

Andrews, J. If the rights of the parties depend upon the contract of insurance as expressed in the policy, there can be no hesitation in affirming the judgment of nonsuit.

The provision as to the commencement of foreclosure proceedings; the requirement that the insured, in case of loss, shall give immediate notice in writing to the company, and the other requirement that within sixty days after a fire he shall render to the company a sworn statement of the particulars specified, are conditions precedent to a right to recover on the policy, and each of the three conditions mentioned was violated. Foreclosure proceedings were commenced to the knowledge of the insured before the fire; no notice of loss was served at any time by him, and the letter of Kelsey to the company written thirty-three days after the fire, even if it could be treated as having been written in behalf of the insured, was not immediate notice; and finally the proofs of loss were not served until months after the sixty days' limitation in the policy had expired. The authorities are conclusive that the non-performance of these conditions, or any one of them, constituted a complete defence to a claim to recover on the policy as printed. Inman *v.* Western F. Ins. Co., 12 Wend. 460; Blossom *v.* Lycoming F. Ins. Co., 64 N. Y. 162; Titus *v.* Glens Falls Ins. Co., 81 id. 411.

The plaintiff was driven to the claim that the company had waived the right to insist upon the conditions of the contract as contained in the policy, or had consented to be bound, notwithstanding the violation of the conditions. He relied, to establish this contention, upon certain transactions between himself and Kelsey, the agent who acted for the company in making the contract of insurance and issuing the policy, fully recited in the statement of facts. It is to be assumed that Kelsey learned of the commencement of the foreclosure proceedings, and thereupon assured the plaintiff that his rights under the policy would not be prejudiced thereby; also that he knew of the fire when it occurred, and after writing the company the letter of July 19, 1889, informed the plaintiff that he had done so, and that he need take no further steps towards giving notice or securing proofs of loss, and it is to be admitted also that the plaintiff had not read the policy, and did not know what conditions it contained.

It is insisted that upon the whole evidence a question was presented for the jury whether the company had waived the conditions relied upon to defeat a recovery or had consented to be bound notwithstanding their violation. The transactions and interviews between Kelsey and the plaintiff took place after Kelsey had ceased to act as the agent for the defendant; but it is claimed that the plaintiff did not know that his agency had terminated, and we shall consider the case upon the assumption that the company was bound by his acts to the same extent as if there had been no change in his relation to the defendant. The substance of the claim made by the plaintiff is that the agent of the company, invested with the power to make contracts of insurance and issue and countersign policies, may subsequently change or modify conditions therein and waive forfeitures; in short, that in respect to policies issued by him he stands in place of the company and may do whatever the company itself might do in the premises.

The powers possessed by agents of insurance companies, like those of agents of any other corporations, or of an individual principal, are to be interpreted in accordance with the general law of agency. No other or different rule is to be applied to a contract of insurance, than is applied to other contracts. The agent of an insurance company possesses such powers and such powers only as have been conferred verbally or by the instrument of authorization, or such as third persons have a right to assume that he possesses. Where the act or representation of the agent of an insurance company is alleged as the act of the principal and therefore binding upon the latter, the test of the liability of the principal is the same as in other cases of agency. No principle is better settled in the law, nor is there any founded on more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and it is immaterial whether the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other. Walsh *v.* Hartford Fire Ins. Co., 73 N. Y. 10.

The limitations upon the authority of Kelsey were written on the face of the policy. It declared that "no officer, agent, or representative of the company should have power to waive any provision or condition" embraced in the printed and authorized policy, but power is given to agents to waive added provisions or conditions, provided such waiver is written upon or attached to the policy. Where a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority, and the consent or act of the agent not so indorsed is void. Walsh *v.* Hartford Fire Ins. Co., *supra;* Marvin *v.* Universal Life Ins. Co., 85 N. Y. 278. The conditions violated in this case were contained in the authorized blank, and as to these the agent had no power in any manner, in writing, or otherwise, to waive them.

In determining the question of liability in this case it is immaterial whether the plaintiff read the policy or not, or that he had no actual knowledge of the conditions or of the limitations of the power of Kelsey. The conditions and limitations were a part of the contract and he was bound to take notice of them, and is not excused upon the plea that he omitted to acquaint himself with the provisions of the policy, and his arrangement with Kelsey to take charge of his insurance interests was a matter with which the defendant had no concern.

The act (Chap. 486, of the Laws of 1886) providing for a uniform policy known as the standard policy, and which makes its use compulsory upon insurance companies, marks a most important and useful advance in legislation relating to contracts of insurance. The practice which prevailed before this enactment, whereby each company prescribed the form of its contract, led to great diversity in the provisions and conditions of insurance policies, and frequently to great abuse. Parties taking insurance were often misled by unusual clauses or obscure phrases concealed in a mass of verbiage and often so printed as almost to elude discovery. Unconscionable defences based upon such conditions were not infrequent, and courts seem sometimes to have been embarrassed in the attempt to reconcile the claims of justice with the law of contracts. Under the law of 1886 companies are not permitted to insert conditions in policies at their will. The policies they now issue must be uniform in their provisions, arrangement, and type. Persons seeking insurance will come to understand to a greater extent than heretofore the contract into which they enter. Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract after the policy has been issued or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent express or implied. The principle that courts lean against forfeitures is unimpaired, and in weighing evidence tending to show a waiver of conditions or forfeitures, the court may take into consideration the nature of the particular condition in question, whether a condition precedent to any liability, or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company.

The acts and representations of Kelsey upon which the plaintiff relies were in excess of his authority as expressed in the policy and did not bind the defendant, there being no evidence upon which it can be held that the company had enlarged his powers or waived the violated conditions.

These views lead to an affirmance of the judgment.

All concur, PECKHAM and MAYNARD, JJ., in result; O'BRIEN, J., not sitting.

Judgment affirmed.[1]

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[1] On the powers of insurance agents, see Viele *v.* Germania Insurance Co., 26 Iowa, 9, 57–64 (1868); Insurance Co. *v.* McGookey, 33 Ohio St. 555, 564–566 (1878); Strickland *v.* Council Bluffs Ins. Co., 66 Iowa, 466 (1885).

On the assumption that the assured knows the terms of the policy, see Catoir *v.* American Life Insurance and Trust Co., 33 N. J. L. 487 (1868); Morrison *v.* Insur

BIGGS *v.* EVANS.

QUEEN'S BENCH DIVISION. 1893.

[[1894] 1 *Q. B.* 88.]

ACTION tried by WILLS, J., without a jury.

The plaintiff sued to recover possession of a tabletop belonging to the plaintiff, and which had been entrusted by him to a person named Geddes, and sold by Geddes to the defendant, under circumstances which are fully stated in the judgment.

Arthur Powell, for the plaintiff.

Hammond Chambers, for the defendant.

Cur. adv. vult.

WILLS, J., delivered judgment as follows: —

The plaintiff was the owner of a valuable tabletop made of what is called opal matrix, an exceptional article, but of a class in which jewellers and dealers in gems might be expected to deal.

In the year 1886 he sent it to the business premises of a person named Geddes who was a dealer in jewels and gems; and who also, as a part of his business, and as a known part of his business, sold such things for other people in his own name, and having them in his possession. The following letter gives the terms of the deposit: "April 30, 1886. I will entrust you with the sale of my opal table upon the following conditions. That the table shall not be sold to any person nor at any price without my authorization is first obtained that such sale shall be effected. That the cheque handed to you in payment for the table shall be paid over to me intact for me to pay into my bankers, and that I shall pay for commission on the sale of the table one-third of the balance which remains after deducting cost of stone mounting and all expenses incurred by me in connection with the same."

Geddes in the year 1888 sold the table out and out to the defendant for £200, which was satisfied as follows: Geddes asked the defendant to pay £170 for him to Streeter, a West End jeweller, in satisfaction of a judgment which Streeter had obtained against him, and to pay him (Geddes) £30 in cash. The defendant did not pay Streeter £170, but gave him a diamond valued between him and Streeter at £120, and paid him £50 in cash.

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ance Co., 69 Tex. 353 (1887); Cleaver *v.* Traders' Ins. Co., 65 Mich. 527 (1887); s. c. 71 id. 414 (1888); Crouse *v.* Hartford Fire Ins. Co., 79 Wis. 249 (1890).

In some jurisdictions a provision that no officer or agent shall waive orally the requirements of an insurance policy has been held to be too broad. Westchester Fire Ins. Co. *v.* Earle, 33 Mich. 143, 153 (1876); Lamberton *v.* Connecticut Fire Ins. Co., 39 Minn. 129 (1888); Renier *v.* Dwelling House Ins. Co., 74 Wis. 89, 98–99 (1889). In other jurisdictions the provision has been enforced. Kimball *v.* Howard Fire Ins. Co., 8 Gray, 33 (1856); Walsh *v.* Hartford Fire Ins. Co., 73 N. Y. 5 (1878); Gladding *v.* California Farmers' Mutual Fire Ins. Assn., 66 Cal. 6 (1884); Smith *v.* Niagara Ins Co., 60 Vt. 682 (1888). — ED.

Geddes shortly afterwards became bankrupt and disappeared. The tabletop at the time of action brought was in the possession of Streeter, who was holding it for the defendant. The plaintiff claims to recover the tabletop from the defendant. The defendant resists the claim on two grounds. First, he says that at common law the plaintiff is estopped from denying his title. Secondly, that he is protected by the Factors Acts, from which of course the Act of 1889 must be excluded, as the transaction took place before it was passed. The claim of the defendant at common law is put thus. It is said that the plaintiff enabled Geddes to sell the tabletop as his own, and that his doing so was within the scope of his authority as it would be understood by persons who dealt with him, and that, as he had put it in the power of Geddes to commit the fraud, his must be the loss.

I think, however, that a fallacy underlies the expression that he enabled Geddes to commit the fraud. In one sense, and one only, did he do so. He gave him the corporal possession of the tabletop, and it was that possession which enabled Geddes to sell it as his own, or by way of a transaction within the scope of his apparent authority, as a person carrying on a business in which such sales are habitually effected. But it is quite clear that it requires more to found the argument in question. In one sense every person who entrusts an article to any person who deals in second-hand articles of that description enables him, if so disposed, to commit a fraud by selling it as his own. A man who lends a book to a second-hand bookseller puts it into his power, in the same sense, to sell it as his own. A man who entrusts goods for safe custody to a wharfinger, who also deals in his own goods, or in other people's goods entrusted to him for sale, in such a sense enables him to commit a fraud by selling them to a customer. But such a transaction clearly could not give a title to a purchaser as against the owner. The true test is, I take it, whether the authority given in fact is of such a nature as to cover a right to deal with the article at all. If it does, and the dealing effected is of the same nature as the dealing contemplated by the authority, and the agent carries on a business in which he ordinarily effects for other people such dispositions as he does effect, what he has done is within the general authority conferred, and any limitations imposed as to the terms on which, or manner in which, he is to sell are matters which may give a right of action by the principal, but cannot affect the person who contracts with the agent. It is within the scope of the authority that the agent should sell the goods on some terms, and it is not usual in the trade to inquire into the limits or conditions of an authority of that kind; and therefore the principal is supposed, as respects other people, to have clothed the agent with the usual authority. The foundation, however, of the whole thing is that the agent should be authorized to enter into some such transaction. If the principal has entrusted the goods to the agent for some other purpose, the agent is acting outside his authority in selling at all; and then the principal, whose goods have been disposed of without any authority at all so to do, is entitled to recover them in spite of the disposition.

Now, in the present case, the letter, taken as a whole, shows that the tabletop never was intrusted to Geddes to sell. He was forbidden in express terms to sell without further authority. He was not to sell the tabletop, but to keep it safely for the plaintiff until a further authority was given; and I think he sold, not violating instructions as to the terms on which he should effect a sale, but in spite of a prohibition to sell at all till some further authority should be given. At common law, therefore, I think the plaintiff is entitled to succeed.

Do the Factors Acts protect the defendant? I think not. I think it is an essential condition of the validity of a sale protected by them that the goods should have been intrusted to the agent for sale. I think the Factors Acts would apply, so far as relates to the business which Geddes was carrying on, the nature of the article dealt in, and what was usual in such a trade. But the defect that the article never was intrusted to him for sale is fatal.

I think there is another difficulty. In order to validate payment to the agent under 6 Geo. IV. c. 94, s. 4, it must be made in the ordinary course of business, that is, by cash or cheque or bill, as the case may be. I do not think that buying up a judgment from some one else, partly by delivery of a diamond of the defendant's own, can be considered as payment in the ordinary course within the section. And there is good reason for it. If the agent gets cash, he may be able to hand it to his principal; but if he does not get cash, and there is only a transaction of this kind, he cannot if impecunious pay the principal; it is out of his power to do so.

I am of opinion, therefore, that judgment must be entered for the plaintiff, with costs. *Judgment for the plaintiff.*[1]

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[1] See the Factors Acts, cited *ante*, p. 253, n. (2).

Important cases on the Factors Acts are: Phillips *v.* Huth, 6 M. & W. 572 (1840); Fuentes *v.* Montis, L. R. 4 C. P. 93 (Ex. Ch., 1868); Cole *v.* North-Western Bank, L. R. 10 C. P. 354 (Ex. Ch., 1875); Price *v.* Wisconsin M. & F. Insurance Co., 43 Wis. 267 (1877); Allen *v.* St. Louis Bank, 120 U. S. 20 (1887); Hastings *v.* Pearson, [1893] 1 Q. B. 62 (1892).— Ed.

SECTION IV.

Misrepresentation, Fraud, and kindred Topics common to Torts and Contracts.

CORNFOOT *v.* FOWKE.

EXCHEQUER. 1840.

[6 *M. & W.* 358.]

THIS was an action upon a written agreement, dated the 12th of November, 1838, made between the plaintiff and the defendant, whereby the defendant agreed to take a ready-furnished house of the plaintiff, for the term of two years, at the rent of £375 per annum, but which the defendant had refused to perform.

Plea, that the plaintiff caused and procured the defendant to enter into the said agreement, and that the defendant was induced to enter into the said agreement, through and by means of the fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him. Verification.

The replication traversed the plea, upon which issue was joined.

At the trial before Lord ABINGER, C. B., at the Middlesex Sittings, after last Trinity Term, the following facts appeared in evidence. The defendant, being in search of a town residence for the purpose of educating his children, applied to Mr. F. B. Clarke, No. 116 Crawford Street, to know if he had a ready furnished house to let in that neighborhood. Mr. F. B. Clarke mentioned several houses, which on looking at them, the defendant thought would not suit him. Subsequently to this, on the 29th October, 1838, Mr. F. B. Clarke wrote to inform him of the house in question, belonging to the plaintiff, stating that the rent required was 400 guineas, but that he thought 350 guineas might be taken, but certainly not less.

Upon the receipt of this letter, the defendant went with two of his sons and a friend, to look at the house in question, No. 16 York Place, Baker Street, and there saw Mr. Clarke, the father of F. B. Clarke, who had been employed by the plaintiff to let the house in question, and to whom persons making inquiries about the house had been referred. On seeing him the defendant said that he had seen Mr. Clarke, of Crawford Street, about taking the house. Mr. Clarke replied, that that Mr. Clarke was his son, but that he himself had the letting of the house. The defendant then said, "Pray, sir, is there anything objectionable about the house?" to which Mr. Clarke replied, "Nothing whatever;" upon which the defendant said, "Then I do not think I shall object to give 350 guineas for the house;" to which Mr. Clarke replied, that his son had made a mistake, that the rent was 450 guineas, and not 350. The defendant thereupon declined to give that rent, and left the house. Afterwards, however, in consequence of some further negotiation, the rent was reduced to £375, and the defendant agreed to take the house on those terms, and the agreement, for the breach of which the action was brought, was drawn up by Mr. Clarke, and signed by the defendant and afterwards by the plaintiff. On the 13th of November, the day after signing the agreement, the defendant discovered that the adjoining house to the plaintiff's (which was a corner house), situate in Davies Street, was a brothel of the worst description, of which there was ample evidence given at the trial, and in consequence of it persons in the immediate neighborhood of it could not let their lodgings, and were obliged to leave their houses. It was also proved that the plaintiff was fully aware of it, and had consulted some of the neighbors as to the best mode of putting down the nuisance. The defendant, on the 14th November, through his attorneys, Messrs. Egan & Waterman, gave notice of his determination not to take possession of the house, because, to his great astonishment, he had discovered that the next house to it was a house of ill fame. The defendant's family, it appeared, consisted of two sons and two daughters, the eldest daughter being sixteen or seventeen years of age.

At the trial, the defendant began, and having proved the above facts, *Thesiger*, for the plaintiff, objected that the question put to Mr. Clarke, the agent, by the defendant, whether there was any objection *about* the house, must be considered as applying to objections *within* the house, or to the house itself, but not to objections arising from something outside and apart from the house; which, he contended, the agent who was merely authorized to let the house, had no authority from his principal to answer. The learned judge overruled the objection, but left it to the jury to say whether the nuisance was such as formed a solid objection to the house; if so, and if they thought that when the defendant used the expression "*about* the house," Mr. Clarke could not have understood him in any other sense than that of an objection *to* the house, they ought to find their verdict for the defendant: and he stated his opinion to be, that although an agent could not bind his principal beyond the scope of his authority, it did not follow that the principal could enforce a contract procured by the false representation of his agent, and that the representation made by the agent must have the same effect as if made by the plaintiff himself. The jury answered both questions in favor of the defendant, and gave their verdict accordingly.

Thesiger, in Easter Term last, obtained a rule to show cause why there should not be a new trial on the ground of misdirection.

Kelly, *Channell*, and *Willcock*, in Michaelmas Term, showed cause.

Thesiger and *W. H. Watson*, *contra*. *Cur. adv. vult.*

The judges, differing in opinion, now delivered their judgments *seriatim*.

ROLFE, B.[1] The jury found for the defendant, and the counsel for the plaintiff afterwards obtained this rule nisi to set aside the verdict, and for a new trial, on the ground that Clarke was not proved to have had authority to make such a statement, or to have known of the nuisance in question, though the plaintiff himself must have been aware of its existence. The point for our decision is, whether it was properly left to the jury, in the absence of proof of express authority, to treat the defendant as not being liable in this action, on the ground that the representation of Clarke was a representation by an agent made in the ordinary course of business, and therefore binding on the principal. It was not shown at the trial what was the precise extent of the authority given to Clarke, but I will assume that he had all the authority usually confided to house agents, and in the absence of express proof he cannot be assumed to have had more. If an agent so authorized should enter into an agreement to let the house of his principal, making it part of the contract that the house was free from any particular nuisance, as, for instance, the immediate neighborhood of a brothel, it is obvious the principal could only enforce the contract, or recover damages for the breach of it, by showing that he was able and willing to do what his agent had contracted to do, that is, to let to the intended tenant the house free from the particular nuisance. No question as to the extent of the agent's authority could in such a case arise. The landlord insisting on his agent's contract, must take it *in solido*, with all its qualifications and provisions. If, instead of an action at the suit of the landlord, the intended tenant should sue the intended landlord for the breach of such a contract, on the ground that the agent had agreed to let a house free from the nuisance of a brothel, then the question argued in this case, as to the authority of a house-agent to make such a contract binding on his principal, would arise. But the present is not a question as to the power of an agent to bind his principal by contract, but as to his power to affect him by a representation collateral to the contract. Now, in order to do this, it is essential, according to what was laid down by GIBBS, C. J., in Pickering *v.* Dowson, 4 Taunt. 786, to bring home fraud to the principal; and that was certainly not done in this case, where all the facts are consistent with the hypothesis that the plaintiff innocently gave no directions whatever on the subject, supposing that the intended tenant would make the necessary inquiries for himself, or even with the stronger supposition that he expressly desired Clarke not to make any representation at all on the subject. If the plaintiff, knowing of the nuisance, expressly authorized Clarke to state that it did not exist, or to make any statement of similar import; or if he purposely employed an agent, ignorant of the truth, in order that such agent might innocently make a false statement believing it to be true, and might so deceive the party with whom he was dealing, in either of these cases he would be guilty of a fraud, and the truth of the plea would then, I think, have been established. But on the general ground of the authority of an agent to bind his principal in matters within the scope of his authority, on which the case was left to the jury, I think that, as no express authority was proved to have been given by the plaintiff, authorizing Clarke to make the representation in question, the fraud stated by the plea is not made out, and consequently the rule for a new trial ought to be made absolute.

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[1] After stating the case. — ED.

ALDERSON, B. In this case the parties have entered into an agreement which is in writing, and to the terms of which nothing can be added, and from them nothing subtracted.

The agent makes a representation at the time of the negotiation, which is contrary to the fact. If that were a fraudulent representation, and in consequence of that representation the bargain was made, the defendant will not be liable, by reason of the fraud, and this is the point raised by these pleadings.

But here the representation, though false, was believed by the agent to be true. He therefore, if the case stopped here, has been guilty of no fraud.

The jury have, however, found that the true facts were known to the principal, though not communicated by him to the agent; and it is said this knowledge, on the part of the principal, is sufficient to establish the fraud.

If, indeed, the principal had instructed his agent to make the false statement, this would be so, although the agent would be innocent of any deceit. But this fact also fails. It may perhaps be admitted, that such a statement, if made part of the original written contract, would be within the scope of the general agency here shown to exist. But the contract is in writing, and this is no part of it. And I think it impossible to sustain a charge of fraud, when neither principal nor agent has committed any, — the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor ever directed the agent to make it; and the agent, because though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bona fide*.

It is said that this will open a door to fraud, by enabling parties in the situation of this principal, themselves conscious of objections to their premises, to appoint agents, who unconsciously may make misrepresentations to the injury of third persons. This does not follow. If the fact could be shown, it would be a fraud on the part of the principal with such a motive to appoint such an agent; and the third party is not (except from his own imprudence) in any real danger, for he may always protect himself by making the representation a part of the contract, in which case its falsehood, whether fraudulent or not, will be a good defence to him. For these reasons, I think there should be a new trial.

PARKE, B. In this case I concur in opinion with my learned Brothers who have preceded me, that there should be a new trial.

It is an action on an agreement by the defendant, to take the plaintiff's house, ready furnished, for a term. The defendant pleads, that the agreement was void, on the ground of fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him. That plea the defendant is to prove.

The alleged fraud consists in an untrue representation made by a house-agent, employed by the plaintiff, in answer to a question by the defendant. The question was, whether there was any objection to the house; the answer, that there was none; and it appeared that the next door was a brothel, and that the plaintiff knew it before, but the agent did not. My Lord Chief Baron thought the plaintiff was bound by the agent's representation, and left the question to the jury, whether that representation was intended to relate to intrinsic objections only, or applied to extrinsic objections also. The jury found that it was meant and understood to refer to both, and to the mode in which that question was left to the jury, or their finding upon it, no objection is made.

But it is said, and I think justly said, that it is not enough to support the plea, that the representation is untrue; it must be proved to have been fraudulently made. As this representation is not embodied in the contract itself, the contract cannot be affected, unless it be a fraudulent representation, and that is the principle on which the plea is founded.

Now the simple facts, that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute fraud: each person is innocent, because the plaintiff makes no false representation, and the agent, though he makes one, does not know it to be false; and it seems to me to be an untenable proposition, that if each be innocent, the act of either or both can be a fraud. No case could be found in which such a principle is laid down, as was admitted in the course of the argument. It must be conceded, that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, knowingly commit a fraud in making it, not only is the contract void, but the principal is liable to an action. Lord Holt held, that in an action of deceit, for selling one sort of silk for another, upon evidence that there was no actual deceit in the defendant, but that it was in his factor beyond sea, the merchant was liable. Hern *v.* Nichols, 1 Salk. 289. But, in the present case, the agent acted without any fraudulent intent; and therefore his act alone neither renders the plaintiff liable to an action nor vitiates the contract. It must also be admitted that if the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked from him, and at the same time believing or suspecting that it would, by reason of such ignorance, be answered in the negative, the plaintiff would unquestionably be guilty of a fraud, and the contract would be avoided; for then the representation of the agent, which he intended to be made, would be the same as his own; and his own representation, coupled with his knowledge of its falsehood, would doubtless be a fraud. But whether the facts in the case would warrant an inference that such a fraud was committed, it is unnecessary to inquire, as, if they would, this question should have been submitted to the jury.

My opinion, therefore, is, that the case has not been properly disposed of, and there ought to be a new trial.

Much discussion took place on the argument of the rule, as to the extent of the authority delegated to the agent, — whether it was to make representations as to the intrinsic qualities of the house, or to extrinsic circumstances. The view of the case which I have taken makes it unnecessary to enter into that question in order to dispose of this rule; and upon my lord's report, I am unable to collect exactly what the authority of the house-agent was. It certainly was not to make any contract, for that was clearly to be executed by both principals: and whether he had authority to make any representations as to the state and condition of the property, does not appear to be clear; and I abstain from entering into that question at all, inasmuch as my opinion proceeds on this, that such representations, whether within the scope of his authority or not, do not affect a regular contract, unless they be fraudulent representations.

Lord Abinger, C. B.[1] I have bestowed some consideration on this subject since, and am sorry to find myself obliged to differ from my Brethren on a matter that appears to me, but for their opinion, too plain to admit of a doubt. In the first place, it is not correct to suppose that the legal definition of fraud and covin necessarily includes any degree of moral turpitude. Every action for the breach of a promise, for deceit, for not complying with a warranty, or for a false representation, is founded upon a legal fraud, which is charged as such in the declaration, although there be no moral guilt in the defendant. The warranty of a fact which does not exist, or the representation of a material fact contrary to the truth, are both said, in the language of the law, to be fraudulent, although the party making them suppose them to be correct. This point, if it could be doubted, is fully established by the case of Williamson *v.* Allison, 2 East, 446. That was a declaration in tort for breach of a warranty, that twenty-four dozen bottles of claret were in a fit and proper state to be exported to India, whereas they were at the time — and the defendant well knew they were — in a very unfit and improper state. At the trial no evidence was given of the defendant's knowledge, and the verdict being for the plaintiff, a motion was made afterwards for a new trial, on the ground that the scienter, having been alleged, ought to have been proved.

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[1] The Chief Baron's opinion has been abbreviated by omitting his statement of the case, and his discussion of the authorities as to notice and of Schneider *v.* Heath, 3 Camp. 506. — Ed.

But the Court, after full discussion, and a reference to cases cited in the argument, were unanimously of opinion that the allegation of the scienter was wholly unnecessary and immaterial, and therefore need not be proved. Now if the action had been for a false representation made by the seller of a material fact, by reason of which the plaintiff was induced to buy, although the seller might have supposed the fact to be true, the same reasoning or the same rule would apply; the difference between a warranty and a representation is nothing more than this, that where there is a written contract the warranty forms a part of the contract, but the representation is collateral to the contract, and may be made verbally, though the contract may be in writing: but if it be of a fact without which the other party would not have entered into the contract at all, or at least on the same terms, it is equally effectual, if untrue, to avoid the contract or to give an action for damages on the ground of fraud. This is often illustrated by actions, which have been very common of late, by the purchasers of public-houses, who have been induced to buy or to give a greater price for the goodwill of the house, by a representation of the extent of its business; and if that representation turns out to be false, even though the party making it supposed it to be true, and whether that party were the principal or the agent, it has never been doubted that the contract is void and that the buyer may recover back his money in an action for money had and received to his use. In the case of Hodson *v.* Williamson, 1 W. Black. 463, Mr. Justice Yates lays it down as a general proposition, that "the concealment of material circumstances vitiates all contracts, upon the principles of natural law." If this be true, can it be doubted that the false representation of a material circumstance also vitiates a contract? These principles are familiar to every person conversant with the law of insurance. But a policy of insurance is a contract, and is to be governed by the same principles as govern other contracts. When it is said to be a contract *uberrimæ fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. Now nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, however innocently made, avoids the contract on the ground of a legal fraud. But though I consider this case as coming fully within the meaning of a legal fraud, even if the agent is presumed to be ignorant of the falsehood of his misrepresentation, I am very far from conceding that it is a case void of all moral turpitude.

The verdict of the jury entitles me to consider the question put by the defendant exactly the same as if it had been put in this form: "Is there no brothel, or smith's forge, or farrier's shop, or other nuisance so near the house as to make it objectionable?" to which the agent replies, "I assure you there is none."

In the case of Pawson *v.* Watson, Cowp. 785, Lord Mansfield lays it down, generally, that in a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false. This maxim is neither negatived nor qualified by the doctrine laid down in that class of cases derived from Pasley *v.* Freeman. The plaintiffs in those cases sought to charge a party with damages for stating that which he believed to be true, though he did not know it to be so, in answer to inquiries made by the plaintiff respecting the credit of a third person. There the defendant had no end to gain, no interest in the event, no motive to deceive; he was not one of the *dramatis personæ* in the construction of any contract. It does not follow from the principle established in these cases, that if in any one of them the defendant had been the agent employed by the purchaser of the goods to buy them for him, and even without the authority of his principal, had made false representations of his circumstances, to induce the seller to make a contract to sell his goods on credit, the seller would have been bound to deliver them.

Mr. Clarke, the agent, at least for letting the house, has in this case induced the defendant to enter into a contract by a false representation by no means free from moral turpitude, even upon the presumption that he was wholly ignorant of the matter. That the truth was known to the plaintiff is admitted; that he had an interest to conceal it, cannot be denied; nor can it be denied that it was concealed from the defendant. Whether his concealment was consistent with good faith and free from moral turpitude, may be determined by a reference to the case put by Cicero in the third book of his Treatise De Officiis, which I the rather mention, because the house, the sale of which he puts hypothetically, by way of example, was liable to an objection that bears some analogy to the present: —

"Vendat ædes vir bonus propter aliqua vitia, quæ ipse nôrit, cæteri ignorent: pestilentes sint, et habeantur salubres; ignoretur in omnibus cubiculis apparere serpentes; male materiatæ, ruinosæ: sed hoc præter dominum nemo sciat: quæro, si hoc emptoribus venditor non dixerit, ædesque vendiderit pluris multo, quam se venditurum putarit, num id injustè an improbe fecerit?" He then gives the arguments on both sides, and concludes that the vendor ought not to have concealed these defects in the house from the buyer. "Neque enim id est celare, quidquid reticeas: sed cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire." Then this illustrious moralist gives his own opinion of the moral turpitude of such a concealment, for he says, "Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? certe non aperti, non simplicis, non ingenui, non justi, non boni viri; versuti potius, obscuri, astuti, fallacis, malitiosi, callidi, veteratoris, vafri." Now, the present is a case in which the fraudulent concealment of a material fact by the principal, and the false representation of the agent, combine to constitute a sufficient degree of fraud, even morally speaking, to sustain the defendant's plea, that he was induced by fraud, covin, and false representation to sign the contract. If, instead of a brothel next door to the house, some person had died of the plague in one of the chambers the week before it was let, the case would be exactly similar to that put by Cicero of the *œdes pestilentes.* According to the concession of Mr. *Thesiger*, that objection arising within the house, the contract, under the circumstances of this case, would be void. But according to the argument of my learned brethren, this intrinsic objection would have made no difference; the agent not being acquainted with the fact, and the principal being no party to the representation. But it appears to me that nothing can be more plain than that the principal, though not bound by the representation of his agent, cannot take advantage of a contract made under the false representation of an agent, whether that agent was authorized by him or not to make such representation.

Put the ordinary case of a servant employed to sell a horse, but expressly forbid to warrant him sound. Is it contended that the buyer, induced by the warranty to give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound, is not entitled to rescind the contract? This would be to say, that though the principal is not bound by the false representation of an agent, yet he is entitled to take advantage of that false representation, for the purpose of obtaining a contract beneficial to himself, which he could not have obtained without it. I own that it never had occurred to me to doubt, upon principle or upon the authority of decided cases, that the knowledge of the principal was the knowledge of the agent, and the knowledge of the agent the knowledge of the principal. . . .

Where the owner of a house or of a farm employs an agent to negotiate and settle the terms of a contract for letting the one or the other, more especially when he has referred to that agent for particulars, can it be doubted that the party treating with that agent is entitled to consider him as the proper source of all information that it may be material to him to possess with a view to making his contract? Or that for the purpose of such contract, any representation, material to the subject of inquiry, must be considered as if made by the principal? Put the case, that Mr. Clarke the agent had been fully apprised of this objection to the house, but that in the multiplicity of his engagements he had sent a clerk to represent him, and that the clerk, in ignorance, had made the representation in question: would the argument have been urged in that case, that there was no fraud in the clerk because he was ignorant, and none in the master because he did not make the representation? But what other relation exists between master and servant, as far as third persons are concerned, but that of principal and agent? If the clerk of a merchant or tradesman offer goods for sale to a customer, with a misrepresentation very material to their value, which representation his master knows to be false, but the clerk supposed to be true, whereupon the customer agrees to give double the real value of the goods, is the customer bound to take and pay for the goods, because the clerk only represented a fact which he did not know to be false? or is not the contract, for the purpose of trying its validity against the purchaser, to be dealt with in the same way as if the master had made the representation? *Qui facit per alium facit per se.* And what would be the condition of men, if, in every case of a treaty made with an agent, the party was under the necessity of submitting to suffer by the misrepresentations of that agent about the subject-matter, because he had not first ascertained the extent of the agent's powers?

In transactions that are of a very unusual character, and where power is rarely granted to an agent to bind his principal, except within very strict limits, it may be a very necessary caution in the party dealing with the agent to know first the extent of his authority; but in so ordinary a transaction as that of letting a ready-furnished house, where the principal refers to a house-agent for particulars, and leaves it to him to procure a tenant, — who would think of suspending the treaty, in order to write to the landlord in the country to make inquiries, lest the agent might not have full power or information to answer them? Nevertheless the argument for the plaintiff is mainly founded upon a conjecture, that the agent might possibly have had no authority to make a representation of this kind, upon which it is contended that it must not be presumed that he had such an authority without proof, and that if he had no such authority he could not bind his principal.

I grapple with this argument, first, by denying the propriety of the conjecture upon which it is founded. I maintain that a man who employs his agent to let his house or farm, or who refers inquirers to an agent for particulars upon any subject, must be presumed, if the contrary be not proved, to have given that agent full authority to communicate all information that is connected with the subject, and that it may be important to the inquirer to know. But I also deny the conclusion, as far as it applies to this case. Let us simplify the case, by assuming that the agent was expressly prohibited from giving any information, except as to the amount of rent demanded, and strictly charged to refer the inquirers to the principal for all other matters; nevertheless the agent, without knowing anything of the facts, thinks fit to answer to inquiries upon every subject upon which it may be material to the tenant to be truly informed; to make such false representations as induce the tenant, without hesitation, to agree to take the house at the rent proposed: whereas no man in his senses would have taken the house at such a rent, or perhaps at any rent, had the facts been truly represented. Now, if the tenant should afterwards bring an action of deceit for a false representation, I will not stop to inquire whether the landlord would be liable, upon his proving that he expressly prohibited his agent from answering any question; but I will say that if, in such an action, he might defend himself upon the ground of want of authority in his agent, it by no means follows that he could insist upon enforcing the contract against the tenant who renounced it.

In other words, as I have before said, it does not follow, that because he is not bound by the representation of an agent without authority, he is therefore entitled to bind another man to a contract, obtained by the false representation of that agent. It is one thing to say that he may avoid a contract if his agent, without his authority, has inserted a warranty in the contract; and another to say, that he may enforce a contract obtained by means of a false representation made by his agent, because the agent had no authority.

Upon these grounds, which I own seem to me very clear, I am of opinion, that for the purpose of this plea the representation of the agent is that of the principal; and the falsehood of that representation to the knowledge of the principal, and the concealment of a material fact to the defendant, are sufficient to sustain the plea. . . .

Rule absolute for a new trial.[1]

GRANT AND OTHERS *v.* NORWAY AND OTHERS.

COMMON PLEAS. 1851.

[10 *C. B.* 665.]

THIS was an action upon the case by the indorsees of a bill of lading, against the owners of a vessel, to recover the amount of advances made by the former upon the bills of lading, the goods never having in fact been shipped.

The declaration stated, that, on the 17th of April, 1846, the defendants were possessed of a certain ship or vessel called the *Belle*, lying in the river Hooghley, at Bengal, being then bound for London, for the carriage of goods and merchandise, to be shipped on board, for freight to be therefor paid to the defendants; that thereupon the defendants gave to Messrs. Biale, Koch, & Co., being merchants and traders then in credit and carrying on business in Calcutta, a bill of lading, signed by the master of the said ship, who was then and there the servant and agent of the defendants in that behalf, and purporting to state, in the name of the said master, that Biale, Koch, & Co. had shipped, in good order, in the said ship, twelve bales of silk, marked and numbered as in the margin of the said bill of lading, and that the same were to be delivered in good condition, &c., unto order or assigns, to wit, to the order of Biale, Koch, & Co., he or they paying freight at

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[1] There are comments on this case in Wilson *v.* Fuller, 3 Q. B. 68, 1009 (Ex. Ch., 1843); Fitzsimmons *v.* Joslin, 21 Vt. 129, 139-141 (1849); Feret *v.* Hill, 15 C. B. 207 (1854); National Exchange Co. *v.* Drew, 2 Macq. 103, 108-109, 144-145 (1855); Wheelton *v.* Hardisty, 8 E. & B. 232, 270-271 (1857); Barwick *v.* English Joint Stock Bank, *post*, p. 412 (Ex. Ch., 1867); Ludgater *v.* Love, 44 L. T. Rep. N. S. 694 (C. A., 1881). — ED.

£5 per ton, &c.; that in the margin of the said bill of lading were certain marks and numbers, purporting to relate to the said goods; that, by the custom of merchants, bills of lading are commonly pledged and deposited by the holders with others as a security for the payment of money, as the defendants well knew; that the defendants, by such delivery of the said bill of lading, enabled Biale, Koch, & Co., to deposit the said bill of lading with other persons as a security for the payment of money, and that, in fact, Biale, Koch, & Co. afterwards indorsed the said bill of lading to, and deposited the same with, the plaintiffs as a security for the payment of a large sum of money, to wit, the sum of £1,684, being the amount of an unpaid bill of exchange of which the plaintiffs, at the request of Biale, Koch, & Co., then became and were the indorsees and *bona fide* holders for value, and of which Biale, Koch, & Co. were the drawers, and which bill of exchange, bearing date the 18th of April, 1846, was by them the said Biale, Koch, & Co. drawn upon Messrs. Johnson, Cole, & Co., London, and whereby they requested the drawees, at ten months' date, to pay to them the said drawers, or order, the said sum of £1,684, and to place the same, with or without advice, to account of shipments of silk *per Belle*, and rice *per Castle Eden*, and the said Biale, Koch, & Co. then indorsed the said bill of exchange to the plaintiffs: that the plaintiffs were induced by Biale, Koch, & Co. to become the indorsees and holders of the said bill of exchange, and to give value for the same to the amount of £1,684, by the deposit of the said bill of lading, but for which they would not have given value nor become indorsees and holders thereof; that the plaintiffs, confiding in the truth of the said bill of lading, and believing, by reason of its contents, that the goods therein described had been and were shipped on board the said ship, deliverable under the said bill of lading to the order of Biale, Koch, & Co., consented to, and did, give value for the said bill of exchange; that, if true, the goods mentioned in the bill of lading would have been, according to the custom of merchants, deliverable to the plaintiffs as holders thereof; that the said ship sailed, and arrived in London on &c., but did not convey or deliver the said supposed goods; that the said goods in the said bill of lading mentioned never were shipped in and upon the said ship: that the said bill of exchange was afterwards, when the same became due, duly presented for payment to the drawees, and dishonored, and that the plaintiffs were still holders thereof for value, and unable to procure payment of the said bill of exchange, and the money for securing the payment of which the said bill of lading was so deposited, still remained due, and the plaintiffs were unable to procure payment thereof; and that, by reason of the premises, and of the misconduct of the defendants as aforesaid, the plaintiffs had lost and been deprived of the said money for the securing the payment of which the said bill of lading was so deposited, to wit, the said sum of £1,684, in the said bill of exchange mentioned, — to the plaintiffs' damage, &c.

Pleas, — first, not guilty, — secondly, that the said ship was not bound, as in the declaration mentioned, for the carriage of goods, &c., for freight, &c., as in the declaration mentioned, — thirdly, that the said bill of lading was not signed by the master of the said ship, in manner and form as in the declaration mentioned, — fourthly, that the said master was not the servant or agent of the defendants in that behalf, in manner and form as in the declaration mentioned, — fifthly, that the defendants did not enable the said persons in the declaration mentioned, to deposit the said bill of lading with other persons as a security for the payment of money, in manner and form as in the declaration alleged, — sixthly, that the defendants did not deliver to the said persons in the declaration mentioned the said bill of lading therein mentioned, in manner and form as in the declaration alleged.

Upon these pleas the plaintiffs joined issue.

At the trial, before WILDE, C. J., at the sitting at Guildhall after Trinity term, 1849, the jury found a verdict for the plaintiffs on the issues joined upon the second and third pleas: and, as to the residue of the issues, a special verdict was found, stating in substance as follows: —

The plaintiffs, during the year 1846, and thence hitherto, had carried on business as merchants, at Calcutta, under the firm of Gladstone & Co.

During the month of April, 1846, the defendants were possessed of, and owners of, the *Belle*, then lying in the river Hooghley, at Calcutta, bound for London, by charter-party for the conveyance of goods for freight; Henry Tillman being the master appointed by the defendants.

On the 17th of April, in that year, Henry Tillman, being such master, and professing to act as such, signed and delivered to Biale, Koch, & Co., in the declaration mentioned, being merchants and traders then in credit and carrying on business in Calcutta, a bill of lading, in the usual form, as follows, and numbered in the margin: —

"Shipped, by the grace of God, in good order and well conditioned, upon the good ship *Belle*, whereof is master for this present voyage Henry Tillman, and now riding at anchor in the Hooghley, and bound for London, twelve bales of silk, numbered as in the margin, to be delivered in the like good order at London, the act of God, the Queen's enemies, &c., excepted, unto order or assigns, he or they paying freight £5 per ton, &c. In witness whereof the said master hath affirmed to three bills of lading, all of this tenor and date, the one of which being accomplished, the other two to stand void. Dated this 17th day of April, 1846. Contents unknown.

(Signed) "H. TILLMAN."

The bill of lading was indorsed "Biale, Koch, & Co."

By the custom of merchants, bills of lading are commonly pledged and deposited by the holders with others as a security for the payment of money.

By such delivery of the said bill of lading, Biale, Koch, & Co. were enabled to pledge and deposit the said bill of lading with other persons as a security for the payment of money: and, on the 18th of April, 1846, the plaintiffs purchased from Biale, Koch, & Co., who then indorsed and delivered to the plaintiffs for full value, the bill of exchange for £1,684 in the declaration mentioned, upon the terms that the payment of the amount of the bill of exchange should be secured by the deposit of the said bill of lading, — which they also indorsed to the plaintiffs, and deposited with them for that purpose.

The bill of exchange was drawn by Biale, Koch, & Co., and requested the drawees to pay £1,684 at ten months, to the drawers, or order, and to place the same, with or without advice, to account of shipments of raw silk *per Belle*, and rice *per Castle Eden.*

The bill was accepted, payable at No. 6 Great Winchester Street, "on delivery of the shipping documents against which this bill is drawn."

The plaintiffs were induced by Biale, Koch, & Co. to give value for, and to become the indorsees of, the bill of exchange, by the deposit of the bill of lading. If true, and if the goods had really been shipped, the bill of lading would have been an available security to the plaintiffs, of the value of £780, and the goods deliverable to them as holders of the bill of lading.

The vessel sailed, and arrived in London: but the goods were never shipped; and the contents of the bill of lading were untrue.

The bill of exchange, of which the plaintiffs were still holders, had been presented for payment, and was still due, and also the £1,684, for securing the payment of which to the extent of £780, the bill of lading was deposited.

The goods to be shipped on board at Calcutta were to be shipped in pursuance of a charter-party entered into in London, on the 24th of September, 1845, between the defendants and Biale, Koch, & Co.; and the vessel was lying in the Hooghley, and bound for London, as before mentioned, in pursuance of the charter-party, and in the course of the voyage mentioned.

The case was argued in the last term, before JERVIS, C. J., CRESSWELL, J., and WILLIAMS, J.

Crowder (with whom were *Channell*, Serjt., and *Bovill*), for the plaintiffs.

Butt (with whom was *Cleasby*), *contra.*

Crowder, in reply.[1] *Cur. adv. vult.*

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[1] In the course of the arguments, which were very elaborate, the judges interposed frequent questions and comments, some of which are here given.

The argument for the plaintiffs was interrupted thus: —

JERVIS, C. J.: "If the master's authority is, to sign bills of lading only upon receiving the goods on board, the owner does not hold him out as his agent until he receives the goods." CRESSWELL, J.: "If, as you say, the authority of the master is not a special authority, but a general authority which is conferred upon him by law, the extent of that authority must be known to all persons who take bills of lading." The same judge (commenting on Hern *v.* Nichols, *ante*, p. 90): "There, the factor

Jervis, C. J., now delivered the judgment of the court.

This case was argued before my Brothers Cresswell and Williams and myself. It arises upon a special verdict, and presents a question of considerable importance, both to those who take bills of lading on the faith of their representing property which passes by the transfer of them, and to the shipowner, whom it is attempted to bind by all bills of lading which his captain may think fit to sign. The point presented by the several pleas is substantially one and the same, viz. whether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible. The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship; but is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made. He may take up money in foreign ports, and, under certain circumstances, at home, for necessary disbursements, and for repairs, and bind the owners for repayment; but his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may pretend that it is. He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So, with regard to goods put on board, he may sign a bill of lading, and acknowledge the nature and quality and condition of the goods. Constant usage shows that masters have that general authority; and, if a more limited one is given, a party not informed of it is not affected by such limitation. "The master is a general agent to perform all things relating to the usual employment of his ship: and the authority of such an agent to perform all things usual in the line of business in which he is employed cannot be limited by any

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entered into a contract with the plaintiff for the employer. Here, you are a step further off. You say, — your agent, with whom I made no contract, has enabled a man with whom I did contract, to cheat me." The same judge again: "Suppose this were not the case of an indorsee of a bill of lading, but that of the owner of the goods, who really sent them by a carrier for the purpose of their being shipped, and the master gives a receipt to the owner of the goods, but the carrier fails to deliver them: in that case, the owner would be induced by the captain's receipt to abstain from pursuing the thief: but, is the indorsee of the bill of lading, under the circumstances supposed, in the same position as the original owner of the goods?"

The argument for the defendants was interrupted thus: —

Cresswell, J.: "Mr. Crowder says, true it is that it is well known that the captain's *real* authority is to sign bills of lading only for goods that are actually put on board the ship: but, he says, there is an *apparent* authority to sign all bills of lading without restriction. Try that by the test of a partner's authority to sign bills of exchange for the purpose of the trade. One draws or accepts a bill in fraud of his partner, — what answer does this afford to a *bona fide* holder for value?" The same judge (commenting on Howard *v.* Tucker, 1 B. & Ad. 712): "Had the captain authority to give a bill of lading acknowledging that freight had been paid, when in fact it had not?" — Ed.

private order or direction not known to the party dealing with him." Smith's Mercantile Law, p. 59.

Is it then, usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board ? for, all parties concerned have a right to assume that an agent has authority to do all which is usual. The very nature of a bill of lading shows that it ought not to be signed until goods are on board; for, it begins as describing them as *shipped*. It was not contended that such a course is usual. In Lickbarrow *v.* Mason, Buller, J., says, 2 T. R. 75: "A bill of lading is an acknowledgment by the captain, of having received the goods on board his ship: therefore, it would be a fraud in the captain to sign such a bill of lading, if he had not received the goods on board; and the consignee would be entitled to his action against the captain for the fraud."

It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped; nor can we discover any ground upon which a party taking a bill of lading by indorsement, would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not.

If, then, from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped. It would resemble the case of goods or money taken up by the master under pretence that they were wanted for the ship, when in fact they were not; or a bill of exchange accepted or indorsed *per procuration*, when no such agency existed; Alexander *v.* Mackenzie, 6 C. B. 766. The words "*per procuration*" give notice to all persons that the agent is acting under a special and limited authority; and therefore the party taking such a bill has to establish the existence of the authority; it is not enough to show that other bills similarly accepted or indorsed have been paid, although such evidence, if the acceptance were general, by an agent in the name of the principal, would be evidence of a general authority to accept in the name of the principal. So, here, the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and a party taking a bill of lading, either originally, or by indorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it.

There is little to be found in the books on this subject. It was discussed in Berkley *v.* Watling, 7 Ad. & E. 29; 2 N. & P. 178. That case was decided on another point: but Littledale, J., stated, that in his opinion, a bill of lading is not conclusive upon the shipowner.

For these reasons, we are of opinion that the issues should be entered for the defendants, and that the defendants are entitled to judgment. *Judgment for the defendants.*[1]

UDELL *v.* ATHERTON.

EXCHEQUER. 1861.

[7 *H. & N.* 172.]

THE first count of the declaration stated, that the defendants were possessed of a certain log of mahogany which they well knew to be rotten and defective; yet that they, by fraudulently concealing from the plaintiff that the said log was rotten and defective, induced the plaintiff to buy the same for more than its value, to wit, for £99, and to accept two bills of exchange, payable to the defendants' order for the said sum, the said log being worth much less than the said sum. Averments: that the plaintiff hath been forced to pay one of the bills and will be forced to pay the other, and by reason of the premises hath sustained loss. — Second count: that the defendants by falsely and fraudulently representing to the plaintiff that a certain log of mahogany was a sound and perfect log of mahogany, and that the same was reasonably worth in the trade at the rate of 3*s.* a foot, induced the plaintiff to buy the said log at the said rate. Averments: that the said log was not worth 3*s.* a foot, and that the plaintiff had sustained other loss.

Plea. — Not guilty.

The cause was tried, before MARTIN, B., without a jury, at the London Sittings after Michaelmas Term, 1860, when the following facts appeared: The plaintiff was a cabinet-maker and the defendants were timber merchants. In April, 1860, one Youngman, who was employed by the defendants to sell their timber on commission, took the plaintiff to the West India Docks and showed him three logs of mahogany belonging to the defendants. Youngman asked 3*s.* 6*d.* per foot for two of the logs and 4*s.* 6*d.* per foot for the third. Youngman represented the third log as a very fine log and perfectly sound. He called several times on the plaintiff and urged him to buy this log, repeating his representations as to its quality. On one occasion he said, "There is not finer wood in London, I will warrant it worth 6*s.* a foot." The plaintiff said, "Never mind 6*s.*, will you warrant it worth 3*s.* a foot?" and Youngman replied, "I will." The plaintiff then offered to buy it at 3*s*. a foot, but Youngman refused to sell it at that price. A few days afterwards he sent the plaintiff an invoice, in which the log was charged 3*s*. a foot, together with a delivery order for the log, and two bills of exchange respectively drawn on the plaintiff at four and six months' date, and payable to the defendants' order. The plaintiff accepted the bills and removed the log to his premises. The four months' bill was paid at maturity and before the plaintiff discovered any defect in the log. Previously to the six months' bill becoming due, the plaintiff ordered the log to be cut up, and he then discovered a large hole in one of its sides, which was caused by a branch of the tree having died before it was felled. On account of this defect the log was not worth more than 1*s*. 3*d*. a foot at the utmost. Youngman afterwards called upon the plaintiff and said that he was never so deceived in a log in his life, and he admitted that it was a very bad one. Plaintiff said he ought to have told him of the defect in the log, and he replied that he did not know of it. Youngman had previously offered to sell the log to a timber merchant, named Oliver, who refused to buy it on account of its defective quality, and had pointed it out to Youngman. After this Oliver again saw the log, and it had been turned over so that the hole in it could not be seen. The plaintiff complained to the defendants of the defective quality of the log, and they said that they had neither authorized nor wished Youngman to sell wood as sound which was defective, and they referred the plaintiff to him. The defendants refused to make any allowance, and insisted on the payment of the whole of the agreed price. There was no evidence that the defendants knew of the fraudulent representations of Youngman, or that they were aware of any defect in the log. Upon these facts the learned judge was of opinion that the plaintiff could not recover in this form of action, and his lordship directed a nonsuit.

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[1] *Acc.:* Schooner Freeman *v.* Buckingham, 18 How. 182 (1855); Pollard *v.* Vinton, 105 U. S. 7 (1881); National Bank of Commerce *v.* C. B. & N. Railroad Co., 44 Minn. 224 (1890). — ED.

Hawkins, in last Hilary Term, obtained a rule *nisi* for a new trial, on the ground that the learned judge had improperly ruled that the defendants could not, under the circumstances, be made liable for the fraud of their agent.

Coleridge and *Kingdon* showed cause.

Barnard and *Willoughby*, in support of the rule.

Cur. adv. vult.

The learned judges, having differed in opinion, now delivered the following judgments.

WILDE, B. I am of opinion that the rule ought to be absolute to enter the verdict for the plaintiff; and I have the authority of the Lord Chief Baron for saying that he agrees with the judgment.[1] . . .

The question is thus raised, whether a principal, who has had the benefit of a contract made by his agent, is responsible for a deliberate fraud committed by his agent in the making of the contract, by which fraud alone the contract was obtained.

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[1] A statement of the case is here omitted. — ED.

I say "reponsible" generally, because I am not aware that if this action of deceit does not lie against the principal any other form of action will. If this be so, the consequences appear to be as follows: —

The man who has reaped the benefit of a fraud committed on his behalf keeps the fruits in his pocket; the man defrauded in the contract has to look to the intermediate person and not him with whom he contracted. If the agent is a man of no means this remedy would be fruitless. If the agent is able to pay he does so without remedy over, and the person defrauded is reinstated out of the funds of one man while the fruits of the fraud are retained by another.

These results make it desirable to examine closely the principles upon which such a decision is to be supported.

It is said that a man who is himself innocent cannot be sued for a deceit in which he took no part, and this whether the deceit was by his agent or a stranger. To this, as a general proposition, I agree. All deceits and frauds practised by persons who stand in the relation of agents, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal.

On this principle it was that the Court of Common Pleas, in Grant *v.* Norway, 10 C. B. 665, held a shipowner not responsible for the fraud of the captain in signing bills of lading without any goods on board; and so, in the case of Coleman *v.* Riches, 16 C. B. 104, a wharfinger was held not liable for a false receipt, which his agent had given, representing that goods had been received at the wharf, which had not so been received. In neither of these cases did the principal authorize or in any way adopt or obtain the benefit of the fraudulent act. But does this principle apply to fraud committed in the making of contracts which the principal has adopted and of which he has claimed and obtained the benefit?

The contract is made by the agent for the principal, but when made, if authorized or adopted, it becomes in law the contract of the principal. Can the principal treat the contract as his, and repudiate the fraud upon which it was built as the agent's? In the making of the actual contract, when the agent speaks he does so with the voice of the principal, for it is the principal's contract he is making.

In the representations which immediately preceded the contract, is the agent speaking only for himself? If so, on what principle is it that the principal could not sue upon a contract in itself valid, but preceded and brought about by fraudulent representations of the agent? And yet this is the plain law.

This brings me to another difficulty. For it would surely be an anomalous state of things, that the innocent principal could not recover upon his contract because fraudulently obtained by his agent, but that, if before discovery the contract be performed, he may ever after keep the benefit of it. Can the buyer's right, upon any sound principle, be made to depend on the extent to which the transaction has been completed? If the fraud had been discovered before the log was cut, could not the buyer have rescinded the contract? If so, why may he not recover now, when the state of things is unaltered by any laches or default of his?

A distinction has indeed been made in equity between contracts performed and unperformed. The latter are sometimes set aside for mistake or surprise, while the former are not. But no such distinction has ever been made in favor of fraud. Fraud, in all courts and at all stages of the transaction, has, I believe, been held to vitiate all to which it attaches.

Next, as to the authorities. — There is, I believe, no case in which the principal's immunity, under such circumstances, has been established. The only dictum in favor of it is, I believe, that of Lord Campbell in the course of argument in Wilde *v.* Gibson, 1 H. L. 605, 615. It may be doubted if it is correctly reported, at any rate it is to be taken, in my opinion, in reference only to the point then under argument.

The authorities the other way are as it seems to me overwhelming. Baron Parke, in Moens *v.* Heyworth, 10 M. & W. 157, says: To support this action for false representation, it is necessary "to prove that by words or acts of the defendants, or their agents, it was made falsely and for the improper purpose of inducing the other party to purchase." Again in Wilson *v.* Fuller, 3 Q. B. 77, Tindal, C. J., in delivering the considered judgment of the full Court of Exchequer Chamber, says: "There was there a fraudulent concealment by Wadeson (the agent) which it must be admitted would bind Mrs. Wilson, if proved." And here Wadeson was only agent and Mrs. Wilson avowedly innocent, and the action against her, as here, for deceit. Again, the Chief Justice says: "As to the representation made by Wadeson, which if fraudulent it may be admitted would bind her," &c. And again, in the much canvassed case of Cornfoot *v.* Fowke, 6 M. & W. 373, Baron Parke, who certainly was not disposed to overstrain the rigid rules of law in favor of any general views of equity, said: "It must be conceded that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, knowingly commit a fraud in making it, not only is the contract void but the principal is liable to an action." Lastly, this point was decided in Hern *v.* Nicholls, 1 Salk. 289; often quoted, and so far as I know never impeached.

To these dicta must be added the authority of the Exchequer Chamber in a still later case, Omrod *v.* Huth, 14 M. & W. 651. It was an action for deceit for fraudulently putting forward certain parcels of cotton as fair samples; and the defendants, the sellers, were there charged, as here, with making the fraudulent representation. At the trial it appeared that the sale was by the defendants' brokers. Coltman, J., who tried the cause, directed the jury, "That unless they could infer that the defendants, or their brokers, were acquainted with the fraud that had been practised in the packing, or had acted in the transaction against good faith or with a fraudulent purpose, the defendants were entitled to the verdict." On a bill of exceptions the Exchequer Chamber upheld this ruling, saying: "If, indeed, the representation was false to the knowledge of the party making it, this would be conclusive evidence of fraud." And the "party making it" in that case was, if anybody, the agent.

I find no case in which this principle has been seriously doubted. I find no text writer who does not adopt it. It is well stated in Mr. Story's Principal and Agent at § 134: "For where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the *res gestæ*." And again, at § 135, he says: "If the agent at the time of the contract makes any representation, declaration, or admission, touching the matter of the contract, it is treated as the representation, declaration, or admission of the principal himself."

The defendant has adopted the sale made by his agent and received the price. He has, by the fraudulent statements of the agent, obtained rather more than twice what he could have obtained by an honest sale. It is not the case of any matter collateral, as a warranty may be. It is not the case of a representation made out of and beyond the particular business then transacting by the agent on the principal's behalf. It is the representations made in the very dealing itself, in the conversation that resulted in the contract, that are in question.

The defendant claims the right of separating the contract from that which induced it, of holding the price and ignoring the false statements which largely enhanced it. In my opinion, justice, the common reason of mankind, and every sound rule of law are opposed to his doing so. Whatever his previous authority to the agent, whatever his own innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether.

There are, no doubt, many frauds committed by agents which would not bind their principals. But I hold that the statements of the agent which are involved in the contract as its foundation or inducement are in law the statements of the principal.

To this most equitable and reasonable extent the identity of the principal with the agent has I conceive been long established in our laws. It has been much discussed whether an untrue but innocent statement by an agent, when coupled with a knowledge in the principal, would support an action of deceit against the principal or bar an action on the contract. Such were the cases of Cornfoot *v.* Fowke and Fuller *v.* Wilson.

The artificial identification of the agent and principal, by bringing the words of the one side by side with the knowledge of the other, induced the apparent logical consequence of fraud. On the other hand the real innocence of both agent and principal repelled the notion of a constructive fraud in either. A discordance of views, varying with the point from which the subject was looked at, was to be expected. And the result is found in the elaborate reasoning of the judgments in the above cases.

But what bearing have they upon the case now in hand? — a remarkable one. The point now in dispute was tacitly conceded by every one. If the agent's statements were not those of the principal, it was needless to inquire whether they were fraudulent. It would have been enough to establish that what the agent had said he had said without authority, and the immunity of the employer would have been established,— it was needless to inquire whether the statement was fraudulent. According to the defendant's argument in the present case, the statements by the house agent in Cornfoot *v.* Fowke, not being authorized, in no way affected his principal whether fraudulent or not; and yet the whole inquiry was confined to whether they were fraudulent or not, — a needless investigation if they did not bind the principal at all.

But the same question has arisen and been the subject of decision in another form, I mean on the question of admissibility of evidence. Whenever the unauthorized statements of the agent are not in law the statements of the principal, they would not be admissible in evidence against the principal. To whatever extent they are admissible, they must in law be considered the statements of and binding on the principal.

Now, what is the rule and where is the line between admissibility and inadmissibility drawn? There was no more careful and accurate judge than Sir William Grant, and he states the rule thus: "What the agent has said may be what constitutes the agreement of the principal, or the representations or statements may be the foundation of or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation." Fairlie *v.* Hastings, 10 Ves. 126. And this, said Tindal, C. J., in Garth *v.* Howard, 8 Bing. 451, 453, "is the leading case on the subject."

Other judges have laid down a similar rule. In Langham *v.* Allnutt, 4 Taunt. 511, 519, Gibbs, C. J., says: "When it is proved A. is agent of B., whatever A. does or says or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B." In Doe *v.* Martin, 4 T. R. 39, 66; Lord Kenyon says: "Without imputing any fraud to Martin, and, indeed, it is negatived by the verdict, the maxim, that the principal is civilly responsible for the acts of his agent, universally prevails, both in courts of law and equity; and, therefore, whatever misconduct and fraud are imputed to Cruttenden, it must affect his principal, Martin."

It remains to answer some of the objections made. It is said that the reason why no action could be maintained by the seller on the contract is, that the principal cannot stand in a better position than the agent who actually made the contract; and that as the agent could not sue on the contract the principal cannot. But this reasoning applies only to derivative rights. Whereas here the contract is the principals' from the first though made by the agent; and as his title is not derivative so it is not prejudicially affected by any acts but those which are in the eye of the law his own.

Another principle has been invoked, as it seems to me improperly. When one of two innocent people must suffer, he who has entrusted the fraudulent agent must, it is said, be content to bear the loss. If such a principle applied to this case, I should have thought that he who entrusted was the seller and not the buyer, who was deceived. But to me it appears to have no application. It applies, as it seems to me, only to cases in which by the fraud of the agent both parties, he who employed him as agent and he who dealt with him, have been defrauded. Whereas here there is only one sufferer, the other being largely a gainer by the deceit as matters now stand; and if made to pay the excess of price back would still retain the real value of the log.

I will only add that the great importance of the question, and the sincere respect I have for those who take an opposite view, have induced me thus fully to vindicate what I believe to be the law, in favor of those who have been cheated and against those who claim to retain the proceeds of the cheat.

BRAMWELL, B.[1] When it is considered that to support this declaration the plaintiff must prove actual moral fraud (*per* Parke, B., 2 Exch. 541; *per* Lord Cottenham, C., 1 H. L. 621), it seems manifest, according to common sense and plain English, that the plaintiff must fail; for it is admitted that no such fraud has been committed by the defendant himself, nor authorized by him either by previous authority or by any ratification or adoption of it when he knew of it; see *per* Lord Cottenham, 1 H. L. 625. He ratifies the sale indeed, but the fraud is no part of the sale, no part of the contract,— it is collateral to it. It might have been made by some person in no sense the defendant's agent, but who wanted the log bought or removed, and whose fraudulent statement induced the buyer to deal for it; but the owner, by selling it to a buyer so influenced, would not be responsible for a fraud so committed. The present alleged fraud is equally collateral to the contract, is as little made by the defendant's agent for that purpose, and as little adopted, and becomes as little the moral fraud of the defendant, as in the case put. Tested then by the way in which the plaintiff has shaped his case, he ought to fail, for he shows neither the actual commission of fraud by the defendant, nor any authority for its commission, nor any ratification or adoption of it. He fails then to show that the defendant induced him to buy the log by "fraudulently stating," &c. That this is so, Wilde *v.* Gibson seems in point, and it may be fairly asked, in what other shape can the plaintiff put his case?

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[1] After stating the case. — ED.

But, independently of considerations arising from the way in which the plaintiff has shaped his case, I think he ought to fail. I think he could not have put it in any way in which he could recover. I do not repeat those remarks already made which bear on this, but there are further considerations. The wrong that was done to the plaintiff was inducing him to buy by fraudulent representations. This was actually done by Youngman, and against him the plaintiff has a remedy, as he would have had had Youngman made the same representations with the same object and result, being in no sense the defendant's agent. It was done at the time of the dealing or sale though the loss did not accrue till after. Now, supposing mahogany had risen in value, and suppose the plaintiff had discovered the fraud and not paid for the log or removed it, the defendant agreeing thereto on disclosure of the fraud, would not the plaintiff have had in such a case a cause of action against Youngman? Certainly. Would he against the defendant? As certainly no. What then is the difference? It is said to consist in this, that the defendant has had the benefit of the fraud, and so he ought to be liable. But why? The reasoning would equally apply had Youngman been in no sense his agent. Or suppose Youngman had received the money and cheated the defendant of it, would the plaintiff then have or not have a remedy against the defendant? It certainly would be a most singular thing that the defendant should be liable for this fraud of Youngman's, though not liable on Youngman's warranty, which he is not, though the same reasoning would apply (See Fenn *v.* Harrison, 3 T. R. 760; *per* Ashurst, J.; and the case of Brady *v.* Todd, 9 C. B., N. S. 592.) Youngman was not a general agent of the defendant, nor was there any evidence of usage in the trade for such warranties; and, indeed, the defendant's counsel admitted that the reason Youngman's warranty was not relied on was because he had no authority to give one, and the cases referred to show the defendant was not bound by it though he received the price agreed for on the face of it. There is the answer to the general dictum of Gibbs, C. J., in Langhorn *v.* Allnutt, 4 Taunt. 511, 519. Let us suppose an agent saying, "I will give a warranty and in writing, then I know the extent of my liability, but I will make no representations lest I should be troubled with questions as to their extent and correctness;" would it be reasonable in such a case that a party should sue the principal on alleged false representations because he could not do so successfully on the warranty? The cases referred to show that, by adopting the transaction, everything done by the agent is not adopted. It is asked, could the defendant have enforced the purchase of the log after both he and the plaintiff knew of the fraud? Probably not. It may be that the contract itself is void, or voidable at the option of the defrauded party while all is *in fieri;* or it may be it is so up to the discovery of the fraud. But suppose the plaintiff had taken away the log, and not paid for it. What then would be the case of the defendant? Suppose the log was worth half what it was sold for, is the defendant to have nothing, or the real value, or the agreed price? It seems to me the latter. It seems to me the defendant may fairly say, "I do not rely on the contract, but you have taken my goods, and you took them on a representation made by you to me you were to pay so much for them, and that you must pay." It is a mistake to assume the defendant is availing himself of Youngman's fraud. He wants that money for which he agreed the plaintiff might have the log. It may be that, without any representation or fraud, he would have got as large a price from some one who trusted to his own judgment. To what extent is such a liability to be carried? Suppose at a sale of furniture and goods in a house there is a gun, and the auctioneer, in answer to inquiries, fraudulently asserts it to be of a certain make, which both he and the owner (who however is not present) know it is not, and then it is bought and used under such circumstances as to make damages recoverable on its bursting, is the seller liable? Suppose in this case the log had been used as a beam to a house, and the log from its defects had given way and the house fallen, would the defendant be liable for damages thereby occasioned? If not, why is he now? If he would be, would he not have great right to complain of the buyer? Has he not, if he is liable to this claim? The defendant may fairly say: — "This is very hard on me: You don't use your own judgment: you trust to representations made to you, the falsity of which you might have ascertained by inspection and inquiry" (for if not there would be no knowledge thereof in Youngman, and so no fraud), "you don't tell me of them, nor give me the option of adopting or rejecting them, and now because they were made you bring this action." How could the defendant, how can any one, guard himself from such a liability as this? It is in vain he tells his agent to make no representation. Is it his business to ask the buyer if any statements have been made? Surely it is more the buyer's duty, when they have been made, to ask if they are with the sanction and approval of the principal. In short the rule ought to apply, that, as between two innocent persons, he who has trusted must take the consequence; he who has enabled the commission of a fraud must be responsible for it. Now here that is the plaintiff; he trusted Youngman, the defendants did not: the plaintiff enabled Youngman to cheat him by trusting his representations and making neither inspection of the log nor inquiry of the defendants. It is clear Youngman would be liable to the plaintiff. Are the defendants jointly liable with him, or are they separately liable, each for the whole, or for what part? Would a recovery against Youngman be a bar to this action? As to the argument that the fraudulent agent may be a pauper, no doubt he may be, but that is no reason for fixing a person not otherwise liable. If it were, it would apply though the log had never been taken or paid for; and would apply to make the seller liable on a warranty. For these reasons and independently of considerations arising out of the form in which the plaintiff has shaped his case, I think he fails to make out any cause of action against the defendant.

It remains to examine the authorities. Of course, if there was one directly in point in any of the superior courts I should adopt it, and leave its correctness to be questioned on appeal. But there is not, though it must be admitted there are *dicta* opposed to my view which are entitled to the greatest weight and respect. (Story's Agency, sects. 58, 59, 132, 133; Parsons on Contracts, p. 52, 55, 3rd ed.; Lord Wensleydale's expression in Murray *v.* Mann, 2 Exch. 538; and in Cornfoot *v.* Fowke, 6 M. & W. 373). There is however no decision in point, and it is conceived that the opinions in question were founded on authorities which do not warrant them to the extent to which the plaintiff applies them, an extent probably far beyond the meaning of their authors. The first case relied on is Hern *v.* Nichols, 1 Salk. 289; but it is clear that was an action on a warranty, which was formerly called an action for deceit, and a good warranty is shown there, for it is said "the plaintiff bought the silk for —— silk and the defendant sold it to him for such, which it was not." It is true the factor had committed a fraud, but that did not make the case less one of warranty. The observation of Holt, C. J., in that case, that he who employs and puts a trust in the deceiver should be the loser, certainly affects the plaintiff more than the defendants. Grammar *v.* Nixon, 1 Stra. 653, is a case where the fraudulent agent was acting within the presumable scope of his authority. In Murray *v.* Mann, 2 Exch. 538, the *dicta* are very wide; but all that was decided was that money had and received could not be maintained by a principal against an agent who had received money for the principal, but who could not retain it, and had been compelled to return it, owing to the fraudulent way in which he had obtained it. Fuller *v.* Wilson, 3 Q. B. 68, cannot, be considered as an authority; for the Court of Exchequer Chamber declined to review the question in Cornfoot *v.* Fowke, 6 M. & W. 373, and merely decided that the case was not proved. On the other hand, Fenn *v.* Harrison, 3 T. R. 760, and the case of Brady *v.* Todd, 9 C. B., N. S. 592, are authorities for our decision, for the reasons above given. Croft *v.* Alison, 4 B. & Ald. 590, and similar cases point the same way. So, also, do Coleman *v.* Riches, 16 C. B. 104; Grant *v.* Norway, 10 C. B. 665; though, no doubt, in those cases the defendant sought to be charged as principal never, in any sense, had the benefit of the fraud. But the judgment of Rolfe, B., in Cornfoot *v.* Fowke, is nearly direct on the question for the defendants, and so are the opinions of Lord Cottenham, Lord Brougham and Lord Campbell in the House of Lords in Wilde *v.* Gibson, 1 H. L. 605. I think therefore the nonsuit should stand.

MARTIN, B.[1] The circumstance that the defendants have received the full consideration of a contract which the plaintiff might have avoided for fraud, and the alleged injustice of permitting them to retain the price of 3*s.* per foot for an article worth only 1*s.* 3*d.*, and which price was agreed to be paid by the plaintiff upon a false and fraudulent misrepresentation made by the agent of the defendants, has been strongly urged as creating a liability; but, notwithstanding, I think there is none. The contract was procured by fraud, and was therefore voidable by the plaintiff. It was not void, for the plaintiff might have insisted upon its performance. It was voidable at his election. The fraudulent misrepresentation was not part of the contract, it was a collateral matter which would have entitled the plaintiff to have avoided it. There would have been no legal objection to the defendants suing as plaintiffs in an action; but it is clear that a plea of fraud would have been a good answer. The plaintiff only knew Youngman in the transaction; and although the defendants might sue upon the contract, they could have no greater right against the plaintiff than Youngman had, and as the plaintiff would have an answer to the action if brought by Youngman he must also have one to an action brought by the defendants. So, also, I apprehend, if the plaintiff had discovered the defect before he had so used the log as to incapacitate him from returning it, he might have returned it to the defendants and rescinded the contract. In truth the contract was voidable for fraud against every one so long as it was executory and capable of being avoided. But the contract has been executed. The plaintiff has taken to the log and used it, and the defendants have received the price, and whatever remedy exists for the plaintiff must be by way of action. The allegation in the declaration upon which the plaintiff's right of action rests is, that the defendants made a false and fraudulent representation. But how can it be said with truth that the defendants made such a representation? They themselves never made it; they never authorized Youngman to make it; they never knew of it until long afterwards and until after the contract had been executed. All that they did was to authorize Youngman to sell the log honestly. No doubt they afforded the occasion upon which the fraudulent misrepresentation was made, but they did nothing more; and in my opinion this is too remote to render them liable to this action. Youngman however is clearly liable upon the facts as assumed, and if he be a solvent man the plaintiff may obtain from him the redress to which he is entitled. I do not think the circumstance, that he possibly may be a person not capable of paying damages, is one which can legally be taken into consideration in order to determine the liability of the defendants. The ability to pay does not affect the question of legal liability for a wrong: all that can reasonably be required is, that the law should afford redress against the individual who commits it.

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[1] After stating the case. — ED.

For these reasons, if there were no authorities upon the subject, I should be of opinion that the defendants are not responsible, but I think the weight of authority is in favor of the defendants. It is true there are *dicta* of most eminent judges in favor of the action, but they are *dicta* only. The first is by Lord C. J. Tindal, in the judgment of the Exchequer Chamber in Wilson *v.* Fuller, 3 Q. B. 68, that a principal is bound in a civil action by a fraudulent concealment of which his agent was guilty. The next is by Baron Parke, in Cornfoot *v.* Fowke, 6 M. & W. 373, that if one employ an agent to make a contract, and that agent (though his principal be perfectly guiltless) knowingly commit a fraud in making it, not only is the contract void but the principal is liable to an action, and he cites Hern *v.* Nichols, 1 Salk. 289. This was a decision at Nisi Prius by Lord Holt, and, as in many other old cases, it is extremely difficult to say whether it was an action upon a warranty or one for deceit, properly so called; if it were upon a warranty or contract it would be no authority upon the present point. In Coleman *v.* Riches, hereinafter mentioned, Mr. J. Cresswell, in speaking of it, says it was not a case of fraud. So also, in Murray *v.* Mann, 2 Exch. 538, Baron Parke again said, if an agent be guilty of fraud in transacting his principal's business the principal is responsible. There was another case referred to, Grammar *v.* Nixon, 1 Str. 653; but in reality it has no bearing upon the present. It was the case of a servant, not an agent. The relation of master and servant is entirely different from that of a principal vendor and his agent or brokers to sell. I quite agree that no higher authority of the kind can be cited than the opinions of Lord C. J. Tindal and Baron Parke; but upon the other hand there is the authority of the Lord Chancellor, Lord Campbell, in Wilde *v.* Gibson, 1 H. L. 605, the other way. He there says: "In an action upon contract the representation of an agent is the representation of the principal, but in an action on the case for deceit the misrepresentation must be proved against the principal." This, in my opinion, is an accurate statement of the law. But I think this case is concluded by adjudged cases. In the case of Grant *v.* Norway, 10 C. B. 665, where the master of a ship had signed bills of lading for goods which had never been shipped, it was held that his doing so did not make his owner responsible to one who had made advances upon the faith of the bills of lading. That is a much stronger case than the present. The master of a ship is the general agent of the owner; Youngman was not the general agent of the defendants, he was merely the agent to sell this single log. The representation of the master was a false and fraudulent misrepresentation; it was false, and false to his knowledge, and this constitutes a false and fraudulent misrepresentation: Polhill *v.* Walters, 3 B. & Ad. 114; yet the owner was held not to be responsible. So also, in Coleman *v.* Riches, 16 C. B. 104, the defendant was a wharfinger at Bristol, and one Board was his general manager at the wharf. The plaintiff had bought a parcel of wheat from one Lewis; Board signed a wharf receipt, in the usual form, for the wheat as received from Lewis at the wharf. Upon the production of the receipt, and on the faith of it, the plaintiff paid the price to Lewis. In fact the wheat had not been delivered, and the receipt was fraudulently concocted between Lewis and Board. The Court of Common Pleas held that the defendant was not liable in an action for a false and fraudulent misrepresentation. This case seems to me in point, and I concur with what Mr. J. Cresswell says, which I think applicable to the present, "that the agent was employed, not to make statements but contracts." It has been decided that an agent to sell a chattel has not authority to give a warranty except specially authorized. This matter was much discussed in Coleman *v.* Riches, 16 C. B. 104; and Mr. J. Cresswell expresses his clear opinion that the agent has no such authority, and this is in accordance with principle. The mere authority to an agent to sell must be to sell according to the ordinary rule of law, and that is "caveat emptor." But the point has been expressly decided by the Court of Common Pleas in Brady *v.* Todd, 9 C. B., N. S. 592, where it was held, that an agent, being a servant, authorized to sell a horse, had not authority to bind his master by a warranty that the horse was sound and quiet in harness. This case therefore substantially overrules the Nisi Prius decision in Alexander *v.* Gibson, 2 Camp. 555. If, therefore, an agent to sell has not authority to bind the principal by a warranty, how is it possible that he can render him liable as upon a false and fraudulent misrepresentation? In my judgment, therefore, the present case is concluded by adjudged cases, and if the plaintiff is to succeed it ought to be by the judgment of a court of error. For my own part, as I have already said, I am satisfied upon legal principle the defendants are not liable. I use the tests applied by Mr. J. Cresswell in Coleman *v.* Riches, 16 C. B. 104. First, was Youngman in fact authorized by the defendants to make the representation? He was not. Secondly, was his situation such as to bring the representation he made within the scope of his authority? I think not. He was employed to sell in accordance with the ordinary rule of law, but he was not employed to represent that to be true which he knew to be false.

For these reasons I am of opinion that the defendants are not responsible, and that the plaintiff must seek his remedy against Youngman, who, upon the evidence in the case, made the false and fraudulent misrepresentation.

Some passages were referred to from Mr. Justice Story's work, and also some *placita* from Rolle's Abridgment. They were cited to the Court of Common Pleas in the cases before mentioned, and I do not think it necessary to refer to them.

As to the alleged hardship upon the plaintiff, there is none. He dealt exclusively with Youngman, and if he be not of ability to pay, the plaintiff is only in the condition of all persons who have received a wrong at the hands of a person unable to make redress. As to the defendants, I do not know the authority as to price given by them to Youngman, but it may have been that he was not to sell the mahogany at a lower price than 3*s.* per foot; in other words, that the defendants would keep their wood if they did not receive in exchange for it a sum of money equal to 3*s.* per foot. Now the plaintiff has taken the log and has used it. By reason of his own act he cannot restore it to the defendants. Why then should they be deprived of the price or any part of it? It is said that the circumstance of the defendants having received the price agreed to be given upon the false representation made by their agent, renders them liable to pay the difference between the contract price and the real value. But is this so in reason and justice? It may well have been that the defendants insisted that no lower price should be accepted than 3*s.* per foot. If the log had turned out worth 20*s.* per foot the plaintiff would have had the benefit. The defendants may have only received what they insisted upon having before they parted with the log. The plaintiff by his own act has deprived the defendants of the possibility of its ever being restored to them. What right has he in reason or justice to deprive the defendants of any portion of that price which they may have insisted upon having before they parted with their property? If Youngman has committed a wrong he is responsible for it; but why are the defendants, who have committed none, to be deprived of their property, and also of a part of what may have been the stipulated price? The maxim of law is, "In pari delicto potior est conditio defendentis." I think the same rule ought to prevail in this case, where there is equal innocence.

The result of our judgments is that the rule will be discharged.

Rule discharged.

NEW YORK AND NEW HAVEN RAILROAD CO. *v.* SCHUYLER ET AL.

COURT OF APPEALS OF NEW YORK. 1865.

[34 *N. Y.* 30.]

THIS is an action in the nature of a suit in equity, against Robert Schuyler and several hundred other defendants. The complaint was sustained by this court on demurrer, as will appear by reference to the reported case in 17 N. Y. 592. The object of the complaint was to have a large number of alleged false and fraudulent certificates and transfers of pretended stock of the company, made by Schuyler, and charged to be held by the defendants, adjudged spurious and void; and to compel the certificates to be brought into court and cancelled; and to enjoin the several defendants from further prosecuting actions then pending, and from bringing suit against the company to enforce such certificates and transfers, or to recover damages for any reasons connected therewith.[1] . . .

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[1] The abstract of the complaint is omitted. — ED.

A large number of the defendants answered, setting forth various facts and grounds upon which they claimed that the plaintiffs were not entitled to the relief sought, and that the certificates or transfers respectively held by them were, or ought to be, treated as valid and binding on the company; or damages awarded to them for injuries sustained by the alleged frauds of Schuyler, and many asking for relief by way of judgments for damages against the company.

The case was tried at Special Term. . . . The Court found various facts (hereinafter more particularly stated), upon which he adjudged that the plaintiffs were entitled to the relief sought by their complaint, as to most of the defendants, and ordered judgment accordingly. He also found facts in respect to a large number of the defendants, upon which he decided that the plaintiffs were liable to them respectively for the damages sustained in consequence of their certificates or transfers turning out to be false and fraudulent, and were entitled separately to maintain actions against the plaintiffs for such damages, but that such damages could not be appropriately, under the pleadings in the case, adjudged to them in this action.

From the judgment . . . the plaintiffs appealed to the General Term from all that portion relating to the rights of the defendants to recover damages for the injuries to them, and to maintain actions against the plaintiffs therefor; and some of the defendants appealed from so much of the decision as adjudged their certificates and transfers invalid, and annulled the same; and some from such decision and from the decision that relief by cross-judgments for damages could not be awarded in this suit.

On these appeals the General Term of the first district affirmed the judgment (with some modifications as to a few of the parties not now important to refer to), and decided, in substance, that upon the facts found by the Special Term, as to the several defendants, it was the duty of the court to have proceeded and assessed the amount of their damages respectively, and awarded judgments in this action against the plaintiffs therefor, and they ordered the case to be sent back to the Special Term for that purpose. . . . Thereupon the Special Term . . . proceeded to make the said assessments; and . . . found further facts, . . . upon which judgments were ordered in favor of said defendants respectively, to be entered as part of the original judgment and as an amendment thereof. The plaintiffs took exceptions to the proceedings to assess . . . and to the judgments. . . .

The last or amended judgment was entered June 30, 1864, and from this judgment the plaintiffs again appealed to the General Term, where the same was affirmed; and from such affirmance the plaintiffs appeal to this court.[1] . . .

The particular facts of individual cases, or classes of cases, are stated so far as necessary in the course of the opinion. The general facts as found by the court on the trial, as they appear from the pleadings and case, are, in substance, as follows: —

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[1] From the statement and also from the opinion have been omitted passages dealing with appeals taken in behalf of divers defendants. — ED.

That the plaintiffs were duly incorporated by the legislature of the State of Connecticut in 1844; and by an act of the legislature of this State, passed in 1846, were authorized to extend their road into this State, and clothed with necessary powers for conducting its business in this State; that the act of incorporation provided that the capital stock of the company should be two millions of dollars, with the privilege of increasing the same to three millions, to be divided into shares of one hundred dollars each, which shares should be deemed personal property and be transferred in such manner and in such places as the by-laws of said company should direct; and that the directors should have full power to make and prescribe such by-laws, rules and regulations, as they should deem needful and proper, touching the disposition and management of the stock, property, estate and effects of the said company, the transfer of the shares, the duties and conduct of their officers and servants, the election and meetings of the directors, and all matters whatsoever which might appertain to the concerns of said company.

That the original corporators failed to obtain subscriptions for stock sufficient to organize the company till 1846. That on the 19th of May, 1846, a board of directors was elected, who organized their body on the same day by electing Robert Schuyler president, which office he continued to hold till his resignation thereof July 4, 1854. That on the 9th of July, 1846, the board of directors established, by certain by-laws adopted by them, a system concerning the transfer of stock of the company and the issuing of certificates therefor, according to which stocks were transferable only on the books of the company by the shareholder or his attorney duly appointed, and on the surrender of the certificate held by him when any certificate had been issued. The same by-laws prescribed the form of the transfer, as follows: —

New York and New Haven Railroad Company.

NEW YORK AND NEW HAVEN RAILROAD COMPANY.

No. 10,002.

Capital $3,000,000. Shares $100 each.

New York Office.

For value received . . . hereby assign and transfer unto . . . all right, title and interest in . . . shares in the capital stock of the New York and New Haven Railroad Company.

NEW YORK, . . . , 18 . .

And transfer books were provided for the use of the agents, in which transfers of this form were printed in blank; and the by-laws also directed that a form of stock certificate should be adopted; and one was adopted and invariably used . . . with a blank assignment and power of attorney printed upon the back of it, as follows: —

NEW YORK AND NEW HAVEN RAILROAD COMPANY.

No. 5,294.

Capital $3,000,000. Shares $100 each.

New York Office.

New York and New Haven Railroad Company.

Be it known, that . . . entitled to . . . shares of the capital stock of the New York and New Haven Railroad Company, transferable on the books of the company, at its office, in the city of New York, by the said . . . or . . . attorney, on the surrender of this certificate.

NEW YORK, . . . , 18 . .

. . . , *Transfer Agent.*

Know all men by these presents, that . . . for value received, ha . . bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto . . . of . . . shares in the capital stock of the New York and New Haven Railroad Company, standing in . . . name on the books of the said company, and transferable only at its office in the city of New York. And . . . do hereby constitute and appoint . . . true and lawful attorney irrevocable, for . . . and in . . . name and stead, but to . . . , use, to sell, assign, transfer and set over all or any part of the said stock ; and for that purpose to make and execute all necessary acts of assignments and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that . . . said attorney or . . . substitute or substitutes shall lawfully do by virtue hereof.

In witness hereof . . . hereunto set . . . hand and seal, the . . . day of . . . , one thousand eight hundred and fifty . . .

Sealed and delivered in the presence of . . .

These certificates, with the blank assignment and power of attorney upon them, were printed and bound in books with margins for entering the time of issuing the certificate, the number of shares, the number of the certificate and to whom issued ; which margins remained bound in the books after the certificates were cut out and issued, and constituted a memorandum of all the certificates issued ; these books were furnished by the company to the transfer agents. A stock ledger was also kept, in which each stockholder was credited with the shares transferred to him and debited with those transferred by him, and in a separate column in each stockholder's account was entered the number of shares represented by each certificate issued to him and the number of the certificate, and when a certificate was surrendered, a line was drawn through this entry, so that the uncancelled charges in the certificate column indicated the amount of each stockholder's stock represented by outstanding certificates, and by a comparison of the aggregate of such charges with the aggregate balances of every stockholder's account, any over-issue of certificates would be made to appear. These books were not accessible to the public, and dealers in stock had no means of information as to the title of parties proposing to dispose of stock, except such as was furnished by the certificates above mentioned or by the agents of the company.

That on the 3d day of February, 1847, Robert Schuyler was appointed transfer agent of the company at the city of New York, and a transfer office was established in that city; other offices and agencies were also established in the cities of Boston and New Haven. From that time forward to and including July 3d, 1854, the entire control and management of the transfer office and agency at New York was left in the hands of said Schuyler, without any examination or interference on the part of said company or its directors, he being also, during the whole period, the president of the company and one of its directors (and the meetings of the board of directors appear from the minutes to have been held at his office in New York).

That in August, 1851, the board of directors resolved to fill up the capital stock to $3,000,000, being 30,000 shares, and directed that the same be apportioned amongst the existing shareholders as then standing on the stock ledger: such distribution was made, and the stock (except 68 shares not taken, which remained, in part, undisposed of till October 15, 1849) was taken by such distributees: that the stock originally subscribed, and that afterwards distributed, was, in most cases, transferred on behalf of the company by one of the transfer agents to the person entitled, and certificates were issued by such agent in the form above set forth: that during the time Schuyler was such agent, transfers of stock were made on the books to the transfer agents on account of the company, and such stock afterwards disposed of by such agents; that Robert Schuyler was a member of the firm of R. & G. L. Schuyler; that said firm held large amounts of the stock of the company, and from its organization to July 3, 1864, were large and constant dealers therein, and Robert Schuyler, as transfer agent during this whole period, attended to transfers and issued certificates to them in the same manner that he did of stock standing in the names of other persons, and no restriction appears at any time to have been put by the company upon his official action toward or with his said firm.

On the first day of February, 1848, Robert Schuyler, as such transfer agent, commenced the over-issue of certificates to his said firm, and on that day such over-issue was sixty shares: and such over-issue continued thenceforth, and at all times thereafter there was over-issue of certificates in the stock account of R. & G. L. Schuyler. On the 20th of March, 1848, the over-issue by transfer commenced, and on that day the number of shares transferred by R. & G. L. Schuyler exceeded the number transferred to them by sixty shares. Such excessive transfers continued till January, 1849, the amount thereof fluctuating from time to time as transfers were made to and by R. & G. L. Schuyler, but the balance on the books of the company was against them at all times during that period. The excessive issues of such stock so transferred on the books of the company by R. & G. L. Schuyler, were credited to the transferees in their respective accounts, and when retransferred were charged in such accounts and credited to the new transferee. These transfers were made in great part under the power of attorney executed in blank by R. & G. L. Schuyler indorsed on the over-issued certificates, by the holders thereof, and such certificates were, on making such transfers, brought in, surrendered and cancelled. During this period, the amount of the over-issued certificates and over-issued transfers was not in excess of the 30,000 shares of the authorized capital of the company.

On the 10th of January, 1849, the excessive transfers amounted to 1,191 shares, but between that day and the 31st of January, shares were transferred to R. & G. L. Schuyler by various persons, sufficient to turn the balance of transfers in their favor. In August, 1851, when the 5,000 additional stock was distributed, the firm of R. & G. L. Schuyler had standing to their credit 854 shares; and in making the distribution and dividend in that month, the stocks previously transferred to the various persons holding the over-issued certificates, were treated by the company as genuine stock; there was at this time outstanding certificates issued to that firm, beyond the amount of their credits, for 1,277 shares; that the over-issued certificates continued to increase till October 17, 1853, at which time it had reached 7,042 shares, but the number of incoming certificates up to that time had not exceeded the credits of R. & G. L. Schuyler by transfers made to them, so that on the 17th of October, 1853, their account showed a balance by transfer to them of four shares. On that day a transfer of 100 shares was charged to them, and thenceforward to and including July 3, 1854, the balance of transfers against them continued to increase until it reached 17,497 shares, and at the same date the outstanding certificates against them amounted to 1,648 shares. All the certificates issued, including the false and over-issued certificates, were regularly entered in numerical order in the certificate books and stock ledger, and an examination of such books would at all times have shown what certificates were outstanding, and a comparison between the footings of the several books would have shown whether R. & G. L. Schuyler were or were not entitled to receive certificates.

The over-issued certificates and transfers were, in all cases in which judgments have been given to defendants, purchased or received by them in good faith on the payment or advance of money. It was an established usage in the city of New York to make purchases of stock and make loans thereon on the faith of such certificates, with the assignment and power of attorney thereon executed in blank by the party to whom originally issued, and they were transferred in the course of business from hand to hand by delivery. It was a usage also to take transfers of stock in the course of dealing on the books of the corporation without receiving a certificate; and, according to the ordinary mode of business, transfers were not allowed by corporations without the surrender and cancellation of the outstanding certificate when one had been issued; and according to the usage among corporations in New York, dealers in their stock were not allowed access to their books, and it was not the custom for dealers to make examinations thereof. That the stock of the New York & New Haven Railroad Company was largely dealt in, in the city of New York, by the delivery of certificates and assignments in blank, and large amounts of such certificates were constantly in circulation, and many of them purported to be issued to R. & G. L. Schuyler, and were signed by Robert Schuyler as transfer agent.

In many cases where valid certificates of stock had been issued to R. & G. L. Schuyler for stock actually belonging to them, and outstanding to their credit on the books at the time, and while such certificates, with the usual assignments and powers of attorney executed in blank were outstanding in the hands of *bona fide* holders, the stock was permitted to be transferred by R. Schuyler in the firm name to other persons, who took the same for value in good faith, without the surrender of the outstanding certificates. The rule on this subject, as established by the by-laws, was generally observed, but in the case of R. & G. L. Schuyler and a few other persons, it was disregarded by R. Schuyler and the clerks of his office.

That the railroad company kept no bank account for the deposit of moneys; that money received on behalf of the company on construction account from time to time by Robert Schuyler, as president or transfer agent, was, from time to time, deposited by him in the bank accounts of the firm of R. & G. L. Schuyler, and when payments were made by Schuyler on behalf of the company, the money was obtained by R. Schuyler; that large amounts were so obtained from time to time, and frequently from the firm of R. & G. L. Schuyler; that said moneys were drawn out from time to time as needed on their checks; that the money so obtained by R. Schuyler was raised by the said Robert Schuyler in the name of his said firm of R. & G. L. Schuyler indiscriminately on genuine and spurious certificates of the stock of said company; but it is not found to what time such moneys continued to be raised.

The firm of R. & G. L. Schuyler failed July 3, 1854, and R. Schuyler, on the morning of the 4th of July, by letter, resigned the offices of president, director and transfer agent, and called the attention of the board of directors to the over-issues appearing in the books. It is also found by the court that up to that time "there was no evidence of any actual knowledge by any of the other directors of any fraudulent acts on the part of Schuyler in the performance of his duties as transfer agent," and the evidence tended to establish that he stood high in the confidence of the community as a man of integrity and business capacity; but the court further found "that a proper examination of the books by the directors would have enabled them to discover the frauds which were perpetrated by Schuyler, and that the board of directors was guilty of negligence in not making such examination, and in leaving the entire charge and control of the transfer of shares and giving of certificates with Schuyler without making such examinations," and "that the plaintiffs, by their transfer agent or clerks, carelessly, negligently and improperly conducted, in relation to the transfer of the stock on the books of the company and the issuing of certificates therefor, in the allowance of transfers of shares of stock on the books of the company and in issuing certificates therefor, when no such shares existed, or when such certificates were not true, and in permitting transfers of spurious stock to be made on the books of the company and certificates of spurious stock to be issued to persons who, in good faith, advanced money or other property thereon, and in permitting shares of stock to be transferred to other persons than those holding the certificates thereof without requiring a surrender of such certificates."

"That the defendants received their transfers of stock through the acts and neglect of the transfer agent, or of the officers of said company, or certificates issued by the acts and neglect of the transfer agent and officers of the company, or certificates of stock valid when issued, but rendered valueless by the fraudulent or negligent pursuance of transfers of such stock to subsequent *bona fide* purchasers without the surrender of the outstanding certificates; and have been misled by the acts and neglect of the transfer agent or officers of said company, in relation to such transfers and certificates, and have, in good faith, and without any violation on their part or in their knowledge of the by-laws and rules of the company, advanced money and other considerations on the faith of such transfers and certificates."

Geo. F. Comstock and *William Tracy*, for the plaintiffs.

Chas. O'Conor and *C. A. Rapallo*, *Mann & Rodman*, *J. Larocque*, *W. Hutchins*, *W. H. Peckham*, *Jno. M. Buckingham* and *D. D. Field*, *Barlow & Kennedy*, *Wm. M. Evarts*, *Judah & Dickman*, *Weeks*, *DeForest & Foster*, *C. N. Potter*, *A. W. Lord*, *D. D. Lord*, *J. S. Stearns*, *Dan. Marvin*, *W. Rutherford*, *J. E. Parsons*, for various defendants.

DAVIS, J.[1] This somewhat summary disposition of the preliminary points of the case leaves an open path to its meritorious questions, some of which, however, may be disposed of even more summarily. One of these is the question whether the stock purporting to be created by the false certificates and fraudulent transfers of Schuyler can be valid stock of the corporation and become part of its capital. In the nature of things this is impossible. A corporation with a fixed capital divided into a fixed number of shares can have no power of its own volition, or by any act of its officers and agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the State can alone confer that authority and remove or consent to the removal of restrictions which are part of the fundamental law of the corporate being; and hence every attempt of the corporation to exert such a power before it is conferred, by any direct and express action of its officers is void; and hence every indirect and fraudulent attempt to do so is void; for if such a result cannot be accomplished directly by the whole machinery of the corporate powers, it is absurd to suppose that it can be produced by the covert or fraudulent efforts of one or more of the agents of the corporation. . . .

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[1] After discussing questions as to procedure. — ED.

Another important legal proposition in the case is so clear upon principle, and so distinctly settled by authority, that nothing but confusion can flow from its discussion. It will bear no more than plain enunciation. A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be. (Life and Fire Ins. Co. *v.* Mechanics' Fire Ins. Co., 7 Wend. 31; Angell on Corp., §§ 382, 388, 391; Albert *v.* Savings Bank, 2 Mary. Dec. 169; Goodspeed *v.* East Haddam Bank, 22 Conn. 541; Bissell *v.* Michigan Southern and Northern Indiana Railroad Co., 22 N. Y. 305-309, per Selden, J.; 1 Wend. Black. [note], 476; Green *v.* London Omnibus Co., 7 C. B. 290 [N. S.]; Frankfort Bank *v.* Johnson, 24 Maine, 490; Philadelphia and Baltimore Railroad Co. *v.* Quigly, 21 How. U. S. 209, and cases cited by Campbell, J.)

It follows, from this proposition, that if it were established in this case that the corporation itself issued the false certificates of stock and permitted the fraudulent transfers of spurious stock, it would be liable to the party directly deceived and injured by that transaction. The incapacity to create the spurious stock would be no defence to an action for damages for the injury. On the contrary, that very incapacity, since it would render the certificate or transfer a fraud and deceit, would itself be the cause of the injury and the basis of recovery. No court would hear the corporation assert that its wrongful act was beyond its chartered powers, and therefore ineffective to charge it with the injurious consequences of the fraud. But in this case the false certificates were issued and the spurious stock transferred by an officer of the corporation. A corporation aggregate being an artificial body — an imaginary person of the law, so to speak — is, from its nature, incapable of doing any act except through agents to whom is given by its fundamental law, or in pursuance of it, every power of action it is capable of possessing or exercising. Hence the rule has been established, and may now also be stated as an indisputable principle, that a corporation is responsible for the acts or negligence of its agents while engaged in the business of the agency, to the same extent and under the same circumstances, that a natural person is chargeable with the acts or negligence of his agent; and "there can be no doubt," says Lord Ch. Cranworth in Ranger *v.* The Great Western R. R. Co., "that if the agents employed conduct themselves fraudulently so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation." (5 House of Lords Cases, 86, 87; Thayer *v.* Barlow, 19 Pick. 511; 4 Serg. & Rawl. 16; 7 Wend. 31; Frankfort Bank *v.* Johnson, 24 Maine, 490; Story on Agency, sec. 308; Angel & Ames on Corp. sec. 382, 388.)

This brings us to consider the propositions on which the liability of the company to respond in damages to the defendants must depend. They are either general as applicable to all of the defendants, or special as growing out of the particular facts of some one or more of the defendants; and it is impracticable, without danger of injustice, to group the cases of all the defendants together and consider them in mass, however desirable that course might be in order to avoid prolixity. In one general proposition an inquiry is primarily involved into the duties concerning its stock which the corporation owed to the public and especially to all who might become dealers therein. The charter of the company was voluntarily sought and accepted. It created a private trading body having in view pecuniary gains and advantages. The legislature limited the capital and fixed the number of shares into which it might be divided, and declared them to be personal property to be transferred in such manner and at such times and places as the by-laws of the company should direct, and then handed over to the directors a discretion, restrained only by the laws of the State and the United States, to enact by-laws touching the disposition and management of the stock, the transfer of shares, the duties and conduct of officers, "and all other matters that might appertain to the concerns of the company." These powers were sought and granted with a view to well known and established commercial usages. It was doubtless a matter of choice to what extent the company would exercise them, but the directors chose to use them in their broadest significance. They proceeded to enact by-laws to regulate the transfer of stock and the issuing of certificates on such transfers. They adopted a form of transfer, of certificate and of assignment and power of attorney indorsed thereon, and gave them every characteristic of negotiability in their power to confer. They sought the commercial centre of this continent and there established a transfer office and agency, and thus gave and secured the most unbounded facilities for dealing in the stock. Their purposes, obviously, were to lay hold of the advantages which such facilities were sure to bring to the stock by enhancing its monetary and convertible value. This course was legitimate; but it brought with it corresponding duties and obligations. I cannot doubt but that upon general and long established principles of law, the corporation became bound to the exercise, in this branch of its business, of such ordinary care and skill as should afford to dealers a safe and reliable mode of acquiring title to its shares in the form of transfers and certificates as provided by its by-laws. "The law always imposes upon every one who attempts to do anything even gratuitously for another, some degree of care and skill in the performance of what he has undertaken. . . . Mere negligence, where there is no obligation to use care, as where a man digs a pit upon his own land and leaves it open, affords no ground of action, but where there is anything in the circumstances to create a duty to an individual or to the public, any neglect to perform that duty from which injury arises, is actionable." (Per Selden, J., in Nolton *v.* Western R. R. Co., 15 N. Y. 444; Coggs *v.* Bernard, Ld. Raym. 909.) . . .

I cannot, therefore, subscribe to the idea that the duties of the plaintiffs, in respect to their stock, were limited to themselves and existing shareholders. They extended also to the commercial community whose confidence and trade the plaintiffs invited, and who in turn were entitled to good faith and fair dealing at the hands of the company; and they sprang into full vigor in behalf of every party who entered upon such dealing.

The next important general inquiry is into the manner in which the plaintiffs discharged those duties at their New York agency, with a view to determine whether their conduct has been of such a character that the law, in behalf of innocent parties, and to prevent injustice, will imply authority in the agent to do the acts that have occasioned the injury, on the principle of *estoppel in pais.* This inquiry was not involved in the case of the Mechanics' Bank against these plaintiffs (3 Kern. 599), for the facts upon which it arises were not then before the Court, and the questions discussed did not embrace them. The only question of estoppel considered in that case was the one arising on the face of the certificate itself, and the learned judge who pronounced the opinion was very careful to define the limits of the authority as they appeared in that case, and to declare that the appointment, by its terms, did not include the acts, and that there was "no pretence that the authority conferred was ever enlarged by any holding out or recognition of such acts." (3 Kern. 636.)

The doctrine of implied agency, when it arises out of negligence, I think, has its true basis in the principle of *estoppel in pais.* That principle, as said by Wilde, B., in Swan *v.* The North British Australasian Co. (7 Hurlst. & Norm. 603), is based on the injustice of allowing a party to be the author of his own misfortune, and then charging the consequences upon others, and "it all along implies an act in itself invalid, and a person who is forbidden for equitable reasons to set up that invalidity." The facts on which this question arises are in part the same as those upon which the extent of Schuyler's actual agency is to be determined.[1] . . . From 1848 down to 1854, all these frauds were written down in the books of the company. . . . From 1849 to 1854, the clerks in the office knew of the over-issue of certificates. . . .

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[1] Here the facts were summarized. — ED

It is apparent that the use of ordinary care and diligence at any time after March, 1848, would have disclosed that Schuyler's management was fraudulent both as to the company and the public, and likely to lead to the disasters that have followed upon it. It is a mistake to suppose that his frauds commenced in October, 1853. They were equally gross in turpitude, though not in amount, for a period of five years before that date; and nothing but the ability of the company to increase the capital from two and a half to three millions, has prevented all excesses beyond the first named sum from falling under the same ban of utter spuriousness. The arrangement, by virtue of which the transfers made on false certificates before the increase of the capital became genuine stock, may have been made in ignorance; but it was an ignorance based on a negligence so gross that the fact becomes as potent as though the truth had been known. It may have been in ignorance that the company received the benefit of "large sums" raised by Schuyler indiscriminately on genuine and spurious certificates. Charity may grant that, but equity cannot disregard the fact, for it was a duty to be wise. It is transparent throughout the case, that the board of directors, by passive submission or active surrender, handed over to Schuyler the substance of all their authority relating to their business in New York, and then for nearly seven years lay down to sleep in supine indifference at his feet. . . . The company placed in Schuyler's hands the very instrumentalities by which the injury was wrought. They imposed restrictions upon their use, but they omitted the safeguards that ordinary prudence would dictate, to discover or prevent their abuse. A wrong which ordinary care will prevent, is in a legal sense caused by the omission of that care where it is a duty to use it. . . . An examination was a duty, because it was the obvious dictate of good sense as the easiest and safest check upon the agent's conduct. The long continued and reckless omission was therefore a culpable negligence, without the concurrence of which Schuyler could not have committed the frauds by which the defendants have suffered; for it was this omission of duty that left him with power to wield the weapons with which the company had armed him, and therefore it may be said to have led directly to the injurious acts. . . .

It is not in such cases one of two innocent parties who is to suffer. The question is between an innocent and a culpable party, and, as was said by Denio, J., in The Bank of Genesee *v.* The Patchin Bank, "I see no objection in applying the principle that where a party has, by his declaration or conduct, induced another to act in a particular manner, he will not afterwards be permitted to deny the truth of his admission if the consequence would be to work an injury to such other person." (3 Kern. 316.) The question of estoppel is one of ethics (per Bronson, J., in Dezell *v.* Odell, 3 Hill, 225), and is to be enforced where, in good conscience and honest dealing, it ought to be. (Welland

Canal Co. *v.* Hathaway, 8 Wend. 483.) "The principle," says Chancellor Kent (2 Com. 620, note c), "that pervades the distinction on this subject rests on sound and elevated morality. There must be no deception anywhere. The principal is bound by the acts of his agent if he clothe him with powers calculated to induce innocent third persons to believe the agent had due authority to act in the given case." "He who created the trust, and not the purchaser, ought to suffer." (Note d.)

On the question of privity in any view of this case, I have no difficulty. If the act of the agent can be charged home upon any principle, upon the corporation, then, as was said in the Bank of Kentucky *v.* The Schuylkill Bank (1 Pars. Eq. Cas. 180), "the *bona fide* holder of any certificate issued by the transfer agents has a primary and direct claim, either to be admitted as a corporator, or if that is impracticable, from the excessive issue of stock, to be compensated for the fraud practised upon him." To entitle the aggrieved party to sue, in such case, no privity is necessary, except such as is created by the unlawful act and the consequential injury, because the injured party is not seeking redress upon contract, but purely for the tortious act in the commission of which the contract is an accidental incident. (Allen *v.* Addington, 11 Wend. 374; Thomas *v.* Winchester, 2 Seld. 397; Scott *v.* Shepherd, 3 Wils. 403; Gerhard *v.* Bates, 2 Ell. & Bl. 489; S. C. 20 Eng. L. & Eq. 129; Redfield on Rail. 61; Kortright *v.* Buffalo Commercial Bank, 22 Wend. *ubi sup.*)

That the Mechanics' Bank against these plaintiffs was not decided on any question of want of privity, we have the authority of the judge who pronounced the opinion: "We certainly," he says, "did not put our judgment upon the ground that the plaintiffs were not in privity of dealing with the defendants by reason of the non-negotiable character of the certificates, and, therefore, could not sue for fraud." (Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y. 151.)

I am, therefore, of opinion that the plaintiffs are estopped by the facts and circumstances of this case, to deny the authority of Schuyler to do the acts from which the injury to the defendants has arisen.

But conceding that the whole question of this case is governed by the law of principal and agent, it becomes of grave significance to ascertain the scope and extent of the powers conferred on the agent. Herein, I think, the case essentially differs from that of the Mechanics' Bank. (3 Kern. 399.) The question of that case is stated by Comstock, J., in 16 N. Y., at pages 154, 155, with succinctness and accuracy. He says: "In that case, the transfer agent of the defendants' corporation was authorized to sign and issue certificates of stock on a transfer from one shareholder to another upon the books, and on the surrender of the previous certificates. The agent, for his own purposes, signed and issued certificates to a large amount where there had been no such transfer or surrender. These unauthorized and spurious instruments were in form precisely like those that were genuine and authorized. Trusting to their false appearance, the plaintiffs took one of them by transfer and advanced money upon it, which they recovered in the New York Superior Court. We held they could not recover, and reversed the judgment, placing our decision prominently upon the ground that the acts of the agent were not within the real or apparent scope of the power delegated to him."

It now appears that the agent, in addition to the power thus stated, had authority also to issue certificates in precisely the same form, to the original subscribers for the stock, and to some extent did do so; that he had authority to dispose of the stock of the company not taken by the original subscribers (of which there was a large amount), and issue certificates in the same form to the purchasers; that he had authority to dispose of certain forfeited shares, and in such case issue like certificates; that he had authority to receive transfers to himself of stocks on behalf of the company, and transfer the same to purchasers and issue like certificates to them; that before the increase of the capital to 30,000 shares, he did issue to his own firm a large number of false certificates which became the basis of transfers on the books to third parties, and by some arrangement were absorbed into the enlarged capital as genuine stock; that he acted to some extent as financial agent of the company, and through his firm raised large amounts, "indiscriminately, on genuine and spurious certificates of stock," which were paid out on the check of the firm on behalf of the company and on its construction account; that to him was intrusted the keeping of all the stock accounts of the company and its dealers at the New York office, and in those accounts he entered all his transactions, both false and genuine; that the books were kept closed to dealers; that his management of the affairs of the office, and of all these various matters, was never investigated or questioned.

It is in all these facts that we are now to seek for "the real or apparent scope of the power delegated to him." As we descend from the sharp promontory of the Mechanics' Bank case to this broad plane of powers and their mode of use, we stand amongst new and far different lights and shadows. We find ourselves quite unable to say, with the able jurist in that case, "He (Schuyler) had no power to sell stock at all, and none to issue certificates except as incidental to a sale between existing stockholders, and then it depended on the condition precedent of a transfer on the books and a surrender of a previous certificate for the same stock." Nor to say, "His appointment in its very terms, which all dealers are supposed to have been acquainted with, did not include his acts, and there is no pretence that it was ever enlarged by any holding out, or recognition of his acts."

When his certificate, regular in form in all respects, is offered in the market, the buyer is not able to refer it to the narrow restrictions of the by-law, for how does it appear that it is not one issued to an original subscriber, where there was no transfer to be made, and no prior certificate to be surrendered; or that it is not one issued to a purchaser of the original stock which Schuyler was empowered to sell and certify in this manner; or that it is not of stock that has been transferred to the agent on account of the company and which he was likewise authorized to sell; or that it was not some of the forfeited shares which he was directed to sell and certify; or that it was not of the kind which, by "some arrangement," is absorbable into the capital as genuine, even if it be in fact spurious; or that it is not issued to raise money for the benefit of the construction fund of the company; or that it is not of the spurious kind which the company have heretofore allowed to be cured by a subsequent acquisition of stock by the Schuylers, and a transfer thereafter under the power.

Whether it does not belong to some one of these classes there are no earthly means of ascertaining save by the representation of the agent. The books are sealed; but if open and most thoroughly investigated they would not necessarily negative the power to issue for some of the purposes for which authority had been given, directly or by recognition; for even if run down to absolute spuriousness it is still open to say, this is of the kind of spurious certificates upon which the company raise money for their construction accounts, or the kind which they legitimatize by subsequent arrangements of the capital; or the kind which, by the custom of dealing becomes good, if a transfer be made under it at a moment when the Schuyler firm happens to have so much stock to its credit on the books. And the accounts for seven years show that all these kinds are treated on the same footing as genuine shares.

It is a well recognized branch of the law of principal and agent, that without any express or special appointment, an implied agency may arise from the conduct of a party. (Story on Agency, § 54.) "Where a person has recognized a course of dealing for him by another or a series of acts of a particular kind, an implied agency is thereby constituted to carry on the same dealing or to do acts of the same character. . . . There may be seeming contradictions of the fundamental doctrine that a principal is bound only by such acts of his agent as he has duly authorized. This presumption or implied agency is one of these, because a man may have accepted supposed acts which he never authorized, and so be bound as to third persons by similar acts." (Per Comstock, J., 16 N. Y. 145, 146.)

There is nothing gained to the plaintiffs by the fact that the certificates are made to the firm of R. & G. L. Schuyler, for so were all those which, prior to October, 1853, became good by a transfer when that firm happened to be in credit on the books of the company; so were those used to raise money for construction; and so of those which went in under the increased capital. It is a general rule that an officer or agent is not to be permitted, under a general power, to certify in his own favor. (Claflin *v.* The Farmers' Bank, 25 N. Y. 293.) But in this case that rule is not applicable, for it clearly appears that from the outset this firm were very heavy dealers in the stocks of the company, that its business was all conducted at this agency, and that Robert Schuyler at all times certified to it as to other dealers. The long acquiescence of the company in this practice, and its actual ratification in some of the cases above mentioned disarm this objection of all force. (Ang. & Ames on Corp. 216; and see Bradly *v.* Richardson, 2 Blatch. C. C. R. 343; S. C. 23 Vt. 720; Story on Agency, § 54.)

In this view of the extent of the authority with which Schuyler was clothed by the company, either by direct appointment or by recognition and ratification, or by actual enjoyments of the fruits of his acts, or by long acquiescence therein from which a presumption or implied agency arises, I have come to the conclusion that the issuing of the certificates by him must be held to be within the scope of the real and apparent authority which he possessed; and the remedy of the defendants is not prejudiced by the fact that he used and intended to use the avails for his own purpose. In short, they stand precisely in respect to the remedy where they would if the board of directors had issued the same certificates in fraud of their powers under the law, and obtained the defendants' moneys thereon.

But these views do not dispose of a question that has been argued in this case with an elaboration and power seldom equalled in a court of justice. From the manner in which the decision of the judges is stated in the Mechanics' Bank case, it is difficult to tell what precise points were designed to be passed upon by the court. It is open to conjecture that the case may have passed off on the ground of want of privity between the plaintiffs and defendants, as was intimated by Selden, J., in The Farmers' & Mechanics' Bank *v.* The Butchers' & Drovers' Bank (16 N. Y. 142), or on the ground, as suggested by H. R. Selden, J., in Griswold *v.* Haven (25 N. Y. 598), "that Kyle to whom the certificate issued, being privy to the fraud, had of course no claim against the company, and that his assignees could have no greater rights than himself;" or upon the mistaken idea that the Court of Errors, in reversing The North River Bank *v.* Aymar, has settled the law adversely to the opinion of the Supreme Court in that case.

But whatever may have been the views of other members of the court, there is no mistaking the ground on which the judge who pronounced the opinion intended to put the liability of a principal for the acts of an agent. It is, in brief, that a principal is bound only by the authorized acts of his agent. The proposition involved was fairly put by the learned judge in this form: "Suppose an agent is authorized by the terms of his appointment to enter into an engagement, or series of engagements, on behalf of his principal, and while the appointment is in force he fraudulently makes one in his own or a stranger's business, but in the form contemplated by the power, and which he asserts to be in the business of his employer by using his name in the contract, can the dealer rely upon that assertion, or is he bound to inquire and to ascertain at his peril whether the transaction is not only in appearance but in fact within the authority? According to the decision of the Supreme Court of this State, in the case of The North River Bank *v.* Aymar (3 Hill, 262), he can." The judge then proceeds to show that the case cited had been reversed by the Court of Errors; and then to discuss the question with his own clearness and vigor, reaching a conclusion which he expresses in these words: "The appearance of the power is one thing, and for that the principal is responsible. The appearance of the act is another, and for that, if false, I think the remedy is against the agent only. The fundamental proposition, I repeat, is, that one man can be bound only by the authorized act of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it.

The counter proposition was again stated by Selden, J., in The Farmers' & Mechanics' Bank *v.* The Butchers' & Drovers' Bank, in this form: "It is, I think, a sound rule that when a party dealing with an agent has ascertained that the act of the agent corresponds in every particular in regard to which such party has or is presumed to have any knowledge with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the acts done under it.

Manifestly, here is an "irrepressible conflict" between these propositions, and we are called upon to determine which expresses the settled law of this State. I think the problem is solved whenever the question whether the decision of the Supreme Court in The North River Bank *v.* Aymar (3 Hill 262), is authoritative as law, is answered; and for this, I have the emphatic assent of COMSTOCK, J., as above quoted. That case stands altogether upon the doctrine of agency. The bank held the power of attorney under which the agent acted. The paper, on its face, notified the bank that it was made by the agent. The power, by express words, limited the authority to notes made in the business of the principal. The character of the paper was, therefore, of no moment on this point, for its negotiability could not shut out a question which arose on the face of the instruments. (See per Selden, J., in Griswold *v.* Haven, 25 N. Y. 601, and per Comstock, 16 N. Y. 153, 154, 155.) The paper, in fact, was not made in the business of the principal. The question was, where the peril of that fact rested; and its solution altogether depended upon the question, was the bank "bound to inquire and to ascertain at its peril whether the transaction was not only in appearance but in fact, within the authority?" The court appreciated the point, and therefore discussed and decided the question distinctively, on the law of principal and agent.

The further history of that case is shown by Judge Comstock, in his opinion in The Mechanics' Bank case (3 Kern. 633), and more fully in his dissenting opinion in The Butchers' and Drovers' Bank case (16

N. Y. 153, 154). As The Mechanics' Bank case left The North River Bank case, the latter would be deemed not law. But the same question arose in The Farmers' and Mechanics' Bank *v.* The Butchers' and Drovers' Bank, and it became essential to determine whether the reversal by the Court of Errors of The North River Bank case had settled the law adversely to the decision of the Supreme Court Judge Comstock earnestly insisted that it had (16 N. Y. 154), but in this he stood alone. Selden, J. (at page 138), assigned reasons for holding the question still open for examination, and after a very full examination declared that the case was properly decided by the Supreme Court. Denio, Ch. J., and Brown, J., delivered opinions, both agreeing with Selden, J., in approving the decision of the Supreme Court. "I am clearly of opinion," said Denio, Ch. J., "that the case of The North River Bank *v.* Aymar, was correctly adjudged in the Supreme Court. If the Court of Errors laid down a different rule in reversing that judgment, they ran counter, as I think I have shown, to a strong course of adjudication in that court and in the Supreme Court, and overturned a legal position which was then well established in this State, and has since been repeatedly acted upon." In Griswold *v.* Haven (25 N. Y. 595), the same question arose; and upon the precise point now under consideration — whether the decision of the Supreme Court in The North River Bank *v.* Aymar, is sound law — I understand there was no dissent from the opinion of H. R. Selden, J., which held it to be so. In The Exchange Bank *v.* Monteath (26 N. Y. 505), the question of its authority again very sharply arose. When that case was first at the bar of the General Term, that court followed The North River Bank *v.* Aymar, as reported in 3 Hill, regarding it as a decisive authority. After a new trial, the case came again to the General Term, but in the mean time the opinion of Comstock, J., in The Mechanics' Bank case, had been published. The court regarded that as establishing a different doctrine, and as showing also that The North River Bank case had been overruled by the Court of Errors. It, therefore, reluctantly followed what it regarded as the later authority. But this court reversed the General Term, and declared that the doctrine of the case of The North River Bank *v.* Aymar, must now be regarded as established on an impregnable basis. "It is," said Davies, J., "well sustained by authority, sound reasoning and well established principles, and it should be firmly adhered to by the courts." If ever a case, discrowned by reversal, was lifted to its feet and restored to authority by adjudication, The North River Bank *v.* Aymar has been; and its vindication is all the more signal because of the ability with which its chief antagonist has conducted the remarkable warfare against it.

We have already seen what principle was involved in that case, and it is impossible to escape the conclusion that the law of this State, as settled by adjudication at this day, is, as put by H. R. Selden, J., in Griswold *v.* Haven, "That where the authority of an agent depends upon some fact outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact." The contrary rule, though asserted with confidence and vindicated with great force in the case of The Mechanics' Bank, was not necessarily adopted by the court, and that case does not so determine. It may with confidence be asserted that all the cases in this State, both before and since, lay down a different rule from that supposed in The Mechanics' Bank case, to have been established by the Court of Errors; and so do the elementary writers upon whom we are accustomed to rely. (Story on Agency, 452; Paley on Agency, by Lloyd, 294, 301, 307; Bacon Abr., Tit. Master and S., K.; 2 Kent Com. 620, notes, 1 Blk. Com. 432.) It were long, by quotation, to show that the cases just noticed necessarily rest on this doctrine. A short allusion to their facts must suffice. The condition of the authority in The North River Bank *v.* Aymar, was that the paper should be made in the business of the principal. In The Butchers' and Drovers' Bank case, that the drawee should have funds in deposit enough to pay the check. In Griswold *v.* Haven, that the grain for which the receipt was given should actually have been received. In Exchange Bank *v.* Monteath (so far as it rested on a question of agency), that the drafts should be for the use and benefit of the defendant's line of boats. In each of these cases, the extrinsic fact which constituted the condition of the authority was peculiarly within the agent's knowledge, and was necessarily represented to exist by the execution of the agent's powers. It might or it might not be discovered by inquiry. So in this case, in the narrow view in which we are now considering it, the condition upon which the agent could issue the certificate was, a transfer in the books and the surrender of a previous certificate, if any had before been issued. These facts are wholly extrinsic and peculiarly within the knowledge of the agent, as part of the special duties to be attended to by him, and were represented by him to exist by the certificate itself. I can see no shade of difference between the question in this case and in those cited, and which seems to me to settle the law. The rule which governs this class of cases, in my judgment, rests upon a sound principle. As was said by Selden, J., in Griswold *v.* Haven, "The mode in which the liability is enforced in all these cases, is by *estoppel in pais.* The agent or partner has in each case made a representation as to a fact essential to his power, upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the fact so represented." It goes back to the celebrated aphorism of Lord Holt, in Hern *v.* Nichols (1 Salk. 289), "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger," or as more tersely expressed by Ashurst, J., in Lickbarrow *v.* Mason (2 T. R. 70), "Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." (Story on Part. § 108, and authorities there cited.) In truth, the power conferred in these cases, is of such a nature that the agent cannot do an act appearing to be within its scope and authority, without, as a part of the act itself, representing expressly or by necessary implication, that the condition exists upon which he has the right to act. Of necessity the principal knows this fact when he confers the power. He knows that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without as *res gestæ* making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation which, if true, is of course binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it. The latter may answer, you intrusted your agent with means effectually to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you gave, since it could not be executed without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case. By this I do not mean to argue that the principal authorizes the false representation. He only in fact authorizes the act which involves a representation, which, from his confidence in the agent, he assumes will be true; but it may be false, and the risk that it may he takes because he gives the confidence and credit which enables its falsity to prove injurious to an innocent party. I have already shown how this principle in many cases sustains liability after all actual authority has been withdrawn, as between the principal and parties who have a right to infer that the authority continues.

The contrary doctrine would be singularly inconvenient, if not absurd, in practice. For instance, under a general power to draw bills, which means, of course, only in the business of the principal, no party could safely take a bill drawn by the agent without pursuing the inquiry whether it was drawn in such business to extremes. If the peril is on the party to whom the bill is given, nothing short of personal application to the principal himself can relieve it, for nowhere short of that is absolute certainty. Every intermediate appearance or representation may be false or deceptive, and the rigid rule of actual authority will be satisfied with nothing less than absolute verity. So, then, the general power carries no safety whatever, since each bill made under it must be verified as to extrinsic facts by resort for perfect security to the principal himself.

Or to bring the illustration nearer to this case: It is claimed that every receiver of a stock certificate, executed by an agent, must verify, at his peril, the extrinsic facts that a transfer of the stock has been made and the former certificate surrendered. But how? If he go to the board of directors they can only refer him to the transfer agent or the books kept by him, for these are alone their sources of information. If he resort to the books they are at best but other representations of the agent which, if they in form show a transfer, may still be deceptive, and nothing but a transfer of actual stock will answer the condition. He must therefore trace the lineage of the stock represented by the certificate to some point behind which no "strain upon the pedigree" will enable the corporation to bastardize the issue. Such a rule would be vastly detrimental to the business interests, both of corporations and of the public.

It would be far better to establish a rule that no man shall take an instrument made by an agent without first having the principal's certificate that it is genuine and authorized; and even this would be impracticable in corporations, for every new certificate, being another act of an agent, would only open a new circuit of inquiry. But such is neither the policy nor good sense of the law.

It is a mistake to suppose that the conventional rule of commercial negotiability has anything to do with this question, except in cases where the paper carries no notice on its face that it is made by somebody assuming to be an agent. That rule stands upon an arbitrary doctrine of the law merchant and not at all upon any principle of estoppel. It extends only to instruments which usage or legislation has brought within it; and its substance is, that by force of the arbitrary rule the possessor of such negotiable instrument has power to give by delivery to a *bona fide* purchaser for value, a good title notwithstanding any defectiveness in his own. Hence, under it a finder or a thief may confer such title with none in himself, not because the loser is estopped by his misfortune from asserting his rights, but because from real or supposed commercial necessities, "*ita lex est scripta.*" But it is a fixed requisite of the rule that the buyer shall be for value without notice, and therefore nothing that gives notice on its face is, in that particular, within the rule. So an instrument that shows on its face that it is made by one man for another, at once warns the taker to inquire if the assumed agent be authorized, and that question becomes one independent of the arbitrary rule of the law merchant and dependent on the doctrines that govern the law of principal and agent. (Attwood *v.* Munnings, 7 B. & C. 278; Fearn *v.* Felica, 8 Scott, N. C. 241.)

I concur, therefore, with Judge Selden, when he asserts that in no respect, except as it touched the question of privity of contract, was the negotiability of the paper of any importance in the case of The North River Bank *v.* Aymar (25 N. Y. 602). In that case it appeared on the face of the paper that it purported to be made by an agent. A different rule as to the effect of negotiability may well obtain where the paper is negotiable within the law merchant, and bears on its face no notice whatever that it is made by some party other than the one it purports to charge, as where it is made in a firm name, or in the form and by the officers, through and by which a corporation can by law issue its authorized evidences of debt.

We have already seen how far privity is essential in actions of tort. (Redfield on Railways, 61 and note; Gerhard *v.* Bates, 20 Eng. L. & Eq. 129, &c.)

I shall not inquire how far the English cases, and especially the leading case of Grant *v.* Norway (10 C. B. 665), so much relied upon, may be in conflict with the law of this State. Both the Judges Selden have sought to show that Grant *v.* Norway is distinguishable from the cases under their consideration, and I will only add that if they did not succeed in pointing out the distinction, and the case really stands in conflict, so much the worse for that case.

We may come back, therefore, to the solid ground of The North River Bank *v.* Aymar, regarding it only as shaken down to greater firmness by the severe ordeal of The Farmers' and Mechanics' Bank case, and with confidence declare the true doctrine of this branch of the law of agency to be, that where the principal has clothed his agent with power to do an act resting upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. In Griswold *v.* Haven, this rule was distinctly settled. The dissenting opinion touched only the right to maintain the form of action brought in that case, but a majority of the court held that the representation of the agent not only charged the principals, but estopped them from denying the actual possession of the wheat asserted to be in store, so as to defeat an action of trover or replevin to recover the property. In this view I see no ground upon which the plaintiffs can, in this case, be permitted to deny that Schuyler was acting within the scope of his authority in issuing the false certificates; and they are therefore to be treated as though issued by the board of directors. Considering them of that character, the question of estoppel, as it arises upon their face, that is, whether the corporation is estopped from saying that they were not genuine representatives or muniments of title to stock, was rightly disposed of by the opinion of Comstock, J., in The Mechanics' Bank case. And it was in that view, that is, regarding them as instruments capable, upon some notion of estoppel, of being specifically enforced, that he alluded to the supposed want of privity in the estoppel itself between the holder in that case and the corporation; but he quite distinctly declined to pass upon the question of the liability of the corporation if the certificate was to be treated as the act of the board.

But the liability of the corporation for a wrongful injury growing out of an act of the directors in excess of the chartered powers, was afterwards vindicated and settled in Bissell *v.* The Michigan Southern & Northern Indiana R. R. Co. (22 N. Y. 258), and it stands well upon the grounds of either of the learned opinions in that case.

It was established by the Court of Chancery in England a century ago, in Ashby *v.* Blackwell (2 Eden, 299). . . .

I shall proceed, as briefly as possible, to consider the cases of defendants, who are parties to this appeal, in the light of the different facts found in them; and for that purpose shall classify the defendants so far as practicable.

First. There is a class of defendants who were purchasers of stocks in good faith and for value, of persons to whose credit such stock stood on the books of the company at the transfer office at the time of such purchase, and who held certificates in due form therefor. On such purchases, the outstanding certificates were surrendered, transfers made on the books in due form, and new certificates issued to the purchaser, who thereupon paid the purchase price to his vendor. These certificates are adjudged spurious because their origin is found to have been, more or less remotely, in over-issues by Robert Schuyler to his firm.

Second. Another class are defendants who made purchases of parties who had credit on the books of the company for the stock sold, but no certificates, and who, on the sale, transferred the stock on the books in due form to the purchasers — who, in some instances, took certificates and in others not. In some cases in this class, it is proved that the money for the stock was not paid till after inquiry at the office showed that the transfer had, in fact, been made.

Third. Another class is of parties who loaned money upon certificates held by the borrowers, to whose credit the stock stood on the books of the company, and who at the time of making such loan or subsequently, surrendered the certificate and transferred the stock on the books, and took out new certificates in due form.

The stock held by these two classes has been also adjudged spurious, because it originated in some like over-issue of the transfer agent.

It will be seen that in these cases where new certificates have been issued by the transfer agent, the letter of his authority in its most limited sense has been pursued. The extrinsic facts upon which the power of the agent depended, apparently existed. Stock stood on the books to the credit of the party making the transfer. The transfer was made in due form. The outstanding certificate was surrendered and cancelled, and thereupon the new one issued. To all appearance the act was within the real and apparent scope of the authority, and every condition of the power fully complied with. But a judicial investigation has shown that this apparent stock credited on the books, was not real. That at some remote period, it had its origin in a fraudulent over-issue. The question is, does the peril of that fact rest on the buyer? I think it does not; but I am constrained to admit, that if the position of the appellants' counsel be sound, I do not see why it must not. The question is only carried back a step farther; that is, to the right of a dealer to buy stock, relying on the books of the company as evidence of the ownership of his vendor. But the books are themselves only representations made by agents, and by no means conclusive in every sense. The credit is a deceptive one, because the stock has no real existence, and if the condition of the power be that there must be an actual transfer of stock, an unreal transfer, however complete its resemblance to reality, does not answer the condition. No matter to what disastrous consequences the rule may lead, it cannot be satisfied without holding that the peril that all appearances of genuineness shall be founded in absolute fact, constantly rests upon the dealer.

The same thing is true of the transfers upon the surrender of certificates, where no certificate had issued. Unless we are to hold the company to the duty of keeping correct books, so that those who refer to and rely upon them shall be protected, there is no remedy. The corporation may mislead the community until thousands are ruined, and be itself entirely protected by being able to say, our agents had no authority to give credits for stock where none existed. The evidence to a corporation of its stockholders is its stock ledger, or the books kept for the express purpose of determining its stockholders. (Gray *v.* Portland, 3 Mass. 385, per Sewall, J.)

Dealers are entitled to rely upon that evidence. As was said by Best, Ch. J., in Davis *v.* The Bank of England (3 Bingham, 393), "If this be not law, who will purchase stock, or who can be certain that the stock he holds belongs to him? It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfer, to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred, from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it the practice even to attempt to look further than the bank books for the title of the person who proposes to transfer to you."

I take it to be sound law, that if A., who is about to sell property to B., and take his check on a bank, applies at the counter of the bank to the proper officer, who informs him that B. has the funds in deposit, and his check will be good, the bank will not be permitted to deny the truth of the assertion after A. has acted upon it, on the ground that its officer had no authority to keep any but correct books. But these parties stand upon a still better footing, for they have relied not merely upon a certificate issued by the agent, but upon the records of title to stock kept by the company, which were the only other existing sources of information. They have there found the stock they proposed to purchase credited to the party offering it for sale, in the stock ledger of the corporation, which is the best evidence of the existence of all genuine stock transferable at this office. Is it to be tolerated that the responsibility for the correctness of these books rests altogether upon dealers who have no control over them?

The defendants who have been led into loaning their money upon certificates and transfers, held and made by parties who had like credits on the books, and who apparently complied with every condition, stand on the same footing with those just noticed. Public policy and the true interests of all parties concerned, as well as plain principles of equity and justice, require that the corporation make good the losses they have sustained.

There is still another class whose claims arise upon other facts, and rest on different principles. It is composed of those defendants who have received certificates representing actual and genuine stock of the company, but whose certificates were rendered valueless by a subsequent transfer to *bona fide* purchasers of the same stock, by the party to whose credit it stood on the books.[1] . . . It is claimed . . . that the transfer was made or permitted by an agent of the company, who acted in excess of his powers. Clearly it was the duty of the transfer agent to have required the surrender and cancellation of the outstanding certificates. That was one of the very duties he was put there to perform. . . . It is the very ground of the company's liability, that its agent failed to do the duty enjoined upon him. The parties were dealing all the while in the actual and legitimate stock of the company, and the agent was called upon to do an act within the exact scope of his authority. . . . "For where a trust," says Lord Holt (12 Mod. 472, 490), "is put in one person, and another, whose interest is intrusted to him, is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified." Nor does it matter that the agent fraudulently neglected his duty for his own private gain; for then arises the exact case for the application of Lord Holt's rule, that when one of two innocent persons must suffer from the fraud or misconduct of a third, he who has reposed a trust or confidence in the fraudulent agent ought to bear the loss. . . .

DENIO, C. J., WRIGHT, POTTER, and BROWN, JJ., concurred with DAVIS, J.

Judgment affirmed.[2]

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[1] The opinion as to this class of claims has been abbreviated by omitting passages pertaining to the law of Corporations. — ED.

[2] Other over-issue cases are: Bridgeport Bank *v.* N. Y. & N. H. Railroad Co., 30 Conn. 231 (1861); Western Maryland Railroad Co. *v.* Franklin Bank, 60 Md. 36 (1882); Moores *v.* Citizens' National Bank, 111 U. S. 156 (1884); Shaw *v.* Port Philip Gold Mining Co., 13 Q. B. D. 103 (1884); Allen *v.* South Boston Railroad Co., 150 Mass. 200 (1889); Hill *v.* Jewett Publishing Co., 154 Mass. 172 (1891). — ED.

BARWICK *v.* ENGLISH JOINT STOCK BANK.

EXCHEQUER CHAMBER. 1867.

[*L. R.* 2 *Ex.* 259.]

THE cause[1] was tried before MARTIN, B., at Westminster, on the 15th of June, 1866; and on the evidence given for the plaintiff, the substance of which is fully stated in the judgment of the Court, the learned Baron ruled that there was no evidence to go to the jury in support of the plaintiff's case, and accordingly directed a nonsuit, but signed a bill of exceptions setting out the evidence.

Brown, Q. C. (*Huddleston*, Q. C., and *Griffits*, with him), for the plaintiff.

Mellish, Q. C. (*Watkin Williams* with him), for the defendants.[2]

Brown, Q. C., in reply.

The judgment of the Court (WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH, and LUSH, JJ.) was delivered by

WILLES, J. This case, in which the court took time to consider their judgment, arose on a bill of exceptions to the ruling of my Brother Martin at the trial that there was no evidence to go to the jury.

It was an action brought for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which the plaintiff alleged to have been committed by the manager of the bank in the course of conducting their business. At the trial, two witnesses were called, first, Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; and that he had done so upon a guarantee given to him by the bank, through their manager, the effect of which probably was, that the drafts of the plaintiff upon Davis were to be paid, subject to the debt of the bank. What were the precise terms of the guarantee did not appear, but it seems that the plaintiff became dissatisfied with it, and refused to supply more oats without getting a more satisfactory one; that he applied to the manager of the bank, and that after some conversation between them, a guarantee was given, which was in this form:

"DEAR SIR, — Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase for, J. Davis and Son not exceeding 1000 quarters of oats for the use of their contract, I will honour the cheque of Messrs. J. Davis and Son in your favour in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payment, except to this bank; and provided, as I explained to you, that they, J. Davis and Son, are able to continue their contracts, and are not made bankrupts.

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[1] The statement of the pleadings has been omitted. — ED.

[2] In the course of this argument, WILLES, J., said: "I should be sorry to have it supposed that Cornfoot *v.* Fowke, 6 M. & W. 358, turned upon anything but a point of pleading." And he referred to Com. Dig., Action upon the Case for Deceit, B. — ED.

(Signed) "DON. M. DEWAR, *Manager*."

The plaintiff stated that in the course of conversation as to the guarantee, the manager told him that whatever time he received the government cheque, the plaintiff should receive the money.

Now, that being the state of things upon the evidence of the plaintiff, it is obvious that there was a case on which the jury might conclude, if they thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably, or might probably, be paid, and that the plaintiff took the guarantee, supposing that it was of some value, and that the cheque would probably, or might probably, be paid. But if the manager at the time, from his knowledge of the accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended that it should not be paid, and kept back from the plaintiff the fact which made the payment of it improbable to the extent of being as a matter of business impossible, the jury might well have thought (and it was a matter within their province to decide upon) that he had been guilty of a fraud upon the plaintiff.

Now, was there evidence that such knowledge was in the mind of the manager? The plaintiff had no knowledge of the state of the accounts, and the manager made no communication to him with respect to it. But the evidence of Davis was given for the purpose of supplying that part of the case; and he stated that, immediately before the guarantee had been given, he went to the manager, and told him it was impossible for him to go on unless he got further supplies, and that the government were buying in against him; to which the manager replied, that Davis must go and try his friends; on which Davis informed the manager that the plaintiff would go no further unless he had a further guarantee. Upon that the manager acted; and Davis added, "I owed the bank above £12000." The result was that oats were supplied by the plaintiff to Davis to the amount of £1227, that Davis carried out his contract with the government, and that the commissariat paid him the sum of £2676, which was paid by him into the bank. He thereupon handed a cheque to the plaintiff, who presented it to the bank, and without further explanation the cheque was refused.

This is the plain state of the facts; and it was contended on behalf of the bank that, inasmuch as the guarantee contains a stipulation that the plaintiff's debt should be paid subsequent to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I speak sparingly, because we desire not to anticipate the judgment which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion, that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the government cheque, by keeping back from the plaintiff the state of Davis's account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of.

If there be fraud in the manager, then arises the question whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my Brothers Martin and Bramwell in Udell *v.* Atherton 7 H. & N. 172; the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business — a question which was settled as early as Lord Holt's time, Hern *v.* Nichols, 1 Salk. 289; but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.[1] That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo.[2] It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws.[3] It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong.[4] In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

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[1] See Laugher *v.* Pointer, 5 B. & C. 547, at p. 554. — REP.

[2] Ewbank *v.* Nutting, 7 C. B. 797. — REP.

[3] Goff *v.* Great Northern Railway Company, 3 E. & E. 672; 30 L. J. (Q. B.) 148, explaining (at 3 E. & E. p. 683) Roe *v.* Birkenhead Railway Company, 7 Ex. 36; and see Barry *v.* Midland Railway Company, Ir. L. Rep. 1 C. L. 130. — REP.

[4] Huzzey *v.* Field, 2 C. M. & R. 432, at p. 440. — REP.

The only other point which was made, and it had at first a somewhat plausible aspect, was this: It is said, if it be established that the bank are answerable for this fraud, it is the fraud of the manager, and ought not to have been described, as here, as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in case for fraud, or whether, under the circumstances, money having been actually procured for and paid into the bank, which ought to have got into the plaintiff's hands, the count for money had and received is not applicable to the case. I do not discuss that question, because in common law pleading no such difficulty as is here suggested is recognized. If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in the case of Raphael *v.* Goodman, 8 A. & E. 565. The sheriff sued upon a bond; plea, that the bond was obtained by the sheriff and others by fraud; proof, that it was obtained by the fraud of the officer; held, the plea was sufficiently proved.

Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, especially considering that the whole case may not have been before them, we think this is a matter proper for their determination, and there ought therefore to be a venire de novo. *Venire de novo.*[1]

HATHAWAY, SURVIVOR, ETC., RESPONDENT, *v.* JOHNSON, APPELLANT.

COURT OF APPEALS OF NEW YORK. 1873.

[55 *N. Y.* 93.]

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, reversing an order of Special Term, which vacates an order of arrest made by a justice at chambers.

This action was brought to recover the purchase-price of a quantity of malt alleged to have been sold by plaintiff's firm to defendant. An order of arrest was granted upon an affidavit stating that the sale of the malt was induced by fraudulent representations on the part of defendant. The papers, on the motion to vacate the order of arrest, disclosed that defendant's business was conducted by one Bidwell, who made the purchase of plaintiff's firm; that defendant had no knowledge of the purchase or of the representations made thereon, until the service of the papers in this action.

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[1] See Mackay *v.* Commercial Bank, L. R. 5 P. C. 394 (1874); Weir *v.* Bell, 3 Ex. D. 238, 243-245 (C. A., 1878), *per* BRAMWELL, L. J.; Houldsworth *v.* City of Glasgow Bank, 5 App. Cas. 317, 339 (H. L., 1880), *per* Lord BLACKBURN. — ED.

George F. Danforth, for the appellant.

J. C. Cochrane, for the respondent.

ANDREWS, J. The single question involved in this appeal is whether, in an action against a principal to enforce a contract for the purchase of property, made by his agent, and to recover the agreed price, the principal can be arrested, on proof that the vendor was induced to enter into the contract and give the credit by means of the fraudulent representations of the agent, where the fraud was not known to or authorized by the principal, and was not ratified by him, unless such ratification is to be inferred from the receipt and use by the principal of the property purchased, before he was informed of the fraud practised by the agent.

This question depends upon the construction to be given to that part of the fourth subdivision of section 179 of the Code, which authorizes an arrest "where the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation upon which the action is brought." The obvious purpose of this provision was to introduce an exception to the general rule prevailing in this State, forbidding arrest and imprisonment for debt, and to permit this remedy in an action upon contract in the single case specified; and the test of the liability to arrest in such an action is the guilt of the defendant in contracting the debt or incurring the obligation sued upon. There must have been a fraudulent purpose in contracting the debt or incurring the liability on the part of the defendant whose arrest is sought. He must have been guilty of a fraud, and this implies personal misconduct, moral and actual, and not merely legal or constructive fraud, merely in respect to the transaction which is the subject of the suit. This construction is strengthened by the consideration that it harmonizes the statute with the general policy and legislation of the State. The act of April 26, 1831, "to abolish imprisonment for debt and to punish fraudulent debtors," abrogated the system under which an innocent debtor, whose only fault might be his inability to pay his debts, could be deprived of his liberty and imprisoned at the instance of the creditor. It was a system of great severity, fruitful of oppression; and its abolition was demanded by public sentiment, influenced by the growth of more just and humane views of the respective rights of creditors and their debtors. But the legislature excluded from the benefit of the act fraudulent debtors, by subjecting them to arrest in an action to recover the debt, and to commitment, "as other prisoners, on criminal process," until they procured their discharge in the manner provided by the act (§ 11). One of the grounds on which an arrest might be made under the act of 1831 was identical with that stated in the provision of the Code under consideration, viz., that the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit was brought. (§ 4, sub. 4.)

Statutes authorizing arrest and imprisonment for debt, although remedial in that they are designed to coerce, by means of the imprisonment, the payment of the creditor, are also regarded as penal, and ought not to be extended by construction so as to embrace cases not clearly within them. (Sturgis *v.* Crowningshield, 4 Wheat. 200; Von Hoffman *v.* The City of Quincy, 4 Wal. 553.) The statute of 1831 and the provisions of the Code authorizing arrests are *in pari materia;* and if the defendant can be arrested under the Code in an action *ex contractu* for the fraud of his agent, of which he was morally guiltless, in an action on the contract, I see no reason why he cannot be arrested and imprisoned, as a "prisoner on criminal process," under the act of 1831, which is still in force.

The order of arrest in this case is sought to be justified on the ground that the fraud of the agent acting within the scope of his authority is, in law, imputed to his principal. The authority of the agent to make the contract for the purchase of the malt is not denied; and the rule is stated by Mr. Justice Story to be (Story Ag., § 134), that where the act of the agent will bind the principal, then his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the *res gestæ.* That the principal is liable for the fraudulent conduct and representations of the agent, made in the course of his dealings for the principal, where the principal has received and retained the fruits of the fraud, is affirmed by the general current of authority. (Hern *v.* Nichols, 1 Salk. 289; Cornfoot *v.* Fowke, 6 M. & W. 358; Murray *v.* Mann, 2 Exch. 537; Bennett *v.* Judson, 21 N. Y. 238.) It is consonant with reason and justice that a principal should not be allowed to profit by the fraud of his agent; and if he adopts the contract made in his behalf, although ignorant of the fraud, he should be held liable to make compensation to the party injured by it. An action for the deceit in such a case was maintained in Bennett *v.* Judson; and Comstock, J., was of opinion that, in point of pleading, the fraud might be charged as that of the defendant. In Udell *v.* Atherton (7 H. & M. 170), there is a very able discussion of the question, whether an action for deceit would lie in such a case against the principal, and the learned judges were equally divided in opinion. But admitting the right of the plaintiff to have brought an action on the case for fraud and deceit against the defendant, it by no means establishes that he was guilty of a fraud in contracting the debt, within the provision authorizing an arrest, in an action on the contract. The plaintiff has abandoned the pursuit of his remedy, by action for the deceit, and has elected to rely on the contract, and the fraud is no part of the cause of action, but is extrinsic to it, and must be established *aliunde* to warrant an arrest, and in this form of action it is personal and not imputed fraud which entitles the plaintiff to the order. The argument that the right to arrest, if the action had been for deceit, is to be taken into view in construing the provision in question is without force, when it is considered that, until the amendment of 1863, no arrest was authorized in an action for fraud or deceit against a resident of the State; and if the plaintiff's construction is sound, then the defendant, before that time, could have been arrested in an action on the contract, although he could not have been in an action for the fraud. In short, the two provisions are not in construction dependent upon or connected with each other. Trover may, in many cases, be maintained against a person innocent of any intentional wrong (Spraights *v.* Hawley, 39 N. Y. 441), and, where trover will lie, an order of arrest in an action for the conversion may be issued.

But if the plaintiff should waive the tort, and bring assumpsit to recover the money received on the sale of the property, he could not arrest the defendant. The change in the form of the action would prevent it. The true construction of the provision of the Code referred to does not, in my judgment, warrant an arrest, under the circumstances of this case.

The order should be reversed, and the order of Special Term affirmed.

All concur except GROVER, J., dissenting, and FOLGER, J., not voting. *Ordered accordingly.*

ARMOUR ET AL., APPELLANTS, *v.* MICHIGAN CENTRAL RAILROAD CO., RESPONDENT.

COMMISSION OF APPEALS OF NEW YORK. 1875.

[65 *N. Y.* 111.]

APPEAL from a judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 3 J. & S., 563.)

This action was brought upon two bills of lading issued by defendant.

The referee found the following facts, in substance: That, on the 7th day of October, 1867, one D. D. Michaels produced and delivered to the defendant's agent, in the city of Chicago, a paper purporting to be a receipt, signed by I. T. Sunderlin, dated the second of the previous July, for 200 tierces prime lard, his brand and manufacture, in store for account and risk of said Michaels, to be held subject to return of said receipt properly indorsed, and payment of storage, usual rate, loss and damage by fire or leakage at owner's risk, marked M. That Michaels delivered to the defendant's agent his order on Sunderlin for 100 tierces of lard, and thereupon the defendant, by its agent, executed and delivered to Michaels a bill of lading, or carrier's receipt, acknowledging the receipt from him of 100 tierces of lard consigned to the plaintiffs, at New York, and to be there delivered to them. The defendant, at the request of Michaels, afterwards, and on the 12th of October, 1867, on the faith and credit of what purported to be Sunderlin's warehouse receipt, having in the mean time, at the request of Michaels, omitted to call on Sunderlin for the 100 tierces, executed and delivered to Michaels another bill of lading, acknowledging the receipt from him of the other 100 tierces of lard, like the previous 100 tierces consigned and to be transported to the plaintiffs, at New York. That the defendant, at the time when these bills of lading were issued, was informed by Michaels that he intended using the same at bank the same day. That Michaels, on the seventh of October, made his draft upon the plaintiffs for $3,600, to which he attached the defendant's bill of lading of that day, and on the twelfth he made another draft upon the plaintiffs for the further sum of $3,600, to which he attached the bill of lading of the latter date, each of which drafts were made payable to the order of and was delivered to the Manufacturers' National Bank of Chicago, by whom they were, with the bills attached, transmitted to New York, and there caused to be presented to the plaintiffs for payment; and that the plaintiffs, on the faith and credit of the respective bills of lading, paid the first draft on the 10th or 11th of October, 1867, and the second, on the fifteenth or sixteenth of the same month. It was soon after, and prior to the twenty-third of the same October, discovered that the receipt purporting to have been signed by Sunderlin for the 200 tierces of lard was a forgery committed by Michaels, and that he had not the property referred to therein in the hands of Sunderlin; of this the defendant had no prior knowledge or information, but, acting in the belief of the genuineness of the receipt, and that a certain 197 tierces of lard in Sunderlin's possession, as warehouseman, branded I. T. Sunderlin, was the property intended to be covered by the receipt, caused them to be seized and placed in its possession, and transported to New York, where they arrived prior to the thirtieth of the same month. On that day, the plaintiffs presented to the defendant's agent in that city the two bills of lading, and requested the delivery to them of the 200 tierces of lard therein mentioned, with which request he refused to comply; and thereupon, on that day, the plaintiffs commenced this action. On the first day of November following, Walbridge, Watkins & Co., having the right of property and possession of the 197 tierces of lard, brought an action of replevin therefor, in the Supreme Court of this State, against the Hudson River Railroad Company, in whose possession the lard then was, and thereby obtained the possession thereof, of which the plaintiffs were notified by the defendant, with a request to appear and defend, and a consent to substitute, instead of its attorney, any attorney they might name. They did not appear in the action, and, by the judgment therein, it was adjudged that the plaintiffs therein had the right to recover the 197 tierces of lard.

As a conclusion of law from these facts, the referee found that by the bills of lading, or carrier's receipts, and the delivery of them to the plaintiffs attached to Michaels' drafts upon them, and the payment by them of those drafts, they acquired all the rights of Michaels; and it being shown that the goods received by the defendant for transportation under its contracts were 197 tierces of lard, to which Walbridge, Watkins & Co. had paramount title, and right of possession, the defendant was legally excused for the non-delivery of the 197 tierces; and that for the value of the remaining three tierces, the plaintiffs were entitled to recover, and ordered judgment against the defendant for $142.30, the balance thereof.

Judgment was entered in accordance with those conclusions.

Further facts appear in the opinion.

Samuel Hand, for the appellants.

Benj. K. Phelps, for the respondent.

Gray, C. The facts in this case (omitting those only which are immaterial) are, in substance, these: The defendant knowing that it had not received from or on account of Michaels any lard whatever, and with knowledge when the respective bills of lading were issued that Michaels intended to use them at bank, issued and delivered them to him; these bills, when thus issued, were attached by Michaels to his drafts upon the plaintiffs for a sum somewhat exceeding $7,000, which, upon presentation to them, they, upon the faith that the defendant had received and would transport to the places specified in the respective bills the lard therein described to be in its possession, paid the sums specified in the respective drafts at the time and in the order in which they were presented; and thus the question comes up, whether the defendant is not estopped from setting up as a defence to this action that its statements, known by its agent, at the time of making them, to be untrue, were in fact false, and that no lard whatever was received by the company for or on account of Michaels? The true answer to this question is not involved in doubt. The well-recognized principle that a party who, by his admissions, has induced a third party to act in a particular manner is not permitted to deny the truth of his admission, if the consequence would be to work an injury to such third party, applies to and governs this case. (2 Redfield on Law of Railways [4th ed.], 167; Dickerson *v.* Seeley, 12 Barb. 99, 102; approved in Ellis *v.* Willard, 9 N. Y. 529, 534.)

It is, however, insisted that the defendant, in issuing these bills of lading, acted in good faith and without any design to commit a fraud upon any one who should make an advance upon the strength of them, and is, therefore, not estopped by the recital contained in them of the receipt of the lard. It cannot, I think, be doubted that the defendant did believe that what purported to be Sunderlin's warehouse receipt was genuine and not a forgery. The difficulty is that the defendant's bill of lading did not recite the receipt by it of Sunderlin's warehouse receipt for the lard, but its own receipt of it, and it may be conceded the defendant really believed the lard would be forthcoming when it should be demanded, and that no injury would result to the plaintiffs. But its false statement that it had received the lard misled them, and hence the defendant must be held to intend what was in fact the legitimate consequences of its own misstatement. And now that it has been the cause of the advances made by the plaintiffs, it is no excuse for not delivering the lard, which it represented to the defendant it had received from Michaels, that it was by the judgment of the Supreme Court of this State prevented from delivering 197 tierces of lard, the property of another, which it never received from Michaels, but seized and would have delivered to the plaintiffs but for the process and subsequent judgment of the court in favor of the rightful owner.

There is some ambiguity produced by a recital in one of the referee's conclusions of law, " that the goods received by the defendant for transportation were 197 tierces of lard," which is solved by the evidence and previous findings of fact, from which it appears that the paper purporting to be Sunderlin's warehouse receipt for 200 tierces of lard was the defendant's only reliance that Michaels had the lard for which the bills of lading were given, and that the receipt purporting to have been given by Sunderlin was a forgery committed by Michaels himself, who had not the property therein referred to; and further on, independent of what is shown as the judgment record in replevin, he found that Walbridge, Watkins & Co., and not Michaels, had not only the right of property in, but the right of possession of, the 197 tierces of lard which the defendant caused to be seized with intent to carry and deliver the same to the plaintiffs instead of the 200 tierces represented by the forged receipt, and which, by the bill of lading, the defendant falsely represented to be in its possession, and of which it was never either actually or constructively possessed.

The judgment of the General and Special Terms should be reversed and new trial ordered.

Dwight, C.[1] The simplest way of arriving at the correct result in this case will be to inquire, in the first place, as to what would have been the rights of the plaintiffs in case the defendant had had the lard in its possession, next to consider the defendant's obligations as having no goods to correspond with the bill of lading, and finally to take into account the effect of the proceedings in replevin.

I. In case the defendant had had in its possession lard to correspond with the bills of lading, the plaintiffs would have had the title to it in trust for Michaels after paying its own lien. It will be observed that the bills ran directly to the plaintiffs. The consignment was made to them. They are not assignees of bills made to Michaels, but the contract to deliver the lard is made by the defendant with them. They were not mere agents of Michaels, but they had an interest to the extent of $7,000 and upward. This fact the defendant knew when the bills were issued, and it could not deny that it contracted to deliver the lard to the plaintiffs in case that it had the property in its possession. The effect of such a bill of lading running to a consignee who has made advances was considered in The Bank of Rochester *v.* Jones, 4 N. Y. 497, 502; Haille *v.* Smith, 1 Bos. & Pull. 563; Allen *v.* Williams, 12 Pick. 297; First National Bank of Toledo *v.* Shaw, 61 N. Y. 283. It was held in these cases, in substance, that where an owner of goods delivers them to a carrier, who issues a bill of lading to a consignee, who advances money on the faith of the bills, the latter becomes owner for his own sake to reimburse himself, and after reimbursement, in trust for the former owner. Haille *v.* Smith is directly in point. In that case, G. & H. Brown, of Liverpool, wishing to draw upon L. Smith & Co., a banking-house in London, to a large amount, agreed, among other securities to be given, to consign goods to a mercantile house consisting of the same partners as the banking-house. The goods were consigned accordingly to the mercantile house. It was held that the consignment to the mercantile house transferred to it the general property in the goods in trust, and that the banking-house and consignors were both concerned as *cestui que trust*, and that the bill of lading operated as an evidence of the change of property. The principle of this case has been twice approved in this court (see the cases above cited), and must now be regarded as settled law. As applied to the facts of the present case, it would result that the plaintiffs would have had the legal title to the lard; that the contract for its delivery was made with them, and that in general they would have been able to vindicate their claim to the property by all the remedies incident to ownership and to a contract for transportation of their property.

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[1] After stating the facts. — Ed

II. It is now necessary to consider how far the fact that the company had no lard affects this question. This inquiry divides itself into two branches. One concerns the power of Street to bind the company by issuing bills of lading when it has no goods to correspond with the bills. The other is to consider the effect of the bills, assuming that the agent had the requisite authority. The defendant insists that Street could not bind it by issuing fictitious or non-representative bills of lading. It claims that his authority was confined to bills for goods actually within its control. It cites, to this effect, Grant *v.* Norway, 10 Com. Bench, 665; Schooner Freeman *v.* Buckingham, 18 How. (U. S.) 182.

Grant *v.* Norway has been subject to much and severe criticism, as being adverse to the general view prevailing in the courts of this State, where confidence has been reposed in an agent and an apparent authority conferred upon him, that the principal must suffer from an actual exercise of authority not exceeding the appearance of that which is granted. When one of two innocent persons must suffer in such a case, that person must bear the loss who reposed the confidence. So far as Grant *v.* Norway stands in the way of this doctrine, it must be deemed to be overruled. (Remarks of Davis, J., in N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 73.) Grant *v.* Norway, however, is not precisely parallel with the present case. In that case the bill of lading was issued to a party who knew that the bill of lading was issued by an agent without authority, and was then transferred to a purchaser acting in good faith. It may, accordingly, be said with plausibility that the representation was not made to the assignee, who simply acquired the title of the fraudulent consignee. It would have resembled the case at bar if the plaintiffs had known of the forgery of Michaels when they took the bills of lading, and had then transferred them to persons paying value and acting in good faith. The case would then have been governed by the rule that an assignee of a thing in action must abide by the case of him of whom he buys. (Remarks of Selden, J., in Griswold *v.* Haven, 25 N. Y. 604-606.)

Street, having power to issue bills direct to consignees for goods actually in the possession of the defendant, and the present bills being in no ways distinguishable in form from those which were usually employed, he must be considered as having the necessary authority as to the plaintiffs acting in good faith.

The only remaining point under this branch of the case is, whether the defendant is not estopped by the statements in the bill of lading from denying that it had sufficient lard secured from Michaels to comply with its terms. The defendant's agent was informed by Michaels that the bills were to be used at bank on the same day. They were issued with the expectation that they would be acted upon by bankers or other capitalists. It cannot complain if the bills accomplished the purpose for which they were designed. The representations in the bills were made to any one who, in the course of business, might think fit to make advances on the faith of them. There is thus present every element necessary to constitute a case of estoppel *in pais*, a representation made with the knowledge that it might be acted upon, and subsequent action upon the faith of it to such an extent, that it would injure the plaintiffs if the representation was not made good. It is now well settled that fraud is not necessary to constitute a case of estoppel. Though the defendant was induced by the fraud or mistake of Michaels to issue these bills, that is immaterial. Its liability depends on the fact that, no matter what its inducements may have been, it has made certain representations upon which the plaintiffs have advanced their money in good faith. If the defendant placed undue confidence in Michaels, it is but the familiar case of imposing the burden upon him who unwisely or unguardedly reposed the confidence. (Brown *v.* Bowen, 30 N. Y. 519; Manufacturers and Traders' Bank *v.* Hazard, id. 226; Shapley *v.* Abbott, 42 id. 443; Rawls *v.* Deshler, 4 Abb. Ct App. 12.) The principle governing the present case was announced in the case of Griswold *v.* Haven, 25 N. Y. 595. It there appeared that the defendants John Wright & Co. issued receipts representing that they had in store, on account of Ford & Son, a quantity of grain

One of the defendants went with one of the firm of Ford & Co. to the plaintiff, and in reply to an inquiry from the plaintiff stated that the grain was in good order and all right. It was held that the plaintiff having made advances on the faith of the statement, the defendants were bound by the act of their agent, and were estopped from denying that they had the grain in store. The difference in facts between this case and the one at bar makes no difference in principle. In the one case the statement was oral, in the other it was written. Both cases have the important and leading element that the agent knew that the statement was to be acted upon.

The fact that a bill of lading is not negotiable, has nothing to do with the question. That point would have been open for discussion if the bills had been issued to Michaels and then assigned to the plaintiffs. As it was, the representations having been made direct to the plaintiffs, their right of action is not derived through Michaels, but rests upon the direct relations between themselves and the defendant. This view is sustained by the case of Moore *v.* The Metropolitan Nat. Bk., 55 N. Y. 41. It is there held that a *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the owner has by assignment conferred the apparent absolute ownership (such purchase being made on the faith of that ownership), obtains a valid title as against the real owner, who is estopped from asserting a title in hostility thereto. This view is also supported by McNeil *v.* Tenth National Bank, 46 N. Y. 325. The court in the Metropolitan Bank Case expressly affirms that a representation in a non-negotiable chose in action is equivalent in all respects, where it is acted upon (in accordance with the usual rules applied in cases of estoppel), to one made in the case of negotiable paper. As this is the latest utterance of the Court of Appeals, overruling Bush *v.* Lathrop, 22 N. Y. 535, so far as that case is inconsistent with it, it must be followed in this court.

If these views are correct the plaintiffs in the present case might have brought an action of trover against the defendant for so many tierces of lard as the bill of lading called for. Griswold *v.* Haven, *supra;* Harding *v.* Carter, Park on Ins. 4 ; 1 Greenl. on Ev., § 208. The same rule is applicable to innocent mistakes which have been acted upon as to fraudulent misrepresentations. Salem Bk. *v.* Gloucester Bk., 17 Mass. 1, 27.

As it must be assumed that the defendants had lard to which the plaintiffs had the title, they could bring any action incident to ownership in case the lard was not delivered. The present action is accordingly well founded.

III. The action of replevin instituted against the Hudson River Railroad Company by Walbridge, Watkins & Co., had no effect upon the plaintiffs' right. There was no evidence that the lard seized in that action was that which the defendant was bound to deliver. It did not have the marks described in the bills of lading, nor was it received by the defendant from Michaels. On the other hand, it was obtained by the defendant from the warehouseman acting for the real owners (Walbridge & Co.) by its own wrongful act. It cannot set up a replevin suit which was caused solely by its unjustifiable intermeddling with the property of another in bar of its duty to deliver lard which it professed to receive from Michaels on behalf of the plaintiffs.

The judgment should be reversed and a new trial ordered.

All concur, except EARL, C., dissenting.

Judgment reversed.[1]

BRITISH MUTUAL BANKING CO. *v.* CHARNWOOD FOREST RAILWAY CO.

COURT OF APPEAL. 1878.

[18 *Q. B. D.* 714.]

APPEAL from an order of the Queen's Bench Division (MANISTY and MATHEW, JJ.) directing judgment to be entered for the plaintiffs.

The action was brought to recover damages for fraudulent misrepresentations alleged to have been made by the defendants through their secretary. At the trial before Lord COLERIDGE, C. J., it appeared that certain customers of the plaintiffs had applied to them for an advance on the security of transfers of debenture stock of the defendant company. The plaintiffs' manager called upon Tremayne, the defendants' secretary, and was informed in effect that the transfers were valid, and that the stock which they purported to transfer existed. The plaintiffs thereupon made the advances. It subsequently appeared that Tremayne, in conjunction with one Maddison, had fraudulently issued certificates for debenture stock in excess of the amount which the company were authorized to issue, and the transfers as to which the plaintiffs inquired related to this over issue. The plaintiffs accordingly lost their security. The defendants did not benefit in any way by the false statements of Tremayne, which were made entirely in the interest of himself and Maddison. There was some question whether Tremayne was still secretary at the time the statements were made, but the jury found that the inquiries were made of him as secretary, and that the defendants held him out as such to answer such inquiries. The jury assessed the damages, and the Chief Justice left either of the parties to move for judgment. A motion was accordingly made on behalf of the plaintiffs before Manisty and Mathew, JJ., who directed judgment to be entered for them.

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[1] *Acc.*: Sioux City & Pacific Railroad Co. *v.* First National Bank, 10 Neb. 556 (1880); Bank of Batavia *v.* N. Y., L. E. & W. Railroad Co., 106 N. Y. 195 (1887); Fifth Avenue Bank *v.* F. S. S. & G. S. F. Railroad Co., 137 N. Y. 231 (1893).

And see Wichita Savings Bank *v.* A., T. & S. F. Railroad Co., 20 Kan. 519 (1878); Brooke *v.* N. Y., L. E. & W. Railroad Co., 108 Pa. 529 (1885).

Compare Manhattan Life Insurance Co. *v.* F. S. S. & G. S. F. Railroad Co., 139 N. Y. 146 (1893); Bank of New York *v.* American Dock & Trust Co., 143 N. Y. 559 (1894). — ED.

The defendants appealed.

Finlay, Q. C., and *H. Sutton*, for the defendants.

W. Graham and *Edward Morten*, for the plaintiffs.

H. Sutton, in reply.

Lord Esher, M. R. In this case an action has been brought by the plaintiffs to recover damages for fraudulent misrepresentation by the defendants, through their secretary, as to the validity of certain debenture stock of the defendant company. The defendants are a corporation, and the alleged misrepresentations were in fact made by a person employed in the capacity of their secretary, and it cannot be doubted that when he made the statements he had a fraudulent mind, and made them knowing them to be false.

I differ from the judgment of the Divisional Court, but I do not think the ground on which my decision is based was present to the minds of the learned judges. The point principally argued in the Divisional Court seems to have been that the defendants could not be liable on account of their being a corporation. It seems to me, however, that there is a defect in the plaintiffs' case irrespective of the question whether the defendants were a corporation or not. The secretary was held out by the defendants as a person to answer such questions as those put to him in the interest of the plaintiffs, and if he had answered them falsely on behalf of the defendants, he being then authorized by them to give answers for them, it may well be that they would be liable. But although what the secretary stated related to matters about which he was authorized to give answers, he did not make the statements for the defendants but for himself. He had a friend whom he desired to assist and could assist by making the false statements, and as he made them in his own interest or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms, that to bind the principal the agent must be acting "for the benefit" of the principal. This, in my opinion, is equivalent to saying that he must be acting "for" the principal, since if there is authority to do the act it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest. The attention of the learned judges seems to have been drawn off from this view of the case by the argument founded on the defendants being a corporation, and I think their judgment must be overruled.

The following judgment was read by

Bowen, L. J. There is, so far as I am aware, no precedent in English law, unless it be Swift *v.* Winterbotham, Law Rep. 8 Q. B. 244, a case that was overruled upon appeal, Swift *v.* Jewsbury, Law Rep. 9 Q. B. 301, for holding that a principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends. The true rule was, as it seems to me, enunciated by the Exchequer Chamber in the judgment of Willes, J., delivered in the case of Barwick *v.* English Joint Stock Bank, Law Rep. 2 Ex. 259. "The general rule," says Willes, J., "is that the master is answerable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit, though no express command or privity of the master be proved." This definition of liability has been constantly referred to in subsequent cases as adequate and satisfactory, and was cited with approval by Lord Selborne in the House of Lords in Houldsworth *v.* City of Glasgow Bank, 5 App. Cas. 317. Mackay *v.* Commercial Bank of New Brunswick, Law Rep. 5 P. C. 394, is consistent with this principle. It is a definition strictly in accordance with the ruling of Martin, B., in Limpus *v.* London General Omnibus Co., 1 H. & C. 526, which was upheld in the Exchequer Chamber (see per Blackburn, J.).

It was argued on behalf of the plaintiffs in the present appeal that the defendant company, although they might not have authorized the fraudulent answer given by the secretary, had nevertheless authorized the secretary to do "that class of acts" of which the fraudulent answer, it was said, was one. This is a misapplication to a wholly different case of an expression which in Barwick *v.* English Joint Stock Bank, Law Rep. 2 Ex. 259, was perfectly appropriate with regard to the circumstances there. In that case the act done, though not expressly authorized, was done for the master's benefit. With respect to acts of that description, it was doubtless correct to say that the agent was placed there to do acts of "that class." Transferred to a case like the present, the expression that the secretary was placed in his office to do acts of "that class" begs the very question at issue, for the defendants' proposition is, on the contrary, that an act done not for the employer's benefit, but for the servant's own private ends, is not an act of the class which the secretary either was or could possibly be authorized to do. It is said that the secretary was clothed ostensibly with a real or apparent authority to make representations as to the genuineness of the debentures in question; but no action of contract lies for a false representation unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so? The action against them, therefore, to be maintainable at all, must be an action of tort founded on deceit and fraud. But how can a company be made liable for a fraudulent answer given by their officer for his own private ends, by which they could not have been bound if they had actually authorized him to make it, and promised to be bound by it? The question resolves itself accordingly into a dilemma. The fraudulent answer must have either been within the scope of the agent's employment or outside it. It could not be within it, for the company had no power to bind themselves to the consequences of any such answer. If it is not within it, on what ground can the company be made responsible for an agent's act done beyond the scope of his employment, and from which they derived no benefit? This shows that the proposition that the secretary in the present case was employed to do that "class of acts" is fallacious, and cannot be maintained. The judgment of the court below is based upon the view that the act done was in fact within the scope of the secretary's employment, and if this proposition cannot be maintained, the judgment must fall with it. How far a statutory corporate body could in any case be made liable in an action for deceit beyond the extent of the benefits they have reaped by the fraud is a matter upon which I desire to express no opinion, for none is necessary to the decision here; but even if the principals in the present case were not a statutory body, with limited powers of contracting and of action, I think there would be danger in departing from the definition of liability laid down by Willes, J., in Barwick *v.* English Joint Stock Bank, and in extending the responsibility of a principal for the frauds committed by a servant or agent beyond the boundaries hitherto recognized by English law. I think, therefore, that this appeal must be allowed with costs.

FRY, L. J. I agree in the view that the appeal must be allowed. It appears to me that the case is one of an action for fraudulent misrepresentation made by a servant, who in making it was acting not in the interest of his employers, but in his own interest. It is plain that the action cannot succeed on any ground of estoppel, for otherwise the defendants would be estopped from denying that the stock was good. No corporate body can be bound by estoppel to do something beyond their powers. The action cannot be supported, therefore, on that ground. Nor can it be supported on the ground of direct authority to make the statements. Neither can it be supported on the ground that the company either benefited by or accepted or adopted any contract induced or produced by the fraudulent misrepresentation. I can see no ground for maintaining the action, and the appeal must be allowed. *Appeal allowed.*

SECTION V.

Crimes.

REX *v.* ALMON.

KING'S BENCH. 1770.

[5 *Burr.* 2686.]

THE defendant having been convicted of publishing a libel (Junius's Letters) in one of the magazines called the "London Museum," which was bought at his shop, and even professed to be "Printed for him;"

His counsel moved, on Tuesday, 19th June, 1770, for a new trial; upon the foot of the evidence being insufficient to prove any criminal intention in Mr. Almon, or even the least knowledge of their being sold at his shop. And they had affidavits to prove, that it was a frequent practice in the trade, for one publisher to put another publisher's name to a pamphlet, as printed for that other, when in fact it was published for himself. That this was the fact in the present case; Mr. Miller being the real publisher of this "Museum," but having advertised it and published it as printed for Mr. Almon, without consulting Mr. Almon, or having his consent or approbation. That, on the contrary, as soon as he saw his name put to it as being printed for him, he immediately sent a note to Mr. Miller, expressing his disapprobation and dissatisfaction. That he himself had no concern whatever in this "London Museum." That he was not at home when they were sent to his shop. That the whole number sent to his shop was three hundred. That about sixty-seven of them had been sold there, by a boy in the shop, but without Mr. Almon's own knowledge, privity, or approbation. That as soon as he discovered it, he stopped the sale, ordered the remainder to be carried up into his garret, and took the first opportunity to return them to Mr. Miller. That it was not proved, that the person who sold them was Mr. Almon's servant, or employed by him; or that Mr. Almon was at all privy to the sale.

On Wednesday 27th June, 1770, it came on again; and

Serjeant *Glynn* argued that the proof against Mr. Almon appeared therefore to be defective: there was nothing to constitute criminality, or induce punishment.

That after the jury had been out about two hours, one of them (Mr. Mackworth) proposed a doubt "Whether the bare proof of the sale in Mr. Almon's shop, without any proof of privity, knowledge, consent, approbation, or *malus animus*, in Mr. Almon himself, was sufficient in law to convict him criminally of publishing a libel."

Mr. Mackworth understood his lordship's answer to this doubt to be this: "That this was conclusive evidence." Otherwise, Mr. Mackworth was convinced in his own mind, that the defendant ought not to be found guilty upon this evidence; nor would he have found him guilty. He certainly gave his verdict under a mistake. If he had apprehended that the jury were at liberty to exercise their own judgment, he would have acquitted the defendant. The serjeant prayed that Mr. Mackworth's affidavit might be read.

Lord MANSFIELD. You know, it can't be read.

Mr. Justice ASTON. A juryman's affidavit with regard to his sentiments in point of law, at the trial, ought not to be admitted; whatever may be the case of his affidavit tending to rectify a mistake in fact.

Lord MANSFIELD, in reporting the evidence, said he had told the jury, that there was evidence of the publication, if they believed the witnesses. And he said, he had directed them (as he always had done, and as he took the law to be) that if they were not satisfied that the blanks were filled up in the information, in the true sense and meaning of the writer, they ought to acquit the defendant; and that the epithets used in the information were inferences of law, drawn from the paper itself, and not facts to be proved.

The COURT were of opinion, that none of the matters urged on behalf of the defendant, nor all of them added together, were reasons for granting a new trial, whatever weight they might have in extenuation of his offence, and in consequence lessening his punishment. For they were exceedingly clear and unanimous in opinion, that this pamphlet being bought in the shop of a common known bookseller and publisher, importing by its title-page to be printed for him, is a sufficient *primâ facie* evidence of its being published by him: not indeed conclusive, because he might have contradicted it, if the facts would have borne it, by contrary evidence. But as he did not offer any evidence to repel it, it must (if believed to be true) stand good till answered, and be considered as conclusive, till contradicted.

Lord MANSFIELD said and repeated, that Mr. Mackworth had understood him perfectly right; and he was very glad to find that there was no doubt of what he had said. The substance of it was, that in point of law, the buying the pamphlet in the public open shop of a known professed bookseller and publisher of pamphlets, of a person acting in the shop, *primâ facie* is evidence of a publication by the master himself; but that it is liable to be contradicted, where the fact will bear it, by contrary evidence tending to exculpate the master, and to show that he was not privy nor assenting to it nor encouraging it. That this being *primâ facie* evidence of a publication by the master himself, it stands good till answered by him; and if not answered at all, it thereby becomes conclusive so far as to be sufficient to convict him. That proof of a public exposing to sale and selling, at his shop by his servant, was *primâ facie* sufficient; and must stand till contradicted or explained or exculpated by some other evidence; and if not contradicted, explained or exculpated, would be in point of evidence sufficient or tantamount to conclusive. Mr. Mackworth's doubt seemed to be

"Whether the evidence was sufficient to convict the defendant, in case he believed it to be true." And in this sense I answered it. *Primâ facie,* 't is good; and remains so, till answered. If it is believed, and remains unanswered, it becomes conclusive. If it be sufficient in point of law, and the juryman believes it, he is bound in conscience to give his verdict according to it.

In practice, in experience, in history, in the memory of all persons living, this is (I believe) the first time that it was ever doubted "That this is good evidence against a bookseller or publisher of pamphlets." The constant practice is, to read the libel, as soon as ever it has been proved to be bought at the defendant's shop. This practice shows that it is considered as already proved upon the defendant: for it could not be read against him, before it had been proved upon him.

If I am mistaken, I am entirely open to alter my opinion, upon being convinced that it is a wrong one: but, at present, I take this point to be as much established, as that an eldest son is (in general) heir to his father. And being evidence *primâ facie*, it stands (if believed) till contrary proof is brought to repel it.

Mr. Justice ASTON laid down the same maxim as being fully and clearly established, "That this *primâ facie* evidence (if believed) is binding till contrary evidence be produced." Being bought in a bookseller's shop, of a person acting in it as his servant, is such *primâ facie* evidence of its being published by the bookseller himself: he has the profits of the shop, and is answerable for the consequences. And here is a corroborating circumstance; namely, that it professes to be printed for him. It is as strong a case as could be put. The sale in his shop is sufficiently proved, and he is answerable for what is done in his shop. And here is no sort of proof produced in contradiction or exculpation. This *primâ facie* evidence, not answered, is sufficient to ground a verdict upon; and there appears no reason for granting a new trial. If he had a sufficient excuse, he might have shown and proved it. But he has not attempted to prove exculpation or excuse; therefore the evidence of his publishing what was thus bought in his shop must stand till the contrary appears. There may indeed be circumstances of extenuation, or even of exculpation; and if it were a surprise upon him, the court would have regard to such circumstances, as far as they merited their regard; but here was no kind of proof, of any such sort.

He cited Benjamin Harris's case, in "State Trials," V. 2. pa. 1037. Rex *v.* Strahan, H. 3 G. 1, and Rex *v.* Eliz. Nutt, H. 2 G. 2. Fitz-Gibbons, 47.

Mr. Justice WILLES was also of opinion that there was no foundation for the motion for a new trial; and that, upon all the circumstances of this case, Mr. Almon was answerable as publisher of the libel. He is a common known bookseller and publisher; and it imports, upon the face of it, to be printed for him; and it was bought in his shop. This is sufficient *primâ facie* evidence of his privity, and no contrary evidence was produced by him. It was liable to be refuted or explained; but as it never was, nor any excuse shown, it stands good to convict him.

Mr. Justice ASHHURST entirely concurred with his lordship and the rest of his brethren, in the doctrine they had laid down, and in holding that there was not any foundation for granting a new trial; and he particularly expressed his approbation of Lord MANSFIELD's answer to Mr. Mackworth, the juryman.

The COURT, therefore, unanimously discharged the rule to show cause why there should not be a new trial.

REX *v.* MEDLEY AND OTHERS.

NISI PRIUS. 1834.

[6 *C. & P.* 292.]

INDICTMENT against the chairman, deputy-chairman, and others of the directors of the Equitable Gas Company, and several persons employed by them in the carrying on of the works, for a nuisance. The first count stated in substance, that, from time whereof the memory of man runneth not to the contrary, there had been and still was a certain ancient river called the Thames, &c., furnishing and affording wholesome water for the drink, &c. of the inhabitants near it, and producing an abundant supply of fish for their food, and also furnishing useful labor and employment to very many fishermen; and that the defendants, well knowing the premises, on the 10th of October and at other times, on certain premises occupied by some of them, did from certain substances produce great quantities of a certain fluid and vapor called gas, and of coal tar and coke, and unlawfully and injuriously conveyed and caused to be conveyed, by divers pipes, &c., great quantities of filthy, noxious, unwholesome, and deleterious liquids, matters, scum, and refuse, resulting from the making of the said gas, &c., from the aforesaid premises into the said River Thames, whereby the waters became charged and impregnated with the said liquid, &c., and became corrupted and insalubrious, and unfit for the use of his Majesty's subjects; and the fish in the river were greatly destroyed and diminished in number, and his Majesty's subjects were deprived of the use of them for food, and very many industrious people, who supported themselves and their families by catching and selling fish, were deprived of their employment, and reduced to great poverty and distress; to the common nuisance and grievous injury of his Majesty's subjects, to the evil example &c., and against the peace &c.

The second count was similar, except that it omitted the injury to the fish and the fishermen, and confined the allegation of injury to the corrupting of the water, and rendering it unfit for drink, &c. The third count was for destroying and diminishing the number of fish, and depriving the King's subjects of them as an article of food. The fourth count was for conveying, and causing and suffering to be drained and conveyed, great quantities of noisome and offensive liquid matter, &c., produced from the making of gas, from certain premises into the stream and water of the Thames, to the great damage and common nuisance of all the King's subjects, &c. The fifth count was similar to the first, except that it omitted the words "coal tar and coke," and also the allegation that the premises were used and occupied by some of the defendants. The sixth count was similar to the second, with the omissions in the fifth. The seventh count was similar to the third, with the same omissions as the fifth and sixth. The eighth count omitted the introductory allegations, and charged the defendants with having conveyed, and caused and procured to oe conveyed, by pipes, &c., certain noxious liquids, produced by the making of gas, into the river, &c. The ninth count also omitted the introductory allegations, and charged the defendants with having caused, procured, permitted, and suffered great quantities of filthy and deleterious liquids, &c. to run and flow into the river, &c.

The defendants pleaded not guilty.[1] . . .

From the evidence of the secretary and some of the persons who had been in the employ of the company, who were called to fix the several defendants, it appeared that the company was established in 1830, and began to supply gas in 1831; that the defendant Medley was chairman; the defendant Treherne, deputy chairman; the defendant Leadbeter, the superintendent; the defendant Hines, the gas engineer; and the defendants Bell and Simmons, clerks in the establishment; — that an endeavor was made to consume the refuse gas by evaporation, which failing, the plan complained of was adopted. The secretary stated on his cross-examination that he believed the directors had not the slightest idea of the new mode adopted, but left it all to the management of Leadbeter, who directed Hines the engineer, who gave orders to the rest of the workmen. He also stated, that, from the improved state of the works, the acts complained of were not likely to occur again. A prospectus was put in, in which the directors referred to the great experience of Mr. Leadbeter as a pledge for the proper management of the works. . . .

Campbell, S. G. for the prosecution.

Sir *J. Scarlett*, for the defendants.

DENMAN, C. J., in summing up, said: This is an indictment which charges the defendants with conveying by certain pipes into the river a certain deleterious ingredient, whereby the waters were corrupted and rendered unfit for human food, and, also, whereby the fish were diminished in number, and the fishermen thrown out of employ. With respect to the fishermen being thrown out of employ, I ought to lose no time in informing you, that will not of itself be ground for an indictment, as, if it were sufficient, every successful speculation in trade might be the subject of a prosecution. The question of what is a nuisance is, as is evident, a question for the jury in each particular case. The words of the indictment convey the law upon the subject as well as any person sitting here can do. The question will be, whether there has been a noxious and deleterious ingredient conveyed into the river, whereby the water has been corrupted and rendered unfit for use; and if there has been, then whether, in the concluding words of the indictment, it was to the common nuisance of the King's subjects. If you think that this has been done, and that it was conveyed from the premises of the defendants, then you will find them guilty. The diminution of the number of fish took place before this establishment, and there were also other causes contributing to it. The second question you will have to consider will be, which of the defendants are guilty of the nuisance. As to Hines, if you are satisfied that a nuisance has been committed, no doubt you must find him guilty. It is said that the directors were ignorant of what had been done. In my judgment that makes no difference; provided you think that they gave authority to Leadbeter to conduct the works, they will be answerable. It seems to me both common sense and law, that, if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants. It is quite clear, that in great rivers of this sort there must be many inconveniences, arising from a variety of causes; and the question, therefore, will be, whether there has been produced by the special acts of this company that which you consider to amount to a nuisance. With respect to copper-bottomed vessels, it seems to me that a great number of trifling objects may produce a deleterious effect, though the individual instances may not be the subject of indictment. In the present case, you will say whether these particular individuals have done an act to the common nuisance of the King's subjects.

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[1] Facts not bearing on Agency are omitted. — ED.

Verdict: — Guilty, against the chairman, deputy chairman, superintendent, and engineer; and not guilty as to the other defendants.

Campbell, S. G., *Law*, Recorder, *Mirehouse*, C. S., *Follett* and *Bullock*, for the prosecution.

Sir *J. Scarlett*, *Adams*, Serjt., and *Kelly*, for the defendants.

A motion for judgment on the parties convicted was made in the course of Trinity Term,[1] before Lord DENMAN, C. J., LITTLEDALE, TAUNTON, and WILLIAMS, JJ.

Affidavits were read from the defendants, Medley and Treherne, in which they stated that no complaints had been made to them at any time respecting the management of the works, nor were they at all aware of the nuisance complained of until the indictment was preferred; and all four defendants swore that the nuisance had been wholly abated by the establishment of an adequate system of evaporation.

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[1] The personal attendance of the defendants was dispensed with by consent. — REP.

Sir *J. Scarlett*, *Adams*, Serjt., and *Kelly*, were heard in mitigation; and *Campbell*, A. G., and *Bullock*, in aggravation of punishment.

Littledale, J., in giving judgment, said: The Court have to pronounce judgment in this case of the King against William Medley, Edmund Treherne, Richard Leadbeter, and Edward Hines, for a nuisance; which is stated to have been committed by conveying very large quantities of noisome liquids, arising from the manufacture of gas, into the river Thames, whereby the water was rendered insalubrious and the fish destroyed. It has been proved, that the water was not only rendered improper for domestic purposes, but that a great quantity of fish was actually destroyed by being poisoned. Now, we think, under all the circumstances, that this is not a matter to be passed over merely by the infliction of a nominal fine. At the same time, as no complaint has been made since this indictment was preferred, we do not think it necessary to visit the offence of these defendants with severe punishment. Under all the circumstances of the case, the Court doth adjudge that the defendants, William Medley and Edmund Treherne, the one being the chairman and the other the deputy-chairman of this company, which is called "The Equitable Gas Company," do pay a fine of £25 each to the King; and that the other defendants, Richard Leadbeter and Edward Hines, the one the general superintendent of these gas-works, and the other the engineer, having also some part of the direction of the works confided to him, do each of them pay a fine of £10.[1]

COMMONWEALTH *v.* NICHOLS.

Supreme Judicial Court of Massachusetts. 1845.

[10 *Met.* 259.]

At the trial of the defendant, in the Court of Common Pleas, before Cushing, J., upon an indictment on Rev. Sts. c. 47, § 2, for selling spirituous liquor without license, a witness testified that he called at a grocery shop in Lowell, kept by the defendant; that the defendant was not present, but that he found a man there who sold him a glass of spirituous liquor, to be used in the shop; but that he did not know whether the man was in the defendant's employ or not. Another witness testified that he knew the shop kept by the defendant, and that the defendant had a clerk in his employ; that he (the witness) once went to said shop, to purchase groceries, when the clerk alone was there, and that, after he had made his purchases, he went to a cask, drew a glass of liquor, and drank it, but did not pay for it, and was not charged for it, to his knowledge. On cross-examination, this witness said he had heard the defendant expressly forbid his clerk to sell any spirituous liquor in a less quantity than twenty-eight gallons.

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[1] *Acc.*: Regina *v.* Stephens, L. R. 1 Q. B. 702 (1866), s. c. Beale's Cas. Cr. Law, 845. Compare Chisholm *v.* Doulton, 22 Ch. D. 736, 740 (1889). See also The King *v.* Dixon, 3 M. & S. 11 (1814); and Commonwealth *v.* Kelley, 140 Mass. 441 (1886) —Ed.

The defendant's counsel requested the judge to instruct the jury, that if they doubted, upon the whole evidence, whether these sales were made by the authority of the defendant, or by his consent, they must acquit him. But the judge declined so to do, and instructed the jury, that if they were satisfied, beyond a reasonable doubt, that the sales were made by the defendant, or any person in his employ, and in his shop, they would be warranted in finding him guilty. The jury found the defendant guilty, and he alleged exceptions to the instructions.

B. F. Butler, for the defendant.

Mellen, for the Commonwealth.

DEWEY, J. The question here raised as to the liability of the principal to be punished criminally for the acts of his agent or servant, in which he does not directly participate personally, is certainly not free from difficulty. As to civil liabilities, a broader and more general principle of responsibility applies, and the master or principal may be held to answer in damages for default and misdoings with which he had no other connection than that which arises from the fact that the injury was occasioned by one employed in his service. As a general rule, something beyond this is necessary to charge the master criminally for acts done by the servant. There must be such a direct participation in the act, or such assent and concurrence therein, as would involve him morally in the guilt of the action. Hence the cases are comparatively rare, and may be considered as exceptions to the general rule, where by legal rules a party is charged criminally for acts of his servant done without his knowledge and assent. The case of a bookseller, or publisher of a newspaper, is to some extent one creating such liability; to what precise extent is, perhaps, yet an unsettled question. Rex *v.* Almon, 5 Burr. 2686, a leading case on that subject, only carried the doctrine so far as to hold that such relation to the act of sale by a servant was *prima facie* evidence to establish the liability of the party, but was not conclusive and might be controlled. It was said by Lord Mansfield that he might avoid the effect of it by showing "that he was not privy nor assenting to it, nor encouraging it." So also it is said that the defendant, in such cases, may rebut the presumption by showing that the libel was sold contrary to his orders, or under circumstances negativing all privity on his part. 2 Stark. on Slander, (2d ed.) 34.

The general rule, however, has been stated, I think, somewhat more broadly as to the liability of booksellers and publishers, respecting all publications issued from their establishments in the regular course of business; and they have been held answerable criminally in such cases, although the particular act of sale or publication was done without their knowledge. 1 Hawk. c. 73, § 10; Rex *v.* Walter, 3 Esp. R. 21. In the recent case of Rex *v.* Gutch & others, 1 Mood. & Malk. 437, where it appeared that Gutch was residing at a distance, was in ill health, and not interfering with the conducting of the paper, the rule is thus stated: "A person who derives profit from, and who furnishes means for carrying on the concern, and intrusts the conduct of the publication to one whom he selects, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the act of publication." But in that case, Lord Tenterden, in delivering the opinion of the court, says, "I do not mean to say, that some possible case may not occur, in which he would be exempt; but generally speaking, he is answerable."

Another class of cases, where the liability of the master for the criminal acts of the servant has been recognized, has arisen under revenue laws and police regulations. In Attorney General *v.* Siddon, 1 Crompt. & Jerv. 220, and 1 Tyrw. 41 (a case of concealing smuggled goods), it was held that a trader is liable to a penalty for the illegal act of a servant, done in the conduct of his business, with a view to protect the smuggled goods, though the master be absent at the time the act is done. It seems here again to have been held only *prima facie* evidence, and that the master might have introduced evidence for the purpose of rebutting such *prima facie* case.

In Attorney-General *v.* Riddle, 2 Crompt. & Jerv. 493, and 2 Tyrw. 523, which was an information under St. 1 Geo. 4, c. 58, prohibiting the delivery of paper not tied up and labelled, and requiring, before it is removed from the place of manufacture, that it be enclosed in a labelled wrapper, the evidence was, that the wife of the defendant, having authority from him to do certain acts in his trade of a paper manufacturer, pledged paper which had no wrapper or label on it, the court held that the authority of the wife was a question for the jury, and that it ought to have been left to the jury to decide whether or not the acts of the wife, under the circumstances stated, were done by the authority of the husband.

It seems to us that the case of a sale of liquors prohibited by law, at the shop or establishment of the principal, by an agent or servant usually employed in conducting his business, is one of that class in which the master may properly be charged criminally for the act of the servant. But in looking at the question presented by the bill of exceptions in the present cases, and considering what should be stated as the rule as to the responsibility of the principal or master in such cases, the court have come to the opinion that the law was stated too strongly, upon that point, against the defendant, inasmuch as the defendant, under the instructions given, might have been found guilty of the charge in the indictment, if a sale had been made in his shop by any person in his employment, without any reference to the circumstances under which the sale was made, and although against the will and in contravention of the orders of the defendant.

We think that a sale by the servant, in the shop of the master, is only *prima facie* evidence of such sale by the master as would subject him to the penalty for violating the statute forbidding the sale of spirituous liquors without license; that the relation of these parties, the fact that the defendant was in possession of the shop and was the owner of the liquor, and that the sale was made by his servant, furnish strong evidence to authorize and require the jury to find the defendant guilty. But we cannot say that no possible case can arise in which the inference from all these facts may not be rebutted by other proof. Unexplained, they would be sufficient to convict the party. So too it should be understood that merely colorable dissent, or a prohibition not to sell, however publicly or frequently repeated, if not made *bona fide*, will not avail. But if a sale of liquor is made by the servant without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved, or countenanced by him, and this is clearly shown by the master, he ought to be acquitted.

New trial granted.[1]

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[1] *Acc.:* Barnes *v.* The State, 19 Conn. 398, 400–401, 405–407 (1849); The State *v.* Smith, 10 R. I. 258 (1872); Anderson *v.* The State, 22 Ohio St. 305 (1872); Commonwealth *v.* Stevens, 153 Mass. 421 (1891); The State *v.* McCance, 110 Mo. 398 (1892). Compare George *v.* Gobey, 128 Mass. 289 (1880).

"It would require a clear expression of the will of the Legislature to justify a construction of a penal statute which would expose an innocent man to a disgraceful punishment for an act of which he had no knowledge, which he did not in any way take part in or authorize, but which he had forbidden." *Per* MORTON, C. J., in Commonwealth *v.* Wachendorf, 141 Mass. 270 (1886).

"It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge, — but as a general rule there must be something of that kind which is designated by the expression *mens rea.* Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master. A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on the servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods knowing them to have been stolen. And this principle of the common law applies also to statutory offences with this difference, that it is in the power of the Legislature, if it so pleases, to enact, and in some cases it has enacted, that a man may be convicted and punished for an offence although there was no blameworthy condition of mind about him; but, inasmuch as to do so is contrary to the general principle of the law, it lies on those who assert that the Legislature has so enacted, to make it out convincingly by the language of the statute; for we ought not lightly to presume that the Legislature intended that A. should be punished for the fault of B." *Per* CAVE, J., in Chisholm *v.* Doulton, 22 Ch. D. 736, 741 (1889). — ED.

COMMONWEALTH *v.* MORGAN ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1871.

[107 *Mass.* 199.]

INDICTMENT, in Suffolk, against Albert Morgan and James N. Smart, alleging that they "did unlawfully and maliciously compose, write, print, and publish, and cause to be composed, written, printed, and published in a certain newspaper, printed and published at Boston in said county of Suffolk by said Morgan and Smart, to wit, the Saturday Evening Express," two libels against Chauncey C. Dean, the first at Boston on September 11, 1870, and the second at Boston on September 18, 1870. The indictment set forth the libels, which charged "State Cop. Dean" with having acted, while a soldier in the army, in a manner to indicate cowardice, and with having been drunk while on duty as a deputy of the constable of the Commonwealth. The district attorney entered a *nolle prosequi* as to Smart.[1] . . .

The defendant offered evidence tending to show that he never saw the libel of September 18, or was aware of its publication, until it was pointed out to him by a third person, and that an apology for and retraction of the statements therein contained was subsequently published in the Saturday Evening Express; but the judge excluded the evidence as immaterial.

The defendant was called by his counsel as a witness, for the purpose of showing that he had never seen the libels until they were pointed out to him, and was asked on cross-examination whether he was not the publisher of the Saturday Evening Express. He objected to answering, on the ground that his answer might criminate him; but the judge overruled the objection, and he answered that he was the sole publisher, and that the paper was not published by himself and Smart. . . .

Dean testified that he bought copies of the Saturday Evening Express containing the libels at newspaper-stands in Boston; and these copies were put in evidence. One of them was dated on the first page, Saturday, September 10, and the other Saturday, September 17; but on the third page of each were two columns headed "Sunday Morning, September 11," and "Sunday Morning, September 18," respectively, and it was in these two columns that the libels were printed.

The defendant requested a ruling that this evidence as to publication would not support the indictment; but the judge declined so to rule, and ruled "that it was not necessary to prove the day when published, provided the publication was within the statute of limitations, and the proof that the papers were purchased at the time testified to by Dean was sufficient evidence."

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[1] The statement and the opinion have been abbreviated by omitting matters not pertaining to Agency. — ED.

The jury returned a verdict of "Guilty as to publishing, but not guilty as to the rest;" and the clerk affirmed and recorded the verdict in the following form: "Guilty of publishing as alleged in the indictment, and not guilty as to the residue." After verdict the defendant moved in arrest of judgment, on the ground "that he had not been convicted of any offence at law," but the motion was overruled; and he alleged exceptions.

J. W. Mahan, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

COLT, J.[1] 4. The defendant then offered to prove that he had never seen the alleged libel, and was not aware of its publication till it was pointed out to him by a third party; and that an apology and retraction was subsequently published in the same newspaper.

When a libel is sold in a bookseller's shop, by a servant of the bookseller, in the ordinary course of his employment; or is published in a newspaper; the fact alone is sufficient evidence to charge the bookseller, or the proprietor of the newspaper, with the guilt of its publication. This evidence, by the earlier English decisions, was held not to be conclusive, but the defendant was permitted to show, in exculpation, that he was not privy, nor assenting to, nor encouraging, the publication. See 1 Lead. Crim. Cas. 145; notes to Rex *v.* Almon, 5 Burr. 2686. Afterwards, such evidence was held conclusive, upon the ground that it was necessary to prevent the escape of the real offender behind an irresponsible party. Rex *v.* Gutch, Mood. & Malk. 433; Rex *v.* Walter, 3 Esp. 21. In both these cases, the defendants offered to show, that they were perfectly innocent of any share in the criminal publication, and that, although proprietors of the papers, they were living at a distance from London, the place of publication, taking no share in the actual publication, and in one case confined by illness when the paper complained of appeared. It was ruled by Lord Kenyon and Lord Tenterden to be no defence. But now, by a recent English statute, a defendant is permitted to prove that such publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution on his part. St. 6 & 7 Vict. c. 96.

The rule thus made positive law is in strict accordance with those just principles which ought to limit criminal liability for the acts of another, and which have been recognized in the decisions of this court. Criminal responsibility on the part of the principal, for the act of his agent or servant in the course of his employment, implies some degree of moral guilt or delinquency, manifested either by direct participation in or assent to the act, or by want of proper care and oversight, or other negligence in reference to the business which he has thus entrusted to another. The rule of civil liability is broader, and the principal must respond in damages for the default or tortious act of the agent or servant in his employment, although he had no knowledge of it, or had actually forbidden it in advance and exercised due care to prevent it.

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[1] See *ante*, p 439, n. (1). — ED.

In Commonwealth *v.* Nichols, 10 Met. 259, it was held that a shopkeeper is criminally liable for an unlawful sale of spirituous liquor in his shop, made with his assent by a servant or agent employed in his business. But such sale is only *prima facie* evidence of assent. And it was said that "if a sale of liquor is made by the servant without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved, or countenanced by him, and this is clearly shown by the master, he ought to be acquitted." It is to be remarked with reference to this case, that the question whether the sale was really against the defendant's will is for the jury upon all the evidence, and that the facts that the profits of the business were received by the defendant, and that there was an absence of proper precautions to prevent the illegal traffic, would justify an inference of his approval.

In The King *v.* Dixon, 3 M. & S. 11, the defendant was convicted of selling unwholesome bread, upon proof that his foreman had by mistake put too much alum in it. There was no evidence that the master knew of the quantity used in this instance. But Bayley, J., said, "If a person employed a servant to use alum, or any other ingredient, the unrestricted use of which was noxious, and did not restrain him in the use of it, such person would be answerable if the servant used it to excess, because he did not apply the proper precaution against its misuse."

It is the duty of the proprietor of a public paper, which may be used for the publication of improper communications, to use reasonable caution in the conduct of his business, that no libels be published. He is civilly responsible for the wrong, to the extent indicated; and he is criminally liable, unless the unlawful publication was made under such circumstances as to negative any presumption of privity, or connivance, or want of ordinary precaution on his part to prevent it. 3 Greenl. Ev. §§ 170, 178.

We are of opinion that the offer of the defendant did not go far enough, in view of the law thus stated, to rebut the presumption of guilt arising from the publication of this libel. The facts offered may be true, and yet entirely consistent with the fact that the conduct of the newspaper was under his actual direction and charge, at a time when he was neither absent from home nor confined by sickness, and when his want of knowledge would necessarily imply criminal neglect to exercise proper care and supervision over the subordinates in his employ. It is consistent also with such information in this instance, in regard to the proposed libellous attack, as should have put him on inquiry; and with the fact that the general management of the paper was of such a character as to justify the inference that the defendant approved of or connived at publications of this description, and had given his general assent to them. Under such circumstances, the defendant ought not to be permitted to escape on the plea that he had not seen the particular article and did not know of its publication.

As to the evidence offered of a subsequent apology and retraction, the answer is that it is only a matter in mitigation of sentence. The crime is not purged by it. . . . *Exceptions overruled.*

THE PEOPLE *v.* ROBY.

SUPREME COURT OF MICHIGAN. 1884.

[52 *Mich.* 577.]

COMPLAINT for keeping saloon open on Sunday. Conviction affirmed.

Jacob J. Van Riper, Attorney-General, for the People.

Jacob V. Rogers, for respondent appellant.

COOLEY, C. J. The respondent, who is keeper of a hotel in the village of Plainwell, in which there is a bar for the sale of spirituous and malt liquors, was prosecuted and convicted for not keeping his bar closed on Sunday, May 6, 1883. The evidence was that on the morning of that day the clerk of the hotel was in the bar-room and had a servant with him scrubbing it out when a person came in from the street. He appeared to be known to the clerk, who told him he did not want him there Sundays. The man said he wanted some whisky. The clerk told him he must get his whisky Saturday night. After some more words between them the clerk told him if he was going to get the whisky to get it and get out as soon as he could. He got the whisky, handed pay for it to the servant, and went off. The respondent was not at the time present. The clerk testifies that he was somewhere about the house, but he thought he was not up yet; the servant says he was about there shortly afterwards. There was no evidence in the case to show that respondent assented to the opening of the bar on that day, or expected or desired that it should be opened; neither was there any evidence to the contrary. He was not a witness on his own behalf.

The case comes to this court on writ of error, and the only question of importance is whether there was any evidence to be submitted to the jury.

The statute under which the conviction was had provides that "all saloons, restaurants, bars, in taverns or elsewhere, and all other places where any of the liquors," etc. "may be sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday," etc. How. St. § 2274; Public Acts, 1881, p. 350.

It will be observed that the requirement that the saloons and other places mentioned shall be closed is positive. The next section of the statute provides that any person who shall violate this, among other provisions, shall be deemed guilty of a misdemeanor, and shall be punished as therein prescribed. In terms, then, the penalties of the statute are denounced against the person whose saloon or other place for the sale of intoxicating drinks is not kept closed, and no other fact is necessary to complete the offence.

It is contended, nevertheless, that to constitute an offence under the section referred to, there must be some evidence tending to show an intent on the part of the respondent to violate it; and People *v.* Parks, 49 Mich. 333, which was a prosecution under another section of the same statute, is cited as authority. It should be said of that case that the facts are not fully given in the report, and that there was positive evidence in the case to negative the intent in the respondent that the criminal act should be committed. But the case is plainly distinguishable from this. The section under which Parks was prosecuted makes not only the proprietor, but his clerks, agents, etc., individually liable for the conduct prohibited, and imposes upon them severally the duty to abstain from it. The section under which Roby is prosecuted makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon, etc., closed.

I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. Thus, in Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating, Commonwealth *v.* Boynton, 2 Allen, 160; and of the offence of selling adulterated milk, though he was ignorant of its being adulterated. Commonwealth *v.* Farren, 9 Allen, 489; Commonwealth *v.* Holbrook, 10 Allen, 200; Commonwealth *v.* Waite, 11 Allen, 264; Commonwealth *v.* Smith, 103 Mass. 444. See State *v.* Smith, 10 R. I. 258. In Missouri a magistrate may be liable to the penalty for performing the marriage ceremony for minors without consent of parents or guardians, though he may suppose them to be of the proper age. Beckham *v.* Nacke, 56 Mo. 546. Where the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age. Commonwealth *v.* Raymond, 97 Mass. 567. See The King *v.* Dixon, 3 M. & S. 11. In State *v.* Steamboat Co., 13 Md. 181, a common carrier was held liable to a statutory penalty for transporting a slave on its steamboat, though the persons in charge of its business had no knowledge of the fact. A case determined on the same principle is Queen *v.* Bishop, 5 Q. B. Div. 259. If one's business is the sale of liquors, a sale made by his agent in violation of law is *prima facie* by his authority, Commonwealth *v.* Nichols, 10 Met. 259; and in Illinois the principal is held liable, though the sale by his agent was in violation of instructions. Noecker *v.* People, 91 Ill. 494. In Connecticut it has been held no defence in a prosecution for selling intoxicating liquor to a common drunkard that the seller did not know him to be such. Barnes *v.* State, 19 Conn. 398. It was held in Faulks *v.* People, 39 Mich. 200, under a former statute, that one should not be convicted of the offence of selling liquors to a minor who had reason to believe and did believe he was of age; but I doubt if we ought so to hold under the statute of 1881, the purpose of which very plainly is, as I think, to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril. There are many cases in which it has been held under similar statutes that it was no defence that the seller did not know or suppose the purchaser to be a minor; State *v.* Hartfiel, 24 Wis. 60; McCutcheon *v.* People, 69 Ill. 601; Farmer *v.* People, 77 Ill. 322; Ulrich *v.* Commonwealth, 6 Bush, 400; State *v.* Cain, 9 W. Va. 559; Commonwealth *v.* Emmons, 98 Mass. 6; Redmond *v.* State, 36 Ark. 58; and in Commonwealth *v.* Finnegan, 124 Mass. 324, the seller was held liable, though the minor had deceived him by falsely pretending he was sent for the liquor by another person. So a person has been held liable to a penalty for keeping naphtha for sale under an assumed name, without guilty knowledge; the statute not making such knowledge an ingredient of the offence. Commonwealth *v.* Wentworth, 118 Mass. 441. Other cases might be cited, and there is nothing anomalous in these. A person may be criminally liable for adultery with a woman he did not know to be married, Fox *v.* State, 3 Tex. App. 329; or for the carnal knowledge of a female under ten years of age though he believed her to be older. Queen *v.* Prince, L. R. 2 Cr. Cas. 154; State *v.* Newton, 44 Ia. 45. And other similar cases might be instanced.

If intent were necessary to be found I should be of opinion there was enough in the case to warrant its submission to the jury. The bar was opened on Sunday by respondent's servants and on his business while he was about the premises. The purpose for which it was opened was immaterial; the offence was committed by opening it for cleaning as much as it would have been by opening it for the sale of liquors. People *v.* Waldvogel, 49 Mich. 337. But the statute requires the proprietor at his peril to keep the bar closed. The purpose in doing so is that persons shall not be there within the reach of temptation. This respondent did not keep his bar closed, and he has therefore disobeyed the law. And he has not only disobeyed the law, but the evil which the law intends to guard against has resulted; that is to say, there has been, either with or without his assent, — it is immaterial which, — a sale of intoxicating liquors to a person who took advantage of the bar being open to enter it.

I think the Circuit Court should proceed to judgment.

SHERWOOD and CHAMPLIN, JJ., concurred.[1]

CAMPBELL, J. In this case the charge of the judge was properly guarded as to the necessity of showing complicity of respondent in the act charged against him, and as to the presumption of his innocence. But in my opinion the rules he laid down were inconsistent with the sufficiency of the facts to sustain a conviction. I think this conviction can only be maintained on the principle that an agent appointed for a confessedly legal purpose is presumed to be authorized to act illegally. I can see no reason why such presumption should be lawful in one case and not in another. In all crimes the presumption of innocence must be the same. The charge here is distinctly criminal, and while the offence is one of importance to the public order, I think that the decisions which set up exceptional rules of evidence to prove it are of dangerous tendency and would not be safe precedents.

COMMONWEALTH *v.* BRIANT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[142 *Mass.* 463.]

HOLMES, J. This is a complaint for unlawfully selling intoxicating liquors to a minor. The court assumed that the case was governed by Commonwealth *v.* Wachendorf, 141 Mass. 270; and instructed the jury that a sale by the defendant's bar-tender might be explained by showing that it was not authorized by the master, or was done in violation of his orders and against his will.

On the question of authority, the defendant asked for a ruling that "agency for any other purpose will not warrant a presumption or inference of agency illegally to sell liquor." The court refused the ruling; and instructed the jury, in substance, that a sale of intoxicating liquors by a bar-tender in his master's shop, and in the regular course of his master's lawful business, is *prima facie* a sale by the master, although the sale is an illegal sale, but that such a sale may be explained by showing that it was not authorized. Even if the ruling requested was wrong, we think the instruction given went too far in an opposite direction. For, although we should admit that a jury might be warranted in inferring that such a sale was authorized, it would not follow that a court could rule that there is a presumption of fact that it was so, which is the purport of the instruction fairly construed. The proposition that there is evidence for the jury to consider, is not identical with the proposition that the evidence, if believed, raises a presumption of fact. The proposition that there is evidence to be considered imports that there may be a presumption of fact. But generally it must be left to the jury to say whether there is one, and in many cases that is the main question which they have to decide.

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[1] *Acc.*: The State *v.* Kittelle, 110 N. Car. 560 (1892). — ED.

The facts that a man employs a servant to conduct a business expressly authorized by statute, and that the servant makes the unlawful sale in the course of it, do not necessarily overcome the presumption of innocence merely because the business is liquor selling, and may be carried beyond the statutory limits. See Commonwealth *v.* Putnam, 4 Gray, 16 ; Commonwealth *v.* Dunbar, 9 Gray, 298.

It is true that a master would be liable civilly for such a sale as supposed in the instruction, but his civil liability exists even when he prohibited the sale, and therefore it does not stand upon a presumption that he authorized the sale, but upon the general ground for a master's liability for the unauthorized torts of his servants, whatever that may be. George *v.* Gobey, 128 Mass. 289 ; Roberge *v.* Burnham, 124 Mass. 277 ; Pub. Sts. c. 100, § 24. See Byington *v.* Simpson, 134 Mass. 169, 170.

Commonwealth *v.* Holmes, 119 Mass. 195, cited for the prosecution, went no farther than to decide that evidence that the defendant's son and clerk sold intoxicating liquors in a public house kept by the defendant was evidence of a sale by the defendant, sufficient to be submitted to a jury. See also Commonwealth *v.* Edds, 14 Gray, 406. Nothing was said as to a presumption of fact. The evidence, too, was stronger than in the case at bar ; for there the defendant set up no license, any sale was unlawful, and the question was whether the defendant gave authority to his clerk to sell at all. It might well be thought that the clerk would hardly undertake to sell in the way of business in his employer's house without some authority. But it is obviously much more likely that a servant employed to make lawful sales should occasionally go beyond his authority, which he might do by mistaking a minor for an adult, than that he should go into a wholly unauthorized business.

Commonwealth *v.* Nichols, 10 Met. 259, probably suggested the ruling of the court, and is perhaps a little nearer the case at bar than Commonwealth *v.* Holmes, as the defendant seems to have sold liquors at wholesale, and to have employed his clerk in that business, although not licensed to sell at retail. The court, in sustaining the defendant's exceptions, said that a sale at retail by the clerk was "only *prima facie* evidence" of a sale by the master. It hardly said, and could not have decided, that such a sale was *prima facie* a sale by the master, or that it raised a presumption of fact. Moreover, if it were held that there was such a presumption of fact in cases like Commonwealth *v.* Holmes and Commonwealth *v.* Nichols, it would not follow that there was the same presumption in the present case, still less that it was so plain that the jury could be instructed to act on it. Such presumptions are questions of fact and of degree.

Exceptions sustained.[1]

J. R. Thayer, for the defendant.

E. J. Sherman, Attorney-General, for the Commonwealth.

SECTION VI.

Admissions.

FAIRLIE *v.* HASTINGS.

CHANCERY. 1803.

[10 *Ves. Jr.* 123.]

THE MASTER OF THE ROLLS.[2] The subject of this cause is a loan of money by the late plaintiff Maha Rajah Nobkissen to the defendant. As it is not by bill in equity that money lent is to be recovered, it is incumbent upon the plaintiff to state, and to prove, some ground for coming into this court for the payment, or the means of obtaining payment of his demand. The question of jurisdiction must depend upon the allegations of the bill; which states, that the defendant applied to the plaintiff for the loan of three lacks of rupees upon the security of the defendant's bond; that the plaintiff agreed to advance that sum by instalments; that a bond was executed, which it was agreed should remain with Caunto Baboo, an agent of the defendant, until the whole money should be advanced, and then should be delivered to the plaintiff; that the money was advanced, but the plaintiff never received the bond; Caunto Baboo in answer to his repeated applications at length informing him, that it had been delivered up to the defendant.

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[1] "The evidence was, that a lottery office was kept in a house rented by Gillespie, . . . under a sign in the name of Gillespie's lottery office; that Gregory, a young lad, acted as his servant or agent in that office, and sold the ticket . . . indorsed in the name of Gillespie; . . . that Gillespie occasionally visited Philadelphia. I did not instruct the jury, that Gillespie was criminally answerable for the act of his agent or servant, but I left them to decide, whether, from the whole body of the evidence, Gillespie was concerned in the sale of this ticket. The house his; the boy conducting business for him as a lottery broker, under his sign; selling this very ticket as his agent, and in his name. These were circumstances, from which the jury might infer his participation in the sale of this ticket; more especially as, if the boy had been employed as his agent to sell tickets authorized by the laws of this State, and not tickets prohibited, a production of his books would establish his innocence. That criminality, even in acts of the blackest dye, might be made out by circumstantial evidence." *Per* DUNCAN, J., in Commonwealth *v.* Gillespie, 7 S. & R. 469, 477 (1822). — ED.

[2] Sir WILLIAM GRANT. The reporter's statement is omitted. The bill prayed that the bond might be delivered up, or the money be paid with interest. — ED.

In support of this statement the plaintiff has not read, and could not read, any part of the answer. But the plaintiff has gone into evidence of declarations by Gobindee Baboo and Caunto Baboo, and the question is whether these declarations can amount to proof of such facts as are alleged by the bill. Upon that question my opinion is, that these declarations do not come within the principle, upon which they are supposed to be admissible. As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal, by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal: or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or the other of those ways I do not know, how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business in which the person making that assertion was employed as agent. For instance, if it was a material fact that there was the bond of the defendant in the hands of Caunto Baboo, that fact would not be proved by the assertion that Gobindee Baboo, supposing him an agent, had said, there was: for that is no fact, that is, no part of any agreement which Gobindee Baboo is making, or of any statement he is making, as inducement to an agreement. It is mere narration; communication to the witness in the course of conversation; and therefore could not be evidence of the existence of the fact.

The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say, a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord Kenyon carried this so far as to refuse to permit a letter by an agent to be read to prove an agreement by the principal; holding that the agent himself must be examined. Maesters *v.* Abram, 1 Esp. 375. If the agreement was contained in the letter, I should have thought it sufficient to have proved that letter was written by the agent; but, if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected. This doctrine was discussed incidentally in

Bauerman *v.* Radenius, 7 T. R. 663; and in that case there is a reference to another, Biggs *v.* Lawrence, 3 T. R. 454, in which Mr. Justice Buller held, that a receipt given by an agent for goods, directed to be delivered to him, might be read in evidence against the principal. The counsel in Bauerman *v.* Radenius state, that the contrary had been frequently since held by Lord Kenyon at *Nisi Prius*, without its having ever been questioned. That statement does not appear to have been denied upon the other side; and seems to have been acquiesced in by Lord Kenyon; who said, "That was not the point upon which the case was argued or determined;" meaning the point, that such a receipt could be admitted in evidence.

It will be found, however, that this question can hardly be said to arise in this case; when it is considered, what the concern of Caunto Baboo in this transaction was, and what are the facts, in proof of which his declaration was offered. Caunto Baboo is stated to have been in the employment of the defendant. One of the witnesses says, he had the general management of his pecuniary concerns. But of this particular transaction he does not appear, either by the bill or the witness, to have had the management. Upon the whole of the statement and evidence it does not appear, that Caunto Baboo was concerned in the negotiation of the loan; that he was employed as the agent for this purpose. The statement of the bill represents the defendant himself to have made the agreement; therefore any representation of Caunto Baboo relative to an agreement, not stated to have been made by him, would not be the statement of an agent; supposing such statement was to be admitted in evidence. The plaintiff fails first in showing, Caunto Baboo was the agent of the defendant. In this case such a fact as Caunto Baboo is represented to have stated, is matter, not of admission, but of testimony. A man cannot admit what another has done, or has agreed to do: but he must prove it. When put upon the proof, that the defendant made the agreement, it is absurd to say, Caunto Baboo admitted he made it. In truth he does not admit that the defendant made it. But, suppose Caunto Baboo distinctly proved the agent of the defendant, and that he said, he knew the defendant did make the agreement for this loan, and did promise and undertake to give a bond for the money, and did execute a bond, but gave the bond, not to the plaintiff, but to the witness, and he gave it back to the defendant, who undertook to calculate the interest, and to give a bond for the whole; all this would be no evidence whatsoever of what the defendant had agreed to do or had done, or omitted to do; and without evidence of his agreement, or his acts, or his breach of agreement, it is utterly impossible to support this bill.

The bill was dismissed.

PETO *v.* HAGUE.

NISI PRIUS. 1804.

[5 *Esp.* 134.]

DEBT on statute to recover the penalty for selling coals, short of measure, the coals having been sold as Pool measure.

The plaintiff called the coal-meter to prove the transaction, and the fraud practised in the sale of the coals. The defendant was a coal-merchant, but his business was conducted by one Peely, who was his nephew. The witness, in giving his evidence, was proceeding to state a conversation between him and Peely; which was, that while the coals were at the wharf, he asked Peely, whether the coals then lying in the punt were to be sold by wharf or Pool measure?

Garrow, of counsel for the defendant, objected, that what was said by Peely was not admissible evidence to affect the defendant. That Peely should himself be called; for, taking him to be even the agent of the defendant, his declaration could not be evidence, although his acts might be so.

Lord ELLENBOROUGH ruled that it was evidence; he said, that Peely appeared to be the manager and conductor of the defendant's business: what he might have said respecting a former sale made by the defendant, or on another occasion, would not be evidence to affect his master; but what he said respecting a sale of coals, then about to take place, and respecting the disposition of the coals then lying at the wharf, which were the object of sale, was in the course of witness's employment for the defendant, and was evidence to affect his master. He accordingly admitted it.

Verdict for the plaintiff for one penalty.

Erskine and *Marryat*, for the plaintiff.

Garrow, for the defendant.

ANDERSON *v.* SANDERSON.

NISI PRIUS. 1817.

[*Holt, N. P.* 591.]

ASSUMPSIT. The wife of the defendant had bought of the plaintiff certain goods, which the defendant hawked about the country. All the articles had been obtained previous to the year 1810.

The defendant pleaded the general issue, and the statute of limitations. Many acknowledgments of the wife were offered in evidence for the purpose of taking the case out of the statute.[1] On the part of the defendant it was objected, that the wife could only be considered as the agent of her husband; and that the admissions of the agent could only bind the principal, if made at the time when the goods were ordered or received by him. That, since the last receipt of goods was more than six years before the action was brought, the only admission which, upon the principle above stated, could be given in evidence, was likewise before that time; and, therefore, that there could be no authority in the wife to make an admission which would take the case out of the statute.

Richards, C. B. The wife was the only person accustomed to purchase goods at all. She was, therefore, the only proper person to ask for money, and to make admissions on the subject as to the sum due.[2]

Verdict for plaintiff.

Starkie, for plaintiff.
Williams and *Gilby*, for defendant.

CLIFFORD *v.* BURTON.

Common Pleas. 1823.

[1 *Bing.* 199.]

In this cause, which was tried before the Lord Chief Baron at the last Hertfordshire assizes, the plaintiff, in order to substantiate a demand for goods sold and delivered at the defendant's shop, proved an admission made by the defendant's wife, who served in his shop, and carried on the business of it in his absence. The witness applied to her for £28 16*s.*; and the admission consisted in her saying, she would pay it if the plaintiff would allow £10, which she claimed, and give a receipt in full.

It was objected, that the circumstance of the wife's serving in the shop was not evidence of such a general agency as would authorize her thus to settle an account, or the court to receive evidence of such a transaction, which was altogether separate and distinct from her service in the shop.

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[1] In s. c., 2 Starkie, 204, it is said: "It was proved that the defendant himself was usually occupied in travelling about the country, for the purpose of vending his cakes and confectionery, and that his wife conducted the business at home, and had acted as her husband's agent in buying and selling articles in the way of business; that she usually purchased the flour which they used; the present demand was for flour to be used in the course of their trade; under these circumstances, it was contended on the part of the plaintiff, that the husband had constituted his wife his agent for the management of his business, and that her admission was sufficient to take the case out of the statute of limitations." — Ed.

[2] *Acc.*: Palethorp *v.* Furnish, 2 Esp. 511, n. (a) (1783); Burt *v.* Palmer, 5 Esp 145 (1804); Gregory *v.* Parker, 1 Camp. 394 (1808). — Ed.

The evidence having been received, and a verdict found for the plaintiff,

Taddy, Serjt., now moved for a new trial on the above objection to the wife's evidence: he contended, that admissions by her in the character of agent must be confined to the transactions in which she was immediately employed; that she had no authority to settle an account except as part of the *res gestæ* upon the delivery of goods in the shop; and that evidence of admissions made upon a separate application for payment ought to have been excluded. In Emmerson *v.* Blonden, 1 Esp. 142, and in 1 Str. 527, Anon., the wife was acting within the scope of her authority, and what she said constituted a part of the authorized transactions. But a principal is not bound by the representations of the agent made at a different time. Peto *v.* Hague, 5 Esp. 134.

But the Court thought there was evidence from which it might be presumed the wife was acting within the scope of her authority when she offered to settle a demand for goods delivered at a shop in which she served, and the business of which she was in the habit of conducting; and they *Refused the rule.*[1]

GARTH *v.* HOWARD AND FLEMING.

COMMON PLEAS, 1832.

[8 *Bing.* 451.[2]]

DETINUE for plate. Plea, general issue. At the trial before **TINDAL**, C. J., it appeared that Howard had, without authority, pawned, for £200, certain plate belonging to the plaintiff. The defendant, Fleming, was a pawnbroker; but the only evidence to show that the plate had ever been in his possession, was a witness who stated that, at the house of the plaintiff's attorney, he heard Fleming's shopman say that it was a hard case, for his master had advanced all the money on the plate at 5 per cent.

This evidence, being objected to, was received, subject to a motion to this court; and a verdict having been given for the plaintiff,

Andrews, Serjt., obtained a rule *nisi* for a new trial, on the ground, among other objections, that the declarations of an agent can only be received in evidence when they have been made in the ordinary course of his employer's business; and that it is not in the course of a pawnbroker's business to lend £200 on a single pledge, or at 5 per cent interest.

Spankie, Serjt., showed cause. The declaration of the shopman was made in the ordinary course of his employer's business; for that business was to lend money on pledges, and the amount of the pledge, or of the interest paid, are immaterial. Now it is established by Rex *v.* Almon, 5 Burr. 2686, that the law presumes a master to be acquainted with the acts of his servant in the course of his business; and slight evidence is sufficient to establish the fact of agency. Hazard *v.* Treadwell, 1 Str. 506. The declarations of Fleming's shopman, therefore, being within the scope of his authority (Schumack *v.* Lock, 10 B. Moore, 39) are conclusive against his employer.

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[1] Compare Stenhouse *v.* C., C. & A. Railroad Co., 70 N. Car. 542 (1874). — ED.

[2] s. c. 1 Moo. & S. 628. — ED.

Andrews. The business, which Fleming's shopman is alleged to have spoken to was, in effect, a private loan, and not the transaction of a pawnbroker's shop. It is inexpedient to extend the exception by which the declarations of agents are received in evidence on hearsay; and in Macsters *v.* Abraham, 1 Esp. 375, Lord Kenyon refused to admit even the letter of an agent as evidence of an agreement by his principal. Such evidence, if received, ought at least to be confined to declarations at the time of the transaction. In Helyear *v.* Hawke, 5 Esp. 74, it was expressly determined that the principal is not bound by the representation of the agent at another time. *Cur. adv. vult.*

Tindal, C. J. The rule in this case has been obtained upon two distinct grounds; but it is unnecessary to give an opinion upon any other than this, namely, whether the declaration of the shopman of the defendant Fleming, that the goods were in the possession of his master, was admissible: for it is clear that, unless Fleming is to be affected by such declaration, he is entitled to the verdict upon the general issue, *non detinet.* If the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker. In that case, the rule laid down by the Master of the Rolls in the case of Fairlie *v.* Hastings, 10 Ves. 128, which may be regarded as the leading case on this head of evidence, directly applies. But the transaction with Fleming appears to us, not a transaction in his business as a pawnbroker, but was a loan by him as by any other lender of money at 5 per cent. And there is no evidence to show the agency of the shopman in private transactions unconnected with the business of the shop. I doubted much at the time whether it could be received, and intimated such doubt by reserving the point; and now, upon consideration with the Court, am satisfied that it is not admissible. It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath: it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent; and it is brought before the court and jury frequently after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer; and again to further suspicion, from the faithlessness of memory in the reporter, and the facility with which he may give an untrue account. Evidence, therefore, of such a nature, ought always to be kept within the strictest limits to which the cases have confined it; and as that which was admitted in this case appears to us to exceed those limits, we think there ought to be a new trial.

Rule absolute.

MORSE *v.* CONNECTICUT RIVER RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1856.

[6 *Gray*, 450.]

ACTION OF TORT by a passenger from Springfield to Chicopee on the defendants' railroad, for the loss of her trunk.

At the trial in the Court of Common Pleas, the plaintiff introduced the deposition of a man who accompanied her on that occasion, from which MELLEN, C. J., at the defendants' suggestion, ordered the following statement to be stricken out: "The next morning after the trunk was lost, in accounting for the trunk, on my inquiry, either the conductor or baggage master told me that, the night before, a gentleman stepped up and claimed and took a trunk of the same description. But the same morning the station agent told me he thought the trunk was carried to Northampton the night before with other baggage." The jury returned a verdict for the defendants, and the plaintiff alleged exceptions to this ruling.

J. Wells, for the plaintiff.

C. W. Huntington, for the defendants. — The declarations of the defendants' agents were properly rejected, not having been made while acting within the scope of their authority, nor in relation to a transaction then depending. It was not the province of the conductor, at least, to do anything about the baggage. The only transaction between the defendants and the plaintiff was the transportation from Springfield to Chicopee, and that was over. These declarations, therefore, were no part of the *res gestæ.* Stiles *v.* Western Railroad, 8 Met. 44; Cooley *v.* Norton, 4 Cush. 93; Corbin *v.* Adams, 6 Cush. 95; 1 Greenl. Ev. § 113, and cases cited. Story on Agency, §§ 134–137.

BIGELOW, J. The declarations offered in evidence were made by the conductor or the baggage master, and by the station master, "the next morning after the trunk was lost, in accounting for the trunk," in answer to inquiries in behalf of the plaintiff. It was part of the duty of those agents to deliver the baggage of passengers, and to account for the same, if missing, provided inquiries for it were made within a reasonable time. These declarations were therefore made by them as agents of the defendants, within the scope of their agency, and while it continued. They should therefore have been admitted.

Exceptions sustained.[1]

LUBY *v.* HUDSON RIVER RAILROAD COMPANY.

COURT OF APPEALS OF NEW YORK. 1858.

[17 *N. Y.* 131.]

APPEAL from the Supreme Court. The action was for alleged negligence in running a railroad car drawn by horses against the plaintiff Mrs. Luby, in one of the streets of New York city. At the trial the plaintiffs called as a witness one Mason, a policeman, and after proving by him that he was on duty near the spot where the accident occurred, and was called upon by the persons assembled around the injured woman, he was permitted, under exception by the defendant's counsel, to testify that he arrested the driver of the car which run against Mrs. Luby. He was also permitted, under like exception, to testify that upon arresting the driver as he was getting off the car and out of the crowd which surrounded it, he asked him why he did not stop the car, to which the driver replied that the brake was out of order. The plaintiff had a verdict and judgment was entered thereupon, and was, upon appeal, affirmed by the Supreme Court at general term in the first district. The defendant appealed to this court.

Charles O' Conor, for the appellant.

Richard O' Gorman, for the respondents.

COMSTOCK, J.[2] The declarations of an agent or servant do not in general bind the principal. Where his acts will bind, his statements and admissions respecting the subject-matter of those acts will also bind the principal, if made at the same time and so that they constitute a part of the *res gestæ*. To be admissible, they must be in the nature of original and not of hearsay evidence. They must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time. 1 Greenl. Ev., § 13; Thalheimer *v.* Brinkerhoff, 4 Wend. 396; Bank of Monroe *v.* Field, 2 Hill, 445; Story on Agency, §§ 135, 136; Fairlie *v.* Hastings, 10 Ves. 128; Barker *v.* Binninger, 4 Kern. 271.

In this case it seems to have been thought material on the part of the plaintiff to prove that the brake of the defendant's car was out of order. Whether this was or was not the direct object of introducing the declaration of the driver, such declaration at all events proved the fact, if the jury saw fit to credit his statement. But the fact, if true, could not be proved in this manner. The declaration was no part of the driver's act for which the defendants were sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done. He was manifestly excusing himself and throwing the blame on his principals. I do not by any means suggest that the conduct of the servant himself, as it was proved on the trial, was not so negligent as to justify the verdict; but the error was in allowing the jury, if they so pleased, to regard another material fact as proved by a mere declaration of the agent, — a fact which may possibly have exercised a decisive influence upon the result. What effect the jury gave to the evidence we cannot tell. I see no way of getting over this difficulty.

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[1] *Acc.*: Lane *v.* Boston & Albany Railroad Co., 112 Mass. 455 (1873). — ED.

[2] Part of the opinion, not dealing with Agency, is omitted. — ED.

All the judges concurring,

Judgment reversed and new trial ordered.[1]

GREAT WESTERN RAILWAY CO., APPELLANTS, *v.* WILLIS, RESPONDENT.

COMMON PLEAS. 1865.

[18 *C. B.* N. S. 748.]

1. THIS was an action tried before the judge of the County Court of Staffordshire and a jury, at Wolverhampton. It was brought to recover £21 7*s.* 6*d.* for the non-delivery within a reasonable time of seven cows, thirty-five sheep, and six pigs, which were delivered to the defendants at Minety, on the 12th of July, 1864, to be carried to Wolverhampton, — the cows, sheep, and pigs being, as was alleged, thereby much injured, and the plaintiff put to expense, and the market at Wolverhampton being lost.

2. The cattle were delivered at the Minety station by the plaintiff about 5 P. M. on the afternoon of the 12th of July.[2] . . .

3. The plaintiff proved that he saw the cattle loaded into trucks at Minety, ready for a goods train which usually leaves Minety about 7 P. M., that he had been in the habit of sending cattle by the defendants' railway for six or seven years, and that cattle loaded in time for that train usually arrived at Wolverhampton about 7 the next morning; . . . that . . . they did not arrive by that train; that the next train was due at 10.30, but was late, and did not arrive till be-

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[1] *Acc.*: Lane *v.* Bryant, 9 Gray, 245 (1857). — ED.

[2] Points not dealing with Agency are omitted. — ED.

tween 12 and 1; . . . that the cattle were brought up to the market by his man Grant about 1 or half-past 1, when the market was over. . . .

5. The plaintiff then proposed to state something relating to the cause of the delay in delivering the cattle by the company, which had passed in conversation about a week after the 12th of July between him and the defendant's night inspector, named East, at Didcot, through which station the trucks in which plaintiff's cattle were would pass, when the defendants submitted that a statement by a subordinate servant at Didcot, not in course of the transaction, but some time afterwards, was not admissible: but the learned judge allowed the question to be put; and the plaintiff then stated that he said to East, "How is it you did not send my cattle on?" and that he said in reply, that he had forgotten them.

The plaintiff also stated that East had the charge of the night cattle-trains at Didcot, and that he would be on duty when the trucks in which the plaintiff's cattle were would pass through Didcot, and that he knew East well, and had frequently seen him on duty at Didcot. . . .

16. The jury found for the plaintiff, that there had been an unreasonable delay, and assessed the damages for loss of market at £14, and injury to the condition of the cattle at £7 7*s.* 6*d.*

17. The questions for the decision of the Court, were, — first, whether the learned judge was right in admitting the evidence of the conversation with East, set forth in the fifth paragraph, — secondly, whether the learned judge was right in refusing to nonsuit the plaintiff, and whether he ought not to have ruled and directed that there was no evidence for the jury, — thirdly, whether the learned judge was right in his direction to the jury.

T. J. Clark (with whom was *Digby*), for the appellants.

Macnamara, for the respondent.[1]

ERLE, C. J. I am of opinion that this night inspector is not to be presumed to have had authority to make admissions relative to transactions gone by, so as to bind his employers. I think neither of the cases cited has any application here. I therefore think there must be a new trial, and that the appellants are entitled to costs.

The rest of the Court concurring,

Rule accordingly.[2]

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[1] Citing Garth *v.* Howard, *ante*, p. 452, and Clifford *v.* Burton, *ante*, p. 451. — ED.

[2] *Acc.*: Anderson *v.* R., W. & O. Railroad Co., 54 N. Y. 334 (1873). — ED.

KIRKSTALL BREWERY CO. *v.* FURNESS RAILWAY CO.

QUEEN'S BENCH. 1874.

[*L. R.* 9 *Q. B.* 468.]

DECLARATION that plaintiffs caused to be delivered to defendants, being common carriers of goods, a parcel containing £35, in bank-notes and gold, to be carried from Whitehaven to Ulverston; that defendants did not deliver the parcel, and it has been wholly lost to plaintiffs.

Pleas, *inter alia:* 3, that the parcel contained money, and was within the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68); and that the nature of the contents was not declared and the extra charge paid when the parcel was delivered to defendants.

Replication: that the loss of the parcel arose from the felonious act of a porter or servant of the defendants, and the non-delivery of the parcel was caused by such felonious act.

Issue joined.

At the trial before DENMAN, J., at the sittings in Middlesex after Trinity Term, 1873, it appeared in evidence that an agent of the plaintiffs, on Wednesday, the 17th of July, 1872, sent a parcel containing £35 in notes and gold from the Whitehaven station of the defendants' railway, addressed to a clerk of the plaintiffs, "Mr. Gardner, Kirkstall Brewery Company's Stores, Ellers, Ulverston" (where there is a station of the defendants), and paid 6*d.* carriage. That the parcel was not delivered to Gardner; and on the same day John Haslam, a porter in the defendant's service at their Ulverston station, disappeared, and had never been found since.

George Holden, a superintendent of police, was then called on behalf of the plaintiffs, and, after objection by defendants' counsel, gave the following evidence: "I am superintendent of police at Ulverston. I know Podmore, the station-master at defendants' station at Ulverston; in consequence of a communication in writing I went to him on Saturday, the 20th of July. He told me that a man of the name of John Haslam had absconded from the service; that a money parcel was missing, and he [Podmore] suspected Haslam had taken it. He said Haslam was the parcel porter. Would I [witness] make inquiries about him?"

The learned judge left it to the jury to say, whether they thought it was established that the parcel was stolen by one of the defendants' servants. The jury found a verdict for the plaintiffs for £35.

A rule was afterwards obtained for a new trial, on the ground of misreception of the above evidence.

Sir H. James, Q. C., and *Reid*, showed cause.

Price, Q. C., and *Crompton*, in support of the rule.

COCKBURN, C. J. I am of opinion that the rule must be discharged on the ground that the evidence was admissible under the particular circumstances of the case. A man, a railway porter at the station to which the parcel is addressed, is believed to have absconded with a parcel of money, which must be taken to have been the plaintiff's money. The parcel and man disappear simultaneously, and the man was the person to whom, in due course, the parcel would have been delivered; there was, therefore, reasonable and probable cause for arresting him on the charge of taking the parcel. Suppose the principal in this case had been an individual, and had gone to a policeman and said, "A parcel has been taken from my premises, and I cannot doubt it has been taken *animo furandi*, for the person to whom it was delivered has absconded just at the time the parcel was missed, I therefore believe him to be the thief; I ask you to make inquiries and to apprehend him if you find him under suspicious circumstances." There is no principle on which that would not be admissible evidence. Then, if Podmore was the agent of the defendants, and if it was within the scope of his duty and authority as agent to do what the principal, if on the spot, would have done, what he says while he is so acting is equally admissible as if said by the principal himself. Now, it is impossible to say, that the man who has the sole management of the station has not authority to cause a person to be apprehended whom he has reasonable ground to suspect has stolen a parcel from the station. Therefore Podmore had authority to cause inquiry to be made after Haslam, and to cause him to be apprehended, and if so, then it was within his duty and authority to make communications to the police. In other words, the effect of the particular circumstances of this case was to make the statement of Podmore to the police superintendent, on the occasion in question, the statement of a person having authority on the part of the company to make it.[1]

Rule discharged.

PACKET COMPANY *v.* CLOUGH.

SUPREME COURT OF THE UNITED STATES. 1874.

[20 *Wall.* 528.]

ERROR to the Circuit Court for the Eastern District of Wisconsin.

In January, 1870, Carlos Clough and Sarah, his wife, in right of the wife, sued the Union Packet Company, in an action on the case to recover damages for personal injuries sustained by the wife in consequence of alleged negligence of the company's servants. The declaration was in the regular common-law form: *Plea:* The general issue.

The company, at the time of the injury, was owner of a steamboat employed by it in carrying passengers and freight on the Mississippi

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[1] Opinions to the same effect were delivered by QUAIN and ARCHIBALD, JJ. — ED.

River, between St. Paul, in the State of Minnesota, and St. Louis, in the State of Missouri. During the passage downward, the boat arrived at Read's Landing, in Minnesota, at about two o'clock on the afternoon of September 30th, 1869, where she stopped to receive passengers. At that place Mrs. Clough (who was about to go to Davenport, in Iowa, at which place the boat was in the habit of touching), in attempting to go on board, fell from the gangway provided for entrance to the boat, and received the injury for which the suit was brought.[1] . . .

It appeared by the statements of Mrs. Clough that she went to Davenport, arriving there in the evening; that she was on the boat two days and a half; that on account of the injury received by her she had been unwilling to pay fare; that the captain demanded none of her, and that she thanked him for the free passage.

In the course of the trial the plaintiffs' counsel asked Mrs. Clough this question: —

"What conversation, if any, did you have with the captain *after* the accident, on her trip down to Davenport?"

The question was objected to by the defendant's counsel, but the court overruled the objection, and the answer to the objection was read as follows:

"He said it was through the carelessness of the hands in putting out the plank that I fell; that they did not put out the regular plank, but loose planks. It was in the evening before we got into Davenport, that I had the conversation with the captain." . . .

Verdict and judgment having been given for the plaintiffs in $6,000, the company brought the case here, assigning for error . . .

6th. The allowing Mrs. Clough to state, as she did, what the captain had said to her *after* the accident, and on the trip down to Davenport and just before arriving at that place, in regard to the cause of the injury. . . .

Mr. J. W. Cary, for the plaintiff in error.

Messrs. W. P. Bartlett and *M. H. Carpenter*, *contra.*

Mr. Justice STRONG delivered the opinion of the court. . . .

The next assignment is more important. The accident by which the plaintiff was injured occurred at Read's Landing, in Minnesota, on the 30th day of September, 1869, about two o'clock in the afternoon. Two days afterwards, as the boat approached Davenport, in the State of Iowa, Mrs. Clough, the witness, had a conversation with the captain, in which he made some statements respecting the accident, and these statements the court allowed to be given in evidence against the defendants. In this we think there was error. Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts.

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[1] From the statement and the opinion, passages not pertaining to Agency are omitted. — ED.

A captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. It is not needful the captain should have such power to enable him to conduct the business intrusted to him, to wit, the reception of passengers, and, hence, his possession of the power to make such admissions affecting his principals is not to be inferred from his employment. 1 Taylor on Evidence, § 541. It is true that whatever the agent does in the lawful prosecution of the business intrusted to him, is the act of the principal, and the rule is well stated by Mr. Justice Story, Story on Agency, § 134, that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*." A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done at a later period. 1 Taylor on Evidence, § 526. The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the "*res gestæ*."

Applying this rule to the present case, how does it stand? The thing of which the plaintiffs complain was negligence, on the 30th of September, — a fault in providing for Mrs. Clough's embarkation on the steamer. That, and that alone, caused the injury she sustained. That and nothing else was the "*res gestæ*." What the captain of the boat said of the transaction two days afterwards was, therefore, but a narrative of a past occurrence, and for that reason it could not affect his principals. It had no tendency to determine the nature, quality, or character of the act done, or left undone, and it is not, therefore, within the rule stated by Judge Story. That rule has been recognized *in totidem verbis* in Wisconsin by Chief Justice Dixon, in delivering the opinion of the court in The Milwaukee and Mississippi Railroad Company *v.* Finney, 10 Wisconsin, 388. And there is nothing in any of the decisions cited by the defendants in error inconsistent with such a rule. The case of *The Enterprise*, cited from 2d Curtis, was a suit in admiralty for subtraction of wages, and the declarations of the master respecting the contract with the seamen were admitted, though not a part of the *res gestæ*. But the decision was rested upon the ground that the admiralty rule is different from the rule at common law. The case of Burnside *v.* The Grand Trunk Railroad Company, cited from 47 New Hampshire, simply decides that the statements of the general freight agent as to the condition of goods delivered to him for transportation, made while the goods are still in transit, or while the duty of the carrier continues, are admissible in evidence against the company. This was a case of contract not executed, and, while it remained unexecuted, the agent had power to vary it; had, in fact, complete control over it. The transaction was still depending, and the agent was still in the execution of an act which was within the scope of his authority. But in the present case the declarations admitted were not made in the transaction of which the plaintiffs complain, or while it was pending. They refer to nothing present. They are only a history of the past.

It is argued they were made before the voyage upon which Mrs. Clough entered was completed. True, they were, but they were not the less mere narration. The accident was past. The injury to Mrs. Clough was complete. The only wrong she sustained, if any, had been consummated two days before. We cannot think the fact that she had not arrived at her port of destination is at all material. If she had left the steamer before the declarations were made it is not claimed, as certainly it could not be, that they were admissible. Now, suppose two persons were injured by the negligence which the plaintiffs assert, and one of them had left the boat before the captain's declarations were made, clearly they would have been inadmissible in favor of the person whose voyage had been completed. This is not denied. Yet the connection between them and the accident would be as close in that case as in this. Can they be admissible in the one case and not in the other? Assuredly not. We must hold, therefore, that there was error in admitting in evidence the statement of the captain of the steamboat made two days after the wrong was done of which the plaintiffs complain. . . .

Judgment reversed, and a venire de novo awarded.[1]

HOWE MACHINE CO. *v.* CLARK.

SUPREME COURT OF KANSAS. 1875.

[15 *Kan.* 492.]

Devenney & Green, for plaintiff.

St. John & Parker, for defendant.

The opinion of the court was delivered by

VALENTINE, J.[2] This was an action of replevin, brought by the Howe Machine Company against James H. Clark, to recover the possession of two horses, one set of double harness, and one set of thills. The judgment in the court below was in favor of the defendant and against the plaintiff, and the plaintiff brings the case to this court for review. The theory of the plaintiff with regard to such property is as follows: The plaintiff originally owned the property. It employed one H. E. Tracy to procure sales of its sewing machines in Johnson county, and furnished him with an "outfit" for that purpose, consisting of said property, together with some other property. The property in controversy was hired to Tracy upon certain conditions, which conditions were immediately broken by Tracy, and the plaintiff from that time not only claims to have owned the property, but also claims to have had the right to the immediate possession thereof. Afterward Tracy sold said horses and harness, and delivered the same, together with said thills, to the defendant Clark, without the knowledge or consent of the plaintiff. . . .

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[1] See Vicksburg & Meridian Railroad *v.* O'Brien, 119 U. S. 99 (1886); s. c., Thayer's Cases on Evidence, 663. — ED.

[2] The reporter's statement is omitted; and so are such parts of the opinion as do not deal with Agency. — ED.

It was error for the court to permit defendant to prove the statements of Tracy formerly made by him concerning this and other property. The defendant claimed that Tracy had authority from the Howe Machine Company to sell this identical property; and, for the purpose of proving that Tracy had such authority, introduced evidence over the objections of the plaintiff, but with the permission of the court, showing that Tracy had at different times stated that he had such authority, and that he had authority to sell not only this but other property belonging to the company. Now it is competent to prove a parol agency, and its nature and scope, by the testimony of the person who claims to be the agent. It is competent to prove a parol authority of any person to act for another, and generally to prove any parol authority of any kind, by the testimony of the person who claims to possess such authority. But it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person who it is claimed had attained such authority. . . .

The judgment of the court below will be reversed, and the cause remanded for a new trial.[1]

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[1] *Acc.:* Brigham *v.* Peters, 1 Gray, 139, 145 (1854); Craighead *v.* Wells, 21 Mo. 404 (1855); Sencerbox *v.* McGrade, 6 Minn. 484 (1861); Hatch *v.* Squires, 11 Mich. 185 (1863); Sax *v.* Davis, 71 Iowa, 406 (1887); Missouri Pacific Railway Co. *v.* Simons, 6 Tex. Civ. App. 691 (1894). — ED.

LOOMIS *v.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893.

[159 *Mass.* 39.]

TORT, for personal injuries occasioned to the plaintiff in consequence of a fall upon some steps in the railroad station of the defendant at Hartford, Connecticut, by reason of ice upon the steps.

At the trial in the Superior Court, before HOPKINS, J., it appeared that there had been a trial of the case at a former sitting of the court in July, 1891, and that a new trial was granted.

It appeared in evidence that the plaintiff went from Springfield to Hartford on one of the defendant's trains, arriving at about twenty minutes past twelve in the afternoon of January 1, 1891; that she passed from the platform to the waiting-room by a staircase constructed of wood, which led down a course of fifteen steps to a broad stair or landing eight feet square, and then, turning to the left, at right angles, descended six steps more to the passageway on a level with the floor of the waiting-room connected therewith; and that the lowest of the six steps was about thirty-five feet from the waiting-room.

This staircase was the regular staircase for passengers going from the platform to the waiting-room. There was no testimony from any person except the plaintiff as to the way in which she fell or the place where she fell, other than what appeared from her subsequent statements, as testified to by other witnesses, and as appeared from their testimony referred to hereafter. She testified that she had gone down the stairs but a very few steps from the platform where she alighted from the train, when she fell and received her injuries; that many persons were going down the stairs at the same time; that she fell three or four steps down, from the top of the long flight and almost to the broad stair, and did not fall at the bottom of the short flight referred to above. . . .

The defendant produced in court, and offered to introduce in evidence, two letters, of which the following are copies, written by a clerk in the office of James B. Carroll, the plaintiff's attorney, to wit.

"Springfield, Mass., Jan'y 5, 1891. Mr. Wm. E. Barnett, Executive Secretary, N. Y., N. H., and H. R. R. Co., New Haven, Conn. Sir: Mrs. Hulda L. Loomis of this city, on Thursday, January 1, 1891, fell down the stairs of your depot at Hartford, just after arriving on the 11.45 A. M. train from here. The cause of the accident was the snow and ice on the stairs. Her spine is affected, and she has received severe internal injuries. Please let me hear from you. Yours truly, James B. Carroll. F."

"Springfield, Mass., Jan'y 10, 1891. Wm. E. Barnett, Exec. Sec'y, N. Y., N. H., and H. R. R. Co., New Haven, Conn. Sir: In reply to yours of the 7th instant, regarding the accident to Mrs. Loomis, I would state that she fell on the third or fourth step from the bottom of the stairway across the tracks from the waiting-room. Your men picked her up after her fall and know where it occurred. It is impossible now to state how much she will take for compensation, as her illness and injury are so serious at present that one cannot tell how permanent may be their effects. Yours truly, James B. Carroll. F."

It was proved that the clerk had the same authority to write the letters which Mr. Carroll, as attorney for the plaintiff, had, and it was further proved that these letters were received in due course of mail by the defendant.

The letter of January 10 was in answer to the following letter of the defendant, which it offered in evidence: —

"New Haven, Conn. Jan. 7th, 1891. James B. Carroll, Esq., Springfield, Mass. Dear Sir; Referring to yours of Jan. 5th, in regard to claim of Mrs. Loomis, will you kindly state precisely the place where she fell, and what amount she claims should be paid to her? Yours truly, Wm. E. Barnett, Exec. Sec'y."

The above letters, a letter of the defendant of January 12, 1891, containing statements favorable to the defendant, and a letter of the plaintiff's attorney of January 13, 1891, containing comments outside the scope of his employment, were all excluded, and the defendant excepted. It was proved that the husband of the plaintiff, as her agent, secured Mr. Carroll as attorney for the plaintiff after the accident in January 1891, and that he did not see her until less than two weeks before the first trial of the action, which was long after the letters were written.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs to all the judges.

G. D. Robinson & W. S. Robinson, for the defendant.

J. B. Carroll, for the plaintiff.

KNOWLTON, J.[1] The principal question in the case relates to the admissibility of a letter written to the defendant by a clerk of the plaintiff's attorney, under authority from the attorney, purporting to state the facts on which her claim was founded. The bill of exceptions sets forth two letters written to the defendant by this clerk, two written to the attorney by the executive secretary of the defendant, and one afterwards written to the defendant by the attorney with his own hand. The first two, written by the clerk under authority from the attorney, were first offered, then testimony was introduced, and the defendant offered the letter from the attorney to the defendant, "and also the letters of the defendant to Mr. Carroll," the attorney, and exceptions were taken to the refusal to admit them. It is clear that the defendant was not entitled to introduce the entire correspondence, for it contains statements of the executive secretary favorable to the defendant, which were not competent. Perhaps, also, the last letter of the plaintiff's attorney, which he wrote with his own hand, was inadmissible as containing opinions and comments which were strictly personal and outside of the scope of his employment. It is contended that the only question open to the defendant is whether the entire correspondence was competent, but we are of opinion that the question whether the first two letters were competent was intended to be saved by the bill of exceptions.

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[1] In reprinting this opinion and the reporter's statement of facts, passages not relating to Agency are omitted. — ED.

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The object of the evidence was to show that, when the plaintiff presented her claim through her attorney, it was for a fall at a place near where the defendant's evidence at the trial tended to show that it occurred, and where the stairs were in perfect condition, and not at the place where the plaintiff located it in her testimony. Upon the issue raised, the fact sought to be proved was material and important. We are also of opinion that the method of proof was competent and proper.

The undisputed evidence tends to show that the attorney had been employed to represent her in the collection of a claim against the defendant for damages resulting from a fall in the defendant's railroad station at Hartford. The terms of his employment do not expressly appear. But a fair inference from the evidence is that he was not merely employed to bring a suit, but was authorized to present the plaintiff's claim, and to endeavor to obtain a settlement of it without a suit. If this was his authority, we have no occasion to consider the cases holding that admissions which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evidence against his client. Such admissions are not within the scope of his employment. Nor have we any reason to consider in this case the general authority of an attorney, by virtue of his position as an attorney at law, in charge of a suit, to bind his client by agreements in reference to the management or disposition of the suit. See Lewis *v.* Sumner, 13 Met. 269; Saunders *v.* McCarthy, 8 Allen, 42; Pickert *v.* Hair, 146 Mass. 1. The maxim, *Qui facit per alium facit per se*, applies as well to acts done or statements made by an attorney at law as by any other agent. The act of a party done by his agent may always be proved against him if material.

An attorney or agent employed to present and collect a claim is impliedly authorized to state to the debtor what the claim is. The plaintiff could not have expected that her attorney would collect her claim from the defendant on demand, without stating the nature and particulars of it, so that the defendant could understand it, and make investigation in regard to its validity. It was as much a part of his duty to state as nearly as possible the precise place in the building where the accident happened, if asked to, as to state in what town or State the plaintiff was when she fell. The defendant's letter of

January 7, 1891, inquiring for particulars, is competent, in connection with the letter of January 10, which purports to be an answer to it, to show how the statement came to be made; and the two together, in connection with the first letter of January 5, show conclusively that writing the words, "she fell on the third or fourth step from the bottom of the stairway across the tracks from the waiting-room," was strictly within the authority of her attorney, employed to present and collect her claim. The fact that they were not written by her own hand, but by an agent who was acting under instructions received through her husband, who was also her agent in the same business, affects the weight, but not the competency, of the evidence. 1 Greenl. Ev. § 186; Marshall *v.* Cliff, 4 Camp. 133; Baring *v.* Clark, 19 Pick. 220; Woods *v.* Clark, 24 Pick. 35, 39; Cooley *v.* Norton, 4 Cush. 93; Morse *v.* Connecticut River Railroad, 6 Gray, 450; Haney *v.* Donnelly, 12 Gray, 361; Gott *v.* Dinsmore, 111 Mass. 45; McAvoy, *v.* Wright, 137 Mass. 207.

There is nothing in the adjudication in Pickert *v.* Hair, 146 Mass. 1, nor in the language of the opinion as applied to the matters then under consideration, which is at variance with the views above stated.

The letters are not inadmissible as part of an offer to compromise a controverted claim. At the time they were written there had been no intimation on the part of the defendant that the plaintiff would not be paid all that she thought it right to ask. The only communication which had been received from the defendant indicated a desire to ascertain the truth, as if for the purpose of promptly paying the claim if it appeared to be valid. *Exceptions sustained.*

LATHROP, J. I am unable to concur in the opinion of the majority of the court.

If it is assumed that the question of the admissibility of the first two letters written by the clerk of the attorney for the plaintiff is open on the exceptions, a point which is not free from doubt, and if it is also assumed that the evidence sought to be introduced is material, a point about which there is also a doubt, as the evidence for the plaintiff tended to show that there was ice on all the steps, and the evidence for the defendant tended to show that there was no ice on any of the steps, I do not agree that the letters were competent evidence.

There was no evidence that the letters in question were written by the direct authority of the plaintiff, or by her consent, or even with her knowledge. There was no evidence that at the time of the accident Mr. Carroll was the plaintiff's attorney; and he could have had no personal knowledge on the subject, as it appeared that he was retained as an attorney at law after the accident by the plaintiff's husband, and did not see her until less than two weeks before the first trial of this action, which was long after the letters were written.

In Pickert *v.* Hair, 146 Mass. 1, the question as to the effect of an admission made by Mr. Thayer, an attorney, after an action brought but before the beginning of the case then before the court, was considered. One of the grounds of the decision was thus stated on page 5: "The admission was not made by Mr. Thayer for the purpose of dispensing with any rule of practice, or with the proof of any fact in the trial of the action already brought, or of the actions which might be brought in reference to the attached property. It was a conversation relating to a fact in controversy, but not an agreement relating to the management and trial of a suit, or an admission intended to influence the procedure in the pending action, or in any other, if the attachment was not discharged."

In support of these propositions several cases are cited, and an examination of them shows that the doctrine hitherto established is that an admission by an attorney does not bind his client, although it relates to a fact in controversy, unless it is made for the purpose of dispensing with some rule of practice, or with the proof of a fact in the trial of a case, or is an admission intended to influence the procedure in the action. To the same effect are the following cases: Rockwell *v.* Taylor, 41 Conn. 55; McKeen *v.* Gammon, 33 Maine, 187; Cassels *v.* Usry, 51 Ga. 621.

The opinion of the majority of the court apparently proceeds upon the theory that an attorney stands in a different relation to his client before an action is brought from that which he occupies afterwards. But no case is cited which sustains this position. The general rule that an attorney cannot, without the consent of his client, disclose a confidential communication made to him by his client, applies as well to communications made before action brought as afterwards. See Foster *v.* Hall, 12 Pick. 89, and cases cited.

With one exception, the cases cited in the opinion of the majority of the court in support of the propositions that an attorney is merely an agent, and that his admission binds his principal, are cases of mere agents, and not of attorneys. They seem to throw no light on the question in this case.

The case of Marshall *v.* Cliff, 4 Camp. 133, remains to be considered. This was an action against the owners of a vessel. To prove the defendants to be the owners, there was offered in evidence an undertaking in the following form, given before the action was begun by the persons who were afterwards the defendant's attorneys of record: "I hereby undertake to appear for Messrs. Thompson and Marshall, joint owners of the sloop *Arundel*, to any action you may think fit to bring against them." This was held by Lord Ellenborough to be sufficient evidence. But, as was pointed out by Mr. Justice Parke, in Wagstaff *v.* Wilson, 4 B. & Ad. 339, the undertaking was "a step in the cause."

I am authorized to state that Chief Justice FIELD concurs in this opinion.

CHAPTER III.

THE AGENT'S RESPONSIBILITY TO STRANGERS.

SECTION I.

Torts.

CHIEF JUSTICE HOLT, in Lane *v.* Cotton, 12 Mod. 472, 488 (K. B., 1701)[1]: —

It was objected at the bar, that they have this remedy against Breese. I agree, if they could prove that he took out the bills, they might sue him for it; so they might anybody else on whom they could fix that fact: but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer.[2]

LORD MANSFIELD, C. J., in Whitfield *v.* Lord Le Despencer, 2 Cowp. 754, 765 (K. B., 1778): —

As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury received.[3] If the man who receives a penny to carry the letters to the post-office loses any of them, he is answerable; so is the sorter in the business of his department; so is the post-master for any fault of his own.

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[1] s. c. 11 Mod. 12, 1 Lord Raym. 646, 1 Salk. 17, Comyns, 100, Carthew, 487, Holt, 582.

The passage is taken from a dissenting opinion; but the disagreement of the judges was as to a question not dealt with in this passage, namely, the question whether the Postmaster General is responsible for the acts or negligence of a clerk in a post-office. — ED.

[2] The same distinction was taken by Coke, counsel for the defendant, in Marsh *v.* Astry, Cro. Eliz. 175 (1590), s. c. 1 Leon. 146. — ED.

[3] See Sands *v.* Child, 3 Lev. 351, 352 (1693). — ED.

STONE ET AL. *v.* CARTWRIGHT.

KING'S BENCH. 1795.

[6 *T. R.* 411.]

THE declaration stated that the plaintiffs were possessed of a certain close in Tipton in the county of Stafford, and also of a dwelling house, &c., there; that the defendant was possessed of a certain coal mine under the surface of the said close and house, &c.; and that the defendant well knowing the premises, but contriving, &c., to injure the plaintiff, &c., worked and caused to be worked, &c., his said mine of coal in a negligent, incautious, and unskilful manner, and neglected to leave necessary and sufficient pillars, &c., to support the said buildings and premises of the plaintiffs and the soil, &c.; by reason whereof the surface of the said close sunk and gave way, &c., and the buildings, &c., were rent and rendered dangerous. It appeared at the trial before Lord KENYON at Stafford that the colliery belonged to A. M. Ward, an infant, and that the defendant had been appointed agent and manager thereof under the Court of Chancery; that he employed a bailiff under him who superintended the work; that he hired and dismissed the colliers at his pleasure, but that he took no personal concern in the business, was not present when the injury complained of was done, nor had given any particular orders for working the mine in the manner which had occasioned it. Upon this evidence Lord KENYON was of opinion that the action could not be maintained against the defendant, who was the middle-man, but that it ought to have been brought either against the person who actually committed the trespass or concurred therein, or against the superior, the owner of the colliery, for whose benefit the work was carried on; and he referred to a case of Gwinne *v.* Poole, 2 Lutw. 935. The plaintiffs being nonsuited,

Russell now moved to set aside the nonsuit.

Lord KENYON, C. J. There is no pretence whatever for imputing liability to the defendant in this action; it might as well be contended that a similar action would lie against the steward of another for all the defaults of improper conduct of the men employed under him by which any other person received damage. In all these cases I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done; but it was never heard of that a servant who hires laborers for his master was answerable for all their acts. The present defendant has no interest in the colliery, nor was it worked for his benefit; he was no more than a steward appointed by the Court of Chancery. His Lordship mentioned the cases of Gwinne *v.* Poole, 2 Lutw. 935, and Goodwin *v.* Gibbons, 4 Burr. 2108, where this question had been considered.

Ashhurst, J., declared himself of the same opinion.

Grose, J. It frequently happens that a person's gardener employs laborers under him, yet it could never be contended that on that account he would be answerable for damage done by them in the course of their employment.

Lawrence, J. If the plaintiffs had given evidence that the defendant had particularly ordered those acts to be done from whence the damage had ensued, that would have varied the case; but no such evidence being adduced, I think the opinion delivered at the trial was perfectly right. *Rule refused.*[1]

HILL *v.* JOHN CAVERLY, JOHN WILLIAMS, AND JOS. CAVERLY.

SUPERIOR COURT OF NEW HAMPSHIRE. 1834.

[7 *N. H.* 215.]

Trespass on the case.[2]

The cause was tried upon the general issue, at January term, 1834.

It appeared, that in the year 1794, a dam was made and a saw-mill erected at the outlet of Bow Pond. The saw-mill continued there until the 14th March, 1832. The ground upon which the dam was built being unfavorable, it broke away three or four times prior to 1823.

On the 1st December, 1822, the Dover Manufacturing Company became the owner of the mill, the dam, and the mill-privilege, and in the years 1823 and 1824 caused a new dam to be erected, eleven feet higher than the old dam. The defendant, Williams, as the agent of the company, superintended the erection of the new dam, and gave directions respecting it. John Caverly also directed in the building of the dam, as an agent of the company; and both John and Joseph Caverly labored in constructing it as servants and agents of the company.

Owing to the nature of the ground, the great body of water, and the manner of its construction, the dam was insufficient and insecure.

The said Williams, as agent of the said company, and John Caverly under him as the servant of the company, controlled the gates and dam until the 2d December, 1829, when the said Dover Manufacturing Company conveyed all their interest in the premises to the Cocheco Manufacturing Company. From that time up to the 14th March, 1832, the last mentioned company controlled and used the water, and the said John Caverly acted as their agent for the purpose.

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[1] *Acc.*: Brown *v.* Lent, 20 Vt. 529 (1848). — Ed.

[2] The reporter's abstract of the declaration has been omitted. — Ed.

On the 12th February, 1829, the Dover Manufacturing Company leased to John Caverly the saw-mill at the outlet of the pond, for a term which had not expired on the 14th March, 1832, he agreeing to follow the directions of the company in everything relating to the stoppage or flowage of the water in said pond.

For some time prior to the 14th March, 1832, there were indications that the dam was defective and dangerous; and on that day, by reason of its defects, it broke away, and thus caused the destruction of the plaintiff's property, mentioned in his declaration.

The court being of opinion that upon the foregoing case the action could not be sustained against these defendants, directed a nonsuit, subject to the opinion of this court.

Christie, for the plaintiff.

I. Bartlett, for the defendants.

BY THE COURT. RICHARDSON, C. J. The injury of which the plaintiff complains, is, that the defendants, by means of a feeble and badly constructed dam, wrongfully and injuriously raised and kept up the water in the pond twelve feet higher than was lawful, from the 1st September, 1831, to the 14th March, 1832, by reason of which the water broke away the dam, and did the damage stated in the declaration. The damage is not alleged to have resulted from any defect in the dam, rendering it unfit to answer any lawful purpose for which it was erected, but from raising the water, by means of the dam, twelve feet higher than was lawful. The action is founded, then, not on any negligence of the defendants in the construction of the dam, but upon an improper use of it between the 1st September, 1831, and the 14th March, 1832. Such being the nature of the action, it is clear it is not maintained by the evidence against Williams and Joseph Caverly. They had no concern with the gates of the dam after the 2d December, 1829.

John Caverly stands on different ground. From the 2d December, 1829, until the dam broke away, he acted as the agent of the Cocheco Company at the dam. But that company had the control and use of the water during the whole time; and he had contracted with the Dover Company, under whom the Cocheco Company claimed the premises, and who had leased the saw-mill to him, to follow the directions of the lessors in everything relating to the stoppage or flowage of the water in the pond.

He must, then, be considered as the mere servant of the Cocheco Company, acting in all he did under the immediate direction and control of the company, or their agents.

The question then, is, whether the facts disclosed in the case render him liable?

Nothing is stated in the case which shows any want of right in the Cocheco Company to raise the water to the height it was raised. If the action can be sustained at all, it must be on the ground that it was imprudent and improper to raise such a head of water with such a dam.

When a servant, by the command of his master, does an apparent wrong, both the master and the servant are liable. Buller's N. P. 47.

And when a servant, in the absence of his master, went into an improper place with a coach and two ungovernable horses, in order to train them there, and the servant not being able to govern the horses, they ran upon an individual and wounded him, — it was held, that both the master and the servant were liable. 2 Lev. 172, Michael *v.* Alestree.

When a servant, by command of his master, hires hands to do work, and they do a wrong, the master, and not the servant who hires the wrong-doers, is liable. 6 D. & E. 411, Stone *v.* Cartwright.

A servant or deputy cannot be charged for mere nonfeasance. 1 Chitty's Pl. 72; 12 Mod. 488.

Thus, in England an under-sheriff is a mere servant of the sheriff, and no action lies against the under-sheriff for a mere breach of duty. Cowper, 403; 5 N. H. R. 456.

No action can be maintained against a servant, unless he can be considered as a wrong-doer. He is never liable for any negligence of his master.

If he aids or assists in a wrongful act, he is liable. 1 Wilson, 328, Perkins *v.* Smith.

In this case, John Caverly shut the gate, and left it shut till the dam gave way. The shutting of the gate was no wrongful act to anybody. The owners had a right to raise a head of water as high as the dam would safely bear. If the gate ought to have been raised sooner, that was business of the owners, and not of John Caverly. He had no authority to raise it, except when directed so to do.

The case discloses no wrongful act, no breach of duty, in John Caverly, no negligence which can render him liable to this plaintiff.

Judgment for the defendants.

DENNY AND OTHERS, TRUSTEES, &c., *v.* THE MANHATTAN COMPANY.

SUPREME COURT OF NEW YORK. 1846.

[2 *Denio*, 115.]

DEMURRER to declaration. The plaintiffs, as trustees of the creditors of Joseph and Andrew Brown, appointed pursuant to proceedings by attachment instituted against them as non-resident debtors, on the 9th day of November, 1836, under the provisions of the revised statutes, sued the defendants in case for an alleged violation of duty as the agents in New York of the Planters' Bank of Tennessee, in refusing to permit a transfer to the plaintiffs on the transfer book of the Planters'

Bank kept by them, of two hundred and eighty-one shares of the capital stock of that bank alleged to belong to the plaintiffs in their character of trustees. The declaration alleged that the defendants were a banking corporation organized under their charter and transacting business in the city of New York, and that the Planters' Bank was a corporation created by the legislature of Tennessee with a capital of $2,000,000, divided into shares of $100 each. It then averred that the defendants at the several times afterwards mentioned, "were the agents in the said city of New York of the said Planters' Bank of Tennessee for the registration and transfer of the stock of such bank and the payment of dividends thereupon in said city, and did during all the time last aforesaid keep at their said banking house in the city of New York, a set of books for the registration and transfer of the said stock of the said Planters' Bank of Tennessee," to wit, &c. It then stated with particularity the title of the trustees to the shares claimed by them, which was substantially as follows: The Browns prior to the attachment against them were the owners of the stock, and held two certificates, each for separate portions of it, issued by the defendants as the lawfully authorized agents of the Planters' Bank, signed by the cashier and by a clerk of the defendants under the corporate seal of the Planters' Bank, which certificates stated that the Browns were entitled to the shares mentioned in the certificates respectively, which were declared to be "transferable only at the bank of the said defendants on the surrender of the certificate." On the 12th day of December, 1837, A. Brown, as survivor of J. Brown who had died, executed under his seal a conveyance and transfer of the stock mentioned in both certificates to Messrs. Crockett and Park, with a power of attorney contained in it, to a clerk of the defendants, who was named, to surrender the certificates and execute a formal transfer. Crockett and Park, a few days afterwards, executed a like conveyance of the stock to the plaintiffs as trustees as aforesaid, with a power of attorney in blank. The declaration thereupon avers that it became and was the duty of the defendants upon the production and surrender of the certificates "to suffer and permit" the stock to be regularly transferred upon the transfer books kept at the defendants' bank to the plaintiffs as trustees under the act; and that the plaintiffs, to wit, on the 29th of September, 1838, &c., exhibited to the defendants these evidences of their right to the stock, and also a letter from the cashier of the Planters' Bank to the cashier of the defendants' company requesting that such transfer might be made, and offered to fill up the blank in the last-mentioned conveyance with the name of a clerk of the defendants, and to do all necessary acts, &c., and requested the defendants to permit the transfer to be made; yet that the defendants not regarding their duty, &c., but contriving and fraudulently intending, &c., would not suffer or permit the stock to be transferred to the plaintiffs on the books so kept by them, &c., whereby the plaintiffs have been unable to obtain a sufficient title to the stock, and have been prevented from selling and disposing of it, whereby it has become of no value to the plaintiffs.

The foregoing is the substance of the first count. There were four other counts substantially like the first, but with some additional averments not material to the point determined by the court.

The defendants demurred to the declaration, assigning special causes, objecting among other things that the declaration did not show any valid title in the plaintiffs as trustees to the stock in question, and that the defendants were not liable to the plaintiffs for acts done or omitted by them as agents of the Planters' Bank; and that if they were liable at all the action ought to have been assumpsit. Joinder.

S. P. Staples and *S. Stevens,* for the defendants.

S. A. Foot, for the plaintiffs.

PER CURIAM. We entertain a pretty strong impression that the plaintiffs have failed to show a good title to the stock: but our decision will be put upon another ground, concerning which we have had no doubt from the moment the case was opened. If the plaintiffs have a cause of action against any one, it is not against the defendants, but against the Planters' Bank of Tennessee. The defendants were not the agent of the plaintiffs, and owed them no duty. They were the agent of the Planters' Bank; and for a neglect to discharge their agency, they are answerable to their principal and to no one else. If third persons are injured by the neglect of a known agent, the rule is *respondeat superior*, and generally the action must be brought against the principal. *Judgment for defendants.*[1]

JOHNSON, IMPLEADED, &c., PLAINTIFF IN ERROR, *v.* BARBER, DEFENDANT IN ERROR.

SUPREME COURT OF ILLINOIS. 1849.

[10 *Ill.* 425.]

TRESPASS upon the case, in the Kane Circuit Court, brought by the defendant in error against the plaintiff in error and one John Johnson, for firing a prairie, &c., and heard before the Hon. JOHN DE CATON and a jury, at the April term, 1847. The defendants pleaded the general issue.

During the progress of the trial, the counsel for the defendants asked the court to give several instructions to the jury, some of which were refused and others given with a qualification. The following is the bill of exceptions taken in the case: —

"Be it remembered that, on the trial of this cause, the counsel for the defendants asked the court to instruct the jury as follows: —

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[1] Affirmed in the Court of Errors, 5 Denio, 639 (1846). — ED.

"1. The court will please instruct the jury, that they must be satisfied from the evidence that John Johnson was the agent of Peter Johnson, employed in and about his business, and that he, John, was and did act within the scope of his employment at the time he set fire to the prairie, or he, Peter Johnson, is not liable, and they will acquit him, which instruction was given by the court, with the following qualification: 'This is the law so far as Peter Johnson is sought to be made liable as master or principal for the acts of John Johnson.'

"2. If John Johnson transcended his authority given by said Peter Johnson, then he, said Peter, is not liable, and they, the jury, shall acquit him. This instruction was given by the court with the same qualification as above.

"3. The principal is not liable for the tortious acts of the agent, although, at the time such tortious acts were committed by the agent, he was engaged and employed in and about the business of the principal, unless he, the agent, in so doing, is carrying out the instructions of the principal, or he, the principal, subsequently assents to it. This instruction was given by the court with the following qualification: 'Yet the principal may be liable for the acts of the servant or agent, while doing the work of the principal or master without the instruction of the principal to do the particular tortious act.'

"4. The plaintiff is not entitled to recover of the defendants unless he proves all the material averments in his declaration, and the loss he, the plaintiff, has sustained, occasioned in consequence of the negligence of the defendants in manner and form as in the said plaintiff's declaration mentioned. This instruction was given by the court.

"5. If the injury is the effect of negligence in both parties, without any intentional wrong or gross negligence on the part of the defendants, then he, the plaintiff, cannot recover or maintain his action, and the jury should find for the defendants. This instruction was given by the court.

"6. It is for the plaintiff to prove that the agent acted with the assent or under the directions of the principal when he commits the tortious acts, and that it cannot be presumed, although he is in the employ of the principal, and unless it is proved they must acquit the principal. This instruction was given with the following qualification: 'This must be understood so far as it is sought to recover for a tortious act of servant or agent acting in relation to the principal or master.'

"7. The plaintiff cannot recover against both of the defendants, for if John Johnson acted under the instructions and directions of Peter Johnson, then he, Peter, is alone liable. If John Johnson acted contrary to the direction of Peter Johnson, then he, Peter, is not liable, and they must acquit him. This instruction was refused by the court.[1] . . .

"To the refusal of the court to give said instructions, and in giving the said qualifications to the instructions given, . . . the defendants excepted. . . ."

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[1] The statement and the opinion have been abbreviated by omitting passages not dealing with Agency. — Ed.

The jury returned a verdict against the defendants. . . . The defendants then entered a motion for a new trial, which the court overruled, and rendered a judgment upon the verdict of the jury.

E. W. Tracy, for the plaintiff in error.

W. D. Barry and *O. Peters*, for the defendant in error.

The opinion of the court was delivered by —

TREAT, C. J.[1] The court properly qualified the first, second, and sixth instructions. The instructions, as demanded, assumed that the relation of master and servant existed between the defendants. The modification confined the instructions to such a state of case.

No error was committed in adding the qualification to the third instruction. The principal is liable to third persons for the frauds, torts, and negligences of the agent, even though the conduct of the agent is without his participation or consent, provided the act is done in the course of the employment, and is not a wilful departure from it. Story on Agency, § 452 *et seq.;* Bush *v.* Steinman, 1 Bosanquet and Puller, 404; Wright *v.* Wilcox, 19 Wend. 343; Foster *v.* Bank, 17 Mass. 479. If one of the defendants, while engaged in the prosecution of the business of the other, carelessly or negligently set fire to the prairie, or even purposely, with a view to benefit or protect the interests of the employer, the latter would be liable for the consequences; but if he set out the fire from motives of malice or wantonness, the principal would not be liable, for that would be an abandonment of the business of the agency. The instruction, as modified by the court, stated the law correctly.

The seventh instruction was clearly wrong. If the act complained of was illegal, the fact that one of the defendants committed it under the direction of the other, did not shield him from responsibility, but both were equally liable to the party injured, as well the one who did the act as the one who procured it to be done. All concerned in the commission of an unlawful act are responsible for the consequences. Admit the principle asserted by this instruction, and every person charged with the commission of an act prohibited by law could excuse himself by showing that he acted in obedience to the command or under the direction of another. Such a doctrine would be subversive of private rights, and detrimental to the public interests. . . .

Judgment affirmed.[2]

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[1] Trumbull, J., did not sit in this case. — REP.

[2] On joinder of defendants, see Wright *v.* Wilcox, *ante*, p. 118; Phelps *v.* Wait, 30 N. Y. 78 (1864). — ED.

BELL *v.* JOSSELYN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1855.

[3 *Gray*, 309.]

ACTION OF TORT for negligently causing water to be admitted to a water pipe in the second story of a building, so that it flowed through and from that pipe into the shop of the plaintiff in the lower story.

At the trial at January term, 1854, of the Court of Common Pleas, before WELLS, C. J., there was evidence tending to show that this building was one of a block which belonged to the defendant's wife, but which he managed, executing leases, receiving rents, and making repairs in his own name; that the Cochituate water was supplied to this block by one main pipe, and distributed by branches to the several tenements; that one Frost was tenant at will of the room over the plaintiff's shop, and had agreed, in part payment for his rent, to pay the water rates for the whole block, but had neglected to do this, and suffered the waste pipe from his sink to get clogged; that the water commissioners of the city of Boston had therefore cut off the supply of water from the block; that the defendant, being informed that one of the tenants wanted the water, went to the water commissioners, paid the rates, became responsible for them for the future, and directed the water to be let on, which was done; and that the faucet in Frost's room was left open, so that the water, after filling the sink, overflowed, and soaked through the floor into the plaintiff's shop and damaged his property.

The defendant contended that the action could not be maintained against him, because he was an agent, acting within the scope of his authority. But the court ruled that his being an agent in a case like the present, would not, in itself, and standing alone, be a defence to this action.

The defendant then contended that an agent could not be held liable, when acting within the scope of his authority, for a mere nonfeasance — which he contended this was — nor for any negligence while acting within the scope of his authority. But the court ruled that the direction to the water commissioners to let on the water, was not a nonfeasance, but a positive act; and if it was done negligently, and without the exercise of ordinary care, he would be liable for any injury occasioned by the want of ordinary care.

The defendant further contended that he could not be liable for want of care in Frost's room, while the tenancy of Frost continued. But the court ruled that Frost's tenancy would not, of itself, be a defence to the action; but would diminish the amount of care which could be reasonably required of the defendant in relation to the premises which Frost occupied.

"The court instructed the jury that, to enable the plaintiff to recover, he must prove four things: 1st. That the defendant had the general management and charge of the premises; 2d. That the directing of the letting on of the water was the cause of the injury; 3d. That in ordering the letting on of the water, without first ascertaining that the faucet in Frost's room was properly turned, the defendant was guilty of a want of ordinary care, that is, such care as a man of ordinary prudence would exercise in his own affairs; 4th. That the plaintiff was in the exercise of ordinary care when he met with the injury."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

C. E. Allen & A. O. Allen, for the defendant.

S. E. Sewall, for the plaintiff.

METCALF, J. Our opinion is, that the rule of law on which the defendant attempts to sustain these exceptions, is not applicable to this case. Assuming that he was a mere agent, yet the injury for which this action is brought was not caused by his nonfeasance, but by his misfeasance. Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all. 2 Inst. Cler. 107; 2 Dane Ab. 482; 1 Chit. Pl. (6th Amer. ed.) 151; 1 Chit. Gen. Pract. 9. The defendant's omission to examine the state of the pipes in the house, before causing the water to be let on, was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts are, the nonfeasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a nonfeasance.

The instructions to the jury were sufficiently favorable to the defendant; and the jury, under those instructions, must have found all the facts necessary to the maintenance of the action.

Exceptions overruled.

BENNETT *v.* BAYES, PENNINGTON, AND HARRISON.

EXCHEQUER. 1860.

[5 *H. & N.* 391.]

THE first count of the declaration was in trespass for breaking and entering the plaintiff's dwelling-house and disturbing the plaintiff and his family therein, and seizing and taking the plaintiff's goods. The second count was in trover. The third count stated, that the plaintiff being tenant of a dwelling-house and premises to certain persons, and there being certain arrears of rent due from him to such persons in respect thereof, the defendants, for and on behalf of such persons, took and carried away the plaintiff's goods in the name of a distress for the said arrears, and under color thereof improperly extorted from, and forced and obliged the plaintiff to pay, over and above the said arrears of rent and all lawful charges, a large sum of money; and unlawfully caused and forced the plaintiff to pay divers exorbitant, excessive, and improper charges for and in respect of the said distress.

Plea. — Not guilty: by Statute 11 Geo. II. c. 19, § 21. — Issue thereon.[1] . . .

The learned judge left the case to the jury, who found a verdict for the plaintiff for £97 19*s.* 6*d.*, including £35 damages for the unlawful entry of the plaintiff's house; and leave was reserved to the defendants, Bayes and Pennington, to move to enter a verdict for them.

Monk, in last Michaelmas Term, obtained a rule *nisi* accordingly, on the ground that no count of the declaration was proved against them; nor any evidence given to go to the jury against them; and that they were not liable for the act of Harrison; that this particular action could not be sustained against any of the defendants; and that no sufficient tender of the rent and expenses was proved.

Brett, showed cause.

Quain, in support of the rule.

BRAMWELL, B., now said: This was a rule to enter a verdict for the defendants Bayes and Pennington. The material facts are these: The plaintiff was tenant of a house at Liverpool, belonging to two persons who resided in London. The defendants, Bayes and Pennington, were in partnership as painters and plumbers, and were agents for the collection of the rent and management of the property of these persons at Liverpool. The defendant Harrison was a broker. Bayes and Pennington signed and delivered to Harrison a warrant of distress for rent claimed from the plaintiff. At the time when they issued the warrant the rent was due, and the act which they required Harrison to do was perfectly lawful. Afterwards, and before Harrison effected any distress, the plaintiff tendered to Bayes and Pennington the amount of the rent. It was argued that the tender was not good, because the expenses were not tendered at the same time. But no authority was adduced (and we know of none) for the purpose of showing that a person intending to distrain is entitled to any expenses before he has actually distrained; and therefore we hold the tender good.

However, Bayes and Pennington refused the sum tendered, and afterwards Harrison distrained; and the question is, whether Bayes and Pennington are liable for that act of Harrison. No question arises from the fact of a tender having been also made to Harrison. The matter may be rendered intelligible by this simple mode of illustration: Suppose Bayes and Pennington had pleaded "not guilty," without putting "by statute" in the margin of the plea, would they have had a defence to this action? Therefore the question is, whether the act of Harrison was the act of Bayes and Pennington: that is to say, an act done by their authority, so that in law they are responsible for it. Under "not guilty" the question would be the same whether there had or had not been a tender to Harrison. The warrant was in the usual form, and was signed by Bayes and Pennington for the landlords. It occurred to my brother CHANNELL and myself, who together with my brother MARTIN heard this case, that it was doubtful whether, under the circumstances, Bayes and Pennington could be liable for the act of Harrison, — whether in fact they were anything more than a mere conduit-pipe for communicating authority from the landlords to Harrison. For my own part, and I believe I may say for my brother CHANNELL, if there had been nothing more we should have continued to entertain great doubt whether they would have been liable. It is certain that a messenger who delivers a letter containing a warrant of distress, not knowing the contents of the letter, is not responsible; and I cannot help thinking that if a servant was sent with this message to a broker, "My master desires you to distrain for rent due to him," the servant would not be liable as a person ordering or committing the trespass. So, if a person wrote a letter in these terms, "My friend, having a bad hand, is unable to write, and he requests me to write and tell you to distrain on his tenant," it is difficult to say that a person so writing would be liable to an action. But in order to show that our doubt is not unfounded, I would refer to Story on Agency, sec. 313, and the cases which are collected and extremely well stated in Smith's Master and Servant, p. 216; also to Sands *v.* Child, 3 Lev. 351. That was an action for suing in the admiralty for a matter done on the land, and thereby staying the plaintiff's ship bound for the East Indies. There was a special verdict, and it was found "that all this was done by the defendants as agents of the East India Company." After judgment for the plaintiff a writ of error was brought, and it was argued: "That this whole affair being transacted on behalf of the company, the action ought to have been brought against the company, and not against the defendants, their servants. But all this was overruled by both courts; for, first, this is not like the case in Godbolt, 185, where one sued in the admiralty for another, by a warrant of attorney, as his agent: for here it is not found that they had any warrant of attorney, and they must have done this of their own heads. Secondly, if it had been done by warrant of attorney from the company, yet that would not excuse the matter, for the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact." [It is put there on their doing the "fact," as it is called.] The same doctrine is laid down by Holt, C. J., in his judgment in Lane *v.* Cotton, 12 Mod. 473, 488, and also in Thompson *v.* Gibson, 7 M. & W. 456, and Perkins *v.* Smith, 1 Wils. 328. The marginal note of the latter case is: "Trover lies against a servant who disposes of goods, the property of another, to his master's use, whether he has any authority or not from his master for so doing." The Chief Justice said: "The point is, whether the defendant is not a tort-feasor, for if he is so no authority that he can derive from his master can excuse him from being liable in this action.[1] [Hughes, the bankrupt, had no right to deliver these goods to Smith. The gist of trover is the detainer or disposal of goods, which are the property of another, wrongfully; and it is found that the defendant disposed of them to his master's use, which his master could give him no authority to do." That is an authority for the purpose of showing that the defendant in such case would be liable because it was his act. Now, it was said that if a man commanded a person to go to a third person, the person bringing the message would be liable to an action. I think it quite clear that no man could communicate authority to another to commit a wrongful act; but at the time the defendant gave this order the act was not wrongful. Therefore, if the defendant had appeared to be in the position indicated in these cases, my brother CHANNELL and I should have been, I think, rather confirmed in our doubts than otherwise.] It seems to us, however, that the matter is not purely one of law, but also of fact, and upon examination of all the circumstances we think that the defendants, Bayes and Pennington were more than mere transmitters of authority from one person to another, and that they themselves were actually ordering the distress to be made. [It is not necessary to say whether they would have been liable to Harrison for his costs and expenses, or whether he would have been liable to them if he had misconducted himself in the distress. Very probably, however, both these things would be so. At all events, we look on these defendants as the persons who are themselves ordering the act to be done, and not merely communicating an authority to a third person.] If that be so, they are as much the persons who have done the act as if their own hands had done it, and the result is that the rule must be discharged. This is the judgment of the whole court, but my brother MARTIN does not participate in the doubt which my brother CHANNELL and myself entertained.

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[1] The reporter's statement of the facts is omitted. — ED.

Rule discharged.[2]

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[1] According to the report in 5 H. & N. 391, BRAMWELL, B., here said: "Therefore a servant or agent is liable for a misfeasance because he is a wrongdoer. But it is said that the issuing the warrant of distress was not wrongful."

The passages in brackets are from the report in 29 L. J. N. S. Ex. 224. — ED.

[2] See Bates *v.* Pilling, 6 B. & C. 38 (1826). — ED.

HORNER *v.* LAWRENCE.

SUPREME COURT OF NEW JERSEY. 1874.

[37 *N. J. L.* 46.]

On *certiorari* to the Burlington Pleas.

Argued at November Term, 1873, before Justices BEDLE, DALRIMPLE, and SCUDDER.

For the plaintiff in *certiorari*, *F. Voorhees.*

For the defendant, *Kingman.*

The opinion of the court was delivered by

BEDLE, J. Lawrence had two hogs in pasture upon Lamb's farm, in a field adjoining a strip of woodland owned by Forsyth, but separated by a worm fence, and through which woodland ran the Camden and Burlington County Railroad. Forsyth procured the wood upon his land to be cut, and employed Horner with two teams to haul it at a certain sum per day for each team. Forsyth lived about five miles from the woodland, and Horner about a mile from Forsyth. The case shows no instruction from Forsyth to Horner how to reach the woodland, but it appears that to get the wood it was necessary to go through the field where the hogs were being pastured. There are no facts, however, showing that Forsyth had any right to a way by necessity over Lamb's land. Horner saw Lamb and got permission from him to open a gap in the fence at a certain place, but with directions to close it up after he went in and after he came out, and also stating "that there were hogs and cattle in the field adjoining, which might get through and on to the railroad and get killed." Horner opened the gap and passed through with his two teams and wagons and a hired man, leaving the gap open while the wagons were being loaded, but closing it after driving out. This occurred twice on one day and once on the next.

Without referring further to the evidence, the case shows sufficient to justify the Pleas in finding that the hogs escaped through the gap, and that one was killed and the other injured upon the railroad. But it is said that there can be no recovery, because Horner was the agent or servant of Forsyth, and that the failure of Horner to put up the bars, was a mere neglect of duty in the course of such agency, for which he should be responsible only to his principal.

Whether, in answer to that, Horner was engaged in an independent employment, or whether the immunity of an agent or servant to a third person extends beyond mere neglects in the scope of an agency arising out of or in reference to matters, in the nature of contracts between the principal and third parties (Shearm. & Red. on Neg. §§ 111, 112), or what the exact limit of responsibility may be, need not now be settled, for the evidence is such that the court below could have considered Horner as having wilfully left down the bars, and thereby became responsible for his own tort, without reference to any question of agency.

He had no directions from Forsyth how to go upon the wood lot, or how to manage with the fence. It does not appear that he informed Forsyth of Lamb's permission, but if Horner is considered as Forsyth's servant he could only, at best, stand as a servant, with authority from Forsyth, precisely the same as the permission given by Lamb, and subject to the direction that he should close up the fence, while the wagons were being loaded, to prevent the escape of the hogs. Now, according to the fair and natural conclusion of the case, Horner purposely left down the fence and trusted to watching the gap, so as to prevent the hogs from going through, if they should attempt it. They escaped his vision, no doubt, while he and his hired man had forgotten their sentry duty at the gap. His conduct was not mere neglect, — it was intentional and wilful violation of his authority. It was his own *misfeasance*, for which, as servant, he cannot, in any respect, claim exemption against the party injured.

This view of the case sustains the judgment below, and it should be affirmed.

OSBORNE *v.* MORGAN AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1881.

[130 *Mass.* 102.]

GRAY, C. J. The declaration is in tort, and the material allegations of fact, which are admitted by the demurrer, are that while the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up by direction of the corporation certain partitions in a room in which the corporation was conducting the business of making wire, the defendants, one the superintendent and the others agents and servants of the corporation, being employed in that business, negligently, and without regard to the safety of persons rightfully in the room, placed a tackle-block and chains upon an iron rail suspended from the ceiling of the room, and suffered them to remain there in such a manner, and so unprotected from falling, that by reason thereof they fell upon and injured the plaintiff. Upon these facts, the plaintiff was a fellow-servant of the defendants. Farwell *v.* Boston & Worcester Railroad, 4 Met. 49; Albro *v.* Agawam Canal, 6 Cush. 75; Gilman *v.* Eastern Railroad, 10 Allen, 233, and 13 Allen, 433; Holden *v.* Fitchburg Railroad, 129 Mass. 268; Morgan *v.* Vale of Neath Railway, 5 B. & S. 570, 736, and L. R. 1 Q. B. 149.

The ruling sustaining the demurrer was based upon the judgment of this court, delivered by Mr. Justice Merrick, in Albro *v.* Jaquith, 4 Gray, 99, in which it was held that a person employed in the mill of a manufacturing corporation, who sustained injuries from the escape of inflammable gas, occasioned by the negligence and unskilfulness of the superintendent of the mill in the management of the apparatus and fixtures used for the purpose of generating, containing, conducting, and burning the gas for the lighting of the mill, could not maintain an action against the superintendent. But, upon consideration, we are all of opinion that that judgment is supported by no satisfactory reasons, and must be overruled.

The principal reason assigned was, that no misfeasance or positive act of wrong was charged, and that for nonfeasance, which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer, an agent or servant was responsible to him only, and not to any third person. It is often said in the books, that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly. Ulpian, in Dig. 9, 2, 27, 9; Parsons *v.* Winchell, 5 Cush. 592; Bell *v.* Josselyn, 3 Gray, 309; Nowell *v.* Wright, 3 Allen, 166; Horner *v.* Lawrence, 8 Vroom, 46. Negligence and unskilfulness in the management of inflammable gas, by reason of which it escapes and causes injury, can no more be considered as mere nonfeasance, within the meaning of the rule relied on, than negligence in the control of fire, as in the case in the Pandects; or of water, as in Bell *v.* Josselyn; or of a drawbridge, as in Nowell *v.* Wright, or of domestic animals, as in Parsons *v.* Winchell, and in the case in New Jersey.

In the case at bar, the negligent hanging and keeping by the defendants of the block and chains, in such a place and manner as to be in danger of falling upon persons underneath, was a misfeasance or improper dealing with instruments in the defendants' actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action. Both the ground of action and the measure of damages of the plaintiff are different from those of the master. The master's right of action against the defendants would be founded upon his contract with them, and his damages would be for the injury to his property, and could not include the injury to the person of this plaintiff, because the master could not be made liable to him for such an injury resulting from the fault of fellow-servants, unless the master had himself been guilty of negligence in selecting or employing them. The plaintiff's action is not founded on any contract, but is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence. The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby. Hawkesworth *v.* Thompson, 98 Mass. 77; Norton *v.* Sewall, 106 Mass. 143; May *v.* Western Union Telegraph, 112 Mass. 90; Grinnell *v.* Western Union Telegraph, 113 Mass. 299, 305; Ames *v.* Union Railway, 117 Mass. 541; Mulchey *v.* Methodist Religious Society, 125 Mass. 487; Rapson *v.* Cubitt, 9 M. & W. 710; George *v.* Skivington, L. R. 5 Ex. 1; Parry *v.* Smith, 4 C. P. D. 325; Foulkes *v.* Metropolitan Railway, 4 C. P. D. 267, and 5 C. P. D. 157. This case does not require us to consider whether a contractor or a servant, who has completed a vehicle, engine, or fixture, and has delivered it to his employer, can be held responsible for an injury afterwards suffered by a third person from a defect in its original construction. See Winterbottom *v.* Wright, 10 M. & W. 109; Collis *v.* Selden, L. R. 3 C. P. 495; Albany *v.* Cunliff, 2 Comst. 165; Thomas *v.* Winchester, 2 Selden, 397, 408; Coughtry *v.* Globe Woollen Co., 56 N. Y. 124, 127.

It was further suggested in Albro *v.* Jaquith, that many of the considerations of justice and policy, which led to the adoption of the rule that a master is not responsible to one of his servants for the injurious consequences of negligence of the others, were equally applicable to actions brought for like causes by one servant against another. The only such considerations specified were that the servant, in either case, is presumed to understand and appreciate the ordinary risk and peril incident to the service, and to predicate his compensation, in some measure, upon the extent of the hazard he assumes; and that "the knowledge, that no legal redress is afforded for damages occasioned by the inattention or unfaithfulness of other laborers engaged in the same common work, will naturally induce each one to be not only a strict observer of the conduct of others, but to be more prudent and careful himself, and thus by increased vigilance to promote the welfare and safety of all." The cases cited in support of these suggestions were Farwell *v.* Boston & Worcester Railroad, 4 Met. 49, and King *v.* Boston & Worcester Railroad, 9 Cush. 112, each of which was an action by a servant against the master; and it is hard to see the force of the suggestions as applied to an action by one servant against another servant.

Even the master is not exempt from liability to his servants for his own negligence; and the servants make no contract with, and receive no compensation from, each other. It may well be doubted whether a knowledge, on the part of the servants, that they were in no event to be responsible in damages to one another, would tend to make each more careful and prudent himself. And the mention by Chief Justice Shaw, in Farwell *v.* Boston & Worcester Railroad, of the opportunity of servants, when employed together, to observe the conduct of each other, and to give notice to their common employer of any misconduct, incapacity, or neglect of duty, was accompanied by a cautious withholding of all opinion upon the question whether the plaintiff had a remedy against the person actually in default; and was followed by the statement (upon which the decision of that case turned, and which has been affirmed in subsequent cases, some of which have been cited at the beginning of this opinion), that the rule exempting the master from liability to one servant for the fault of a fellow-servant did not depend upon the existence of any such opportunity, but extended to cases in which the two servants were employed in different departments of duty and at a distance from each other. 4 Met. 59–61.

So far as we are informed, there is nothing in any other reported case, in England or in this country, which countenances the defendants' position, except in Southcote *v.* Stanley, 1 H. & N. 247; S. C. 25 L. J. (N. S.) Ex. 339; decided in the Court of Exchequer in 1856, in which the action was against the master, and Chief Baron Pollock and Barons Alderson and Bramwell severally delivered oral opinions at the close of the argument. According to one report, Chief Baron Pollock uttered this *dictum:* "Neither can one servant maintain an action against another for negligence while engaged in their common employment." 1 H. & N. 250. But the other report contains no such *dictum*, and represents Baron Alderson as remarking that he was "not prepared to say that the person actually causing the negligence" (evidently meaning "causing the injury," or "guilty of the negligence"), "whether the master or servant, would not be liable." 25 L. J. (N. S.) Ex. 340. The responsibility of one servant for an injury caused by his own negligence to a fellow-servant was admitted in two considered judgments of the same court, the one delivered by Baron Alderson four months before the decision in Southcote *v.* Stanley, and the other by Baron Bramwell eight months afterwards. Wiggett *v.* Fox, 11 Exch. 832, 839; Degg *v.* Midland Railway, 1 H. & N. 773, 781. It has since been clearly asserted by Barons Pollock and Huddleston. Swainson *v.* Northeastern Railway, 3 Ex. D. 341, 343. And it has been affirmed by direct adjudication in Scotland, in Indiana, and in Minnesota. Wright *v.* Roxburg, 2 Ct. of Sess. Cas. (3d series) 748; Hinds *v.* Harbou, 58 Ind. 121; Hinds *v.* Overacker, 66 Ind. 547; Griffiths *v.* Wolfram, 22 Minn. 185.

Exceptions sustained.

G. F. Verry & H. L. Parker, for the plaintiff.

W. S. B. Hopkins & F. T. Blackmer for the defendants.[1]

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[1] In Delaney *v.* Rochereau, 34 La. Ann. 1123, 1128 (1882), BERMUDEZ, C. J., said: —

"At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done, the agent, in the latter case, being liable to his principal only. For non-feasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for

GEORGE L. WEBER *v.* CAROLINE WEBER.

SUPREME COURT OF MICHIGAN. 1882.

[47 *Mich.* 569.]

CASE. Plaintiff brings error. Reversed.

M. E. Dowling, for plaintiff in error.

D. C. Holbrook, for defendant in error.

CAMPBELL, J. Plaintiff sued defendant in case for making false representations to him concerning the freedom from encumbrance of certain land which she sold to him as agent for her husband Henry Weber. The declaration contains full averments showing the purchase and payment to have been made in reliance on these representations, — their wilful falsehood, and the loss of the entire premises by sale under the mortgage which existed, and which defendant had said did not exist, by declaring that there was no encumbrance whatever.

Defendant demurred to the declaration on the grounds — *first*, that defendant was Henry Weber's wife and that he should have been made co-defendant; *second*, that defendant is not averred to have been interested in the property; *third*, that it does not appear the representations were made at Henry Weber's request and by his authority; and *fourth*, that the mortgage being recorded was notice. The court below sustained the demurrer, and gave judgment for defendant.

It is not now claimed that the fact that the mortgage was recorded was of any importance. Where positive representations are made concerning a title for fraudulent purposes, and are relied on, it can hardly be insisted that what would be merely constructive notice in the absence of such declarations will prevent a person from having the right to rely on statements which if true would render a search unnecessary. And it is not necessarily true that a recorded mortgage is unpaid, merely because not discharged.

Neither is it true that an agent is exempt from liability for fraud knowingly committed on behalf of his principal. A person cannot avoid responsibility merely because he gets no personal advantage from his fraud. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another. No one can lawfully pursue a knowingly fraudulent employment; and while it may be true that the principal is often liable for the fraud of

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such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct.

"Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men." — ED.

his agent though himself honest, his own fraud will not exonerate his fraudulent agent. Starkweather *v.* Benjamin, 32 Mich. 306; Josselyn *v.* McAllister, 22 Mich. 300.

If liable at all, the agent may as well be sued separately, as any other joint wrong-doer. It is not usually necessary to sue jointly in tort. And we do not think that under our present statutes the case of husband and wife makes any different rule applicable. At common law the husband was liable personally for his wife's torts, and she could not be sued without him. But under our statutes now, that liability has been abolished, and she is solely responsible for them. Comp. L. §§ 6129, 7382. This being the case, we can see no ground for joining them in a suit, unless both are sued as wrong-doers. The evident purpose of the law was to put him, as to her personal wrongs, on the same footing with any third person.

The demurrer should have been overruled. The judgment below must be reversed, with costs of both courts, and the defendant required to answer over, within twenty days.

The other Justices concurred.[1]

FELTUS ET AL. *v.* SWAN.

SUPREME COURT OF MISSISSIPPI. 1884.

[62 *Miss.* 415.]

APPEAL from the Circuit Court of Wilkinson County. Hon. J. B. CHRISMAN, Judge.

This is an action for damages, brought on September 3, 1884, by J. A. V. Feltus and others, against D. D. Withers and B. P. Swan. The declaration avers that the plaintiffs own a plantation known as Deer Park, and that defendant Withers owns an adjoining plantation known as Lochdale, "which is and has been for more than ten years past under the charge and control of defendant Withers, as the owner thereof, and defendant B. P. Swan, as the manager and agent thereof, and that more than ten years ago a levee was built by the respective owners of said plantations, and from thence until now has remained for the joint protection thereof against high waters, and it has always been the custom, and plaintiffs were entitled to have the waters from time to time collecting behind and back of said levee, and being in and upon their said land, from rain, sipage, and overflow, drained and carried away from the same through a certain drain, cut and run around, in, and through said Lochdale plantation, and thence off of plaintiffs' said land, and that it was the duty of defendants, owning and occupying the adjoining close and plantation aforesaid, to open the said drain, that the water might be drained off of plaintiffs' land aforesaid, and plaintiffs' land could only be drained through defendants' said close and plantation; that during the year 1884, from January 1 to September 1, large quantities of water, from rain, sipage, and overflow, collected in and driven back upon plaintiffs' land, were obstructed and prevented from running off and away from the land by defendants' neglecting and refusing to open the drain aforesaid, which it was their duty to do, and by reason of such neglect and refusal the aforesaid land of plaintiffs for the time aforesaid was rendered unfit to cultivate, and greatly damaged, etc."

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[1] In Cullen *v.* Thomson's Trustees, 4 Macq. 424, 432–433 (1862), Lord WESTBURY said: "Can it be maintained as a proposition of law that a servant who knowingly joins with and assists his master in the commission of a fraud is not civilly responsible for the consequences? All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another; and the reason is plain, — for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud." In the same case, at p. 441, Lord WENSLEYDALE said: "In some cases a man may innocently assist in a transaction which is a fraud on some one. Of course, such a person cannot be responsible criminally or civilly." — ED.

Swan demurred to the declaration on the ground that, as the agent of Withers, he was not liable for the acts, omission, and neglect averred in the declaration. The court sustained the demurrer, and the plaintiffs asked leave to amend their declaration by inserting words therein charging that the neglect and refusal which it was declared produced the damage to the plaintiffs "was malicious, and with the intention of injuring the plaintiffs' aforesaid lands." The court refused to grant such leave, and dismissed the action as to Swan. The plaintiffs dismissed as to Withers and appealed against Swan.

C. P. Neilson and *D. C. Bramlett*, for the appellants. It is not clear that the injury complained of is a mere non-feasance of the agent, — in fact, it occurs to us that we charge a positive wrong. This must be apparent to any one acquainted in theory or fact with the levee system of the Mississippi River. In times of high water, back of all or nearly all levees large quantities of water collect to the height of the river water in front, and this back water must be drained off as the river recedes, otherwise it is more damaging than to have welcomed the overflow. And it is also true that there are natural drains in many sections, through which only the water from a large area of land may be carried off. But whether the wrong charged is a misfeasance or non-feasance, we contend that it is an exception to the general rule which exempts a servant from personal liability to a third person for injuries done by negligence in the discharge of his duties. Here is a most flagrant outrage done, causing great damage, which was alone in the power of appellee and Withers to avert, and they are equally liable under the declaration here, and were properly joined. See 1 Wait's Act. and Def. 264–265; Addison on Torts, 3d ed. 933. It was error in the court below to deny our application to amend our declaration.

Carson, Shields & Carson, for the appellee.

CAMPBELL, C. J., delivered the opinion of the court.

The appellee, being a mere agent, was not liable for an omission of duty, except to his principal. Story Ag. §§ 308, 309; Wharton Ag. §§ 535, 536; Dulap's Paley's Ag. 396.

The proposed amendment would not have made the declaration good, for whatever motive operated on the agent, the charge against him was only that he had failed to do, and not that he had done anything maliciously, and for non-feasance or omission to act at all the agent is answerable only to his employer. *Affirmed.*

BAIRD ET AL. *v.* SHIPMAN, ADMINISTRATOR.

SUPREME COURT OF ILLINOIS. 1890.

[132 *Ill.* 16.]

APPEAL from the Appellate Court for the First District, heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

The following opinion of the Appellate Court fully presents the questions arising upon this record: —

GARNETT, P. J. "This is an appeal from a judgment for damages, founded on the alleged negligence of appellants, by which the death of Joseph Garnett, appellee's intestate, is said to have been caused. The place where the injury happened was in a barn situated on premises on Michigan avenue, in Chicago, belonging to Aaron C. Goodman, who was then, and for several years before, a resident of Hartford, Connecticut. Appellants were his agents for renting the premises during the years 1884 and 1885, and during both years were carrying on the real estate business in Chicago. On the trial, evidence was given tending to show that they had, in fact, complete control of the premises, with the residence and barn thereon, repairing the same in their discretion, and there was no proof that in such matters they received any directions from the owner. The property was rented by appellants to Emma R. Wheeler and A. R. Tillman from April 1, 1884, to April 30, 1885, and to Emma R. Wheeler from May 1, 1885, to April 30, 1886. Both leases were in writing, and by the terms of each lease the tenants covenanted to keep the premises in good repair. The tenant in the last lease rented the premises to Nellie E. Pierce, who occupied the same from April 28, to September, 1885. The evidence tends to prove that when the lease was made to Emma R. Wheeler, the large carriage door to the barn was in a very insecure condition, and that appellants, through one Warner, the manager of their renting department, verbally agreed with Mrs. Wheeler to put the premises in thorough repair. Nothing was done to improve the condition of the door, and on June 12, 1885, while the deceased, an expressman by occupation, was engaged in delivering a load of kindling in the barn, for one of the parties living in the house, the door, weighing about four hundred pounds, fell from its fastenings, and injured him to such an extent that he died the next day.

"Appellants make two points: First, that the verdict is clearly against the weight of the evidence; second, that they were the agents of the owner, Goodman, and liable to him only, for any negligence attributable to them.

"There is nothing more than the ordinary conflict of evidence found in such cases, presenting a question of fact for the jury, and the finding must be respected by this court in deference to the well-settled rule.

"The other point is not so easily disposed of. An agent is liable to his principal only for mere breach of his contract with his principal. He must have due regard to the rights and safety of third persons. He cannot, in all cases, find shelter behind his principal. If, in the course of his agency, he is entrusted with a dangerous machine, to guard himself from personal liability he must use proper care in its management and supervision, so that others in the use of ordinary care, will not suffer in life, limb, or property. Suydam *v.* Moore, 8 Barb. 358; Phelps *v.* Wait, 30 N. Y. 78. It is not his contract with the principal which exposes him to, or protects him from, liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. Delaney *v.* Rochereau, 34 La. Ann. 1123.

"If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts, and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, by reason of his having so left them without proper safeguards. Osborne *v.* Morgan, 130 Mass. 102.

"A number of authorities charge the agent, in such cases, on the ground of misfeasance, as distinguished from non-feasance. Mechem, in his work on Agency (sec. 572), says: 'Some confusion has crept into certain cases from failure to observe clearly the distinction between non-feasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal and imposed upon him by his relation, which is non-feasance. Misfeasance may involve, also, to some extent the idea of not doing, as, where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, — does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual, in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation.' To the same effect are Lottman *v.* Barnett, 62 Mo. 159; Martin *v.* Benoist, 20 Mo. App. 263; Harriman *v.* Stowe, 57 Mo. 93; and Bell *v.* Josselyn, 3 Gray, 309.

"A case parallel to that now in hand is Campbell *v.* Portland Sugar Co., 62 Me. 552, where agents of the Portland Sugar Company had the charge and management of a wharf belonging to the company, and rented the same to tenants, agreeing to keep it in repair. They allowed the covering to become old, worn, and insecure, by means of which the plaintiff was injured. The court held the agents were equally responsible to the injured person with their principals.

"Wharton, in his work on Negligence (sec. 535), insists that the distinction, in this class of cases, between non-feasance and misfeasance, can no longer be sustained; that the true doctrine is, that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is remotely due to the agent's negligence, the reason being, that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct centre of legal responsibilities and duties, but that wherever there is no such interruption of causal connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury. The rule, whether as stated by Mechem or Wharton, is sufficient to charge appellants with damages under the circumstances disclosed in this record. They had the same control of the premises in question as the owner would have had if he had resided in Chicago, and attended to his own leasing and repairing. In that respect, appellants remained in control of the premises until the door fell upon the deceased. There was no interruption of the causal relation between them and the injured man. They were, in fact, for the time being, substituted in the place of the owner, so far as the control and management of the property was concerned. The principle that makes an independent contractor, to whose control premises upon which he is working are surrendered, liable for damages to strangers caused by his negligence, although he is at the time doing the work under contract with the owner (Wharton on Negligence, sec. 440), would seem to be sufficient to hold appellants. The owner of cattle, who places them in the hands of an agister, is not liable for damages committed by them while they are under the control of the agister. It is the possession and control of the cattle which fix the liability, and the law imposes upon the agister the duty to protect strangers from injury by them. Ward *v.* Brown, 64 Ill. 307; Ozburn *v.* Adams, 70 id. 291.

"When appellants rented the premises to Mrs. Wheeler, in the dangerous condition shown by the evidence, they voluntarily set in motion an agency, which, in the ordinary and natural course of events, would expose persons entering the barn to personal injury. Use of the barn for the purpose for which it was used when the deceased came to his death, was one of its ordinary and appropriate uses, and might, by ordinary foresight, have been anticipated. If the insecure condition of the door fastenings had arisen after the letting to Mrs. Wheeler, a different question would be presented; but as it existed before and at the time of the letting, the owner or persons in control are chargeable with the consequences. Gridley *v.* Bloomington, 68 Ill. 47; Tomle *v.* Hampton, 129 Id. 379.

"Neither error is well assigned, and the judgment is affirmed."

L. H. Boutell, for the appellant.

Cameron & Hughes, for the appellee.

PER CURIAM. We fully concur in the legal proposition asserted in the foregoing opinion, and deem it unnecessary to add to what is therein said in support of that proposition.

The judgment is affirmed.[1]

SECTION II.

Unauthorized Contracts.

BALLOU *v.* TALBOT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1820.

[16 *Mass.* 461.]

THE declaration was "in a plea of the case for that the said Talbot, at, &c., on, &c., by his note of that date, by him subscribed, for value received, promised the plaintiff to pay him, or his order, $380 on demand with interest," &c.

Trial on the general issue, in May last, before JACKSON, J., at Taunton. The note produced was signed by the defendant, and, after his name, were added the words "agent for David Perry." The defendant objected that this evidence did not comport with the declaration. The plaintiff offered to prove, that the defendant was not authorized to make the note, as agent for Perry. The defendant contended that, if that was the fact, still the plaintiff could not recover in this action;

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[1] See Campbell *v.* Portland Sugar Co., 62 Me. 552 (1873).

Cases on conversion by agents are collected in 1 Ames & Smith's Cases on Torts, 307-341. — ED.

and that he should have brought a special action on the case, setting forth that the defendant undertook to act as agent, and pretended to have such authority, when he was not authorized.

The judge overruled this objection, intending to reserve the question for the consideration of the whole court. The trial proceeded, and the plaintiff obtained a verdict on the ground that the defendant was not authorized to sign the note, as agent to Perry.

If, in the opinion of the court, the plaintiff was entitled to recover under these circumstances, judgment was to be rendered on the verdict; otherwise the plaintiff was to become nonsuit, or such order made in the cause as to the Court should seem proper.

W. and *F. Baylies*, for the defendant.

Morton, for the plaintiff.

Parker, C. J. The question in this case is not whether the defendant is liable for having undertaken to make the promise for Perry, but whether the note declared on is the note of the defendant.

It is obvious, from the signature, that it was neither given nor received as the defendant's note. It is found by the jury, that he had no authority to sign it for Perry; but the legal inference from this fact is, not that it became his promise directly, but that he is answerable in damages for acting without authority. What is stated in the case of Long *v.* Colburn, as an intimation of the court, was undoubtedly a settled opinion, viz., that, in such case, a special action upon the case would be the proper action.

One way, and perhaps the best way, to ascertain whether a party is sued in the right form of action, is to see of what fact the declaration gives him notice, and whether that constitutes substantially the contract to which he is called to answer. In the case before us the defendant is charged with having made a promissory note to the plaintiff. The evidence produced is apparently the note of another. But he wrongfully made this note for the other. This is entirely new ground, of which the declaration gave him no notice, and which he cannot be expected to be prepared to answer.

Besides, if the note is to be considered as evidence of the defendant's own promise, he must pay according to the tenor of it; whereas, if he were sued for falsely assuming an authority, he might defend himself by showing that the person, for whom he assumed to act, had afterwards ratified his act, or that he had otherwise satisfied the debt for which the note was given, or perhaps, he might show that no debt was due for which the note was given, or that he had authority to make it. It is, in short, a proper subject for a special action, in which damages will be recovered according to the injury sustained.

In the cases cited by the plaintiff's counsel, the parties held personally liable, either made themselves so by the terms of the contract, though purporting to act for another, or they acted in certain capacities in which they had no right to bind the estate of those for whom they undertook to act. In the case before us, the promise was avowedly made by the defendant for Perry; and it was matter of evidence, extrinsic to the contract, whether he had authority or not. The verdict is set aside, and the plaintiff must be called.

Plaintiff nonsuit.[1]

POLHILL *v.* WALTER.

King's Bench. 1832.

[3 *B. & Ad.* 114.]

Declaration stated, in the first count, that J. B. Fox, at Pernambuco, according to the usage of merchants, drew a bill of exchange, dated the 23d of April, 1829, upon Edward Hancorne, requesting him, sixty days after sight thereof, to pay Messrs. Turner, Brade, and Co., or order, £140 16*s.* 8*d.* value received, for Mr. Robert Lott; that afterwards the defendant, well knowing the premises, did falsely, fraudulently, and deceitfully represent and pretend that he was duly authorized by Hancorne to accept the said bill of exchange according to the usage of merchants, on behalf and by the procuration of Hancorne, to whom the same was so directed as aforesaid, and did then and there falsely and fraudulently pretend to accept the same by the procuration of Hancorne; that the said bill of exchange was indorsed over, and by various indorsements came to the plaintiff, of which the defendant had notice; that the plaintiff, relying upon the said pretended acceptance, and believing that the defendant had authority from Hancorne, so to accept the bill on his behalf, and in consideration thereof, and of the indorsement, and of the delivery of the bill to him the plaintiff, received and took from the last indorsers the bill as and for payment of the sum of money in the bill specified, for certain goods and merchandises of the plaintiff sold to the indorsers; that when the bill became due, it was presented to Hancorne for payment, but that he, Hancorne, did not nor would pay the same, whereupon the plaintiff brought an action against Hancorne as the supposed acceptor thereof; and that by reason of the premises, and the said false representation and pretence of the defendant, the plaintiff not only lost the sum of money in the bill of exchange mentioned, which has not yet been paid, but also expended a large sum, to wit, £42 7*s.*, in unsuccessfully suing Hancorne, and also paid £17 to him as his costs. The second count, after stating the drawing of the bill according to the custom of merchants, by Fox, as in the first count, alleged that the defendant, well knowing the premises, did falsely and deceitfully represent and pretend that he, the defendant, was duly authorized by Hancorne to accept the bill according to the said usage and custom of merchants, on behalf and by the procuration of Hancorne, to whom the same was directed, and did accept the same in writing under pretence of the procuration aforesaid; that by various indorsements the bill came to the plaintiff; that he, the plaintiff, relying on the said pretended procuration and authority of Hancorne, and in consideration thereof, and of the said acceptance, received and took the bill as and for payment of a sum of money in the bill specified, in respect of goods sold by the plaintiff. The count then stated the presentment of the bill to Hancorne and his refusal to pay, and averred that it became and was the duty of the defendant to pay the sum in the bill specified, as the acceptor thereof, but that he had refused. There was a similar allegation of special damage as in the first count. Plea, not guilty. At the trial, before Lord TENTERDEN, C. J., at the London sittings after Hilary term, 1831, it appeared in evidence that the defendant had formerly been in partnership with Hancorne, but was not so at the time of the present transaction. The latter, however, still kept a counting-house on the premises where the defendant carried on business. The bill of exchange drawn upon Hancorne was, in June, 1829, left for acceptance at that place, and, afterwards, a banker's clerk, accompanied by a Mr. Armfield, then a partner in the house of the payees, called for the bill. The defendant stated that Hancorne was out of town, and would not return for a week or ten days, and that it had better be presented again. This the clerk refused, and said it would be protested. Armfield then represented to the defendant that expense would be incurred by the protest, and assured him that it was all correct; whereupon the defendant, acting upon that assurance, accepted it per procuration of Mr. Hancorne. After this acceptance, it was indorsed over by the payees. On the return of Hancorne, he expressed his regret at the acceptance, and refused to pay the bill. The plaintiff sued him, and, on the defendant appearing and stating the above circumstances, was nonsuited. The present action was brought to recover the amount of the bill, and the costs incurred in that action, amounting in the whole to £196. The defendant's counsel contended that as there was no fraudulent or deceitful intention on the part of the defendant, he was not answerable. Lord Tenterden was of that opinion, but left it to the jury to determine whether there was such fraudulent intent or not; and directed them to find for the defendant if they thought there was no fraud, otherwise for the plaintiff; giving the plaintiff leave to enter a verdict for the sum of £196 if the court should be of opinion that he was entitled thereto. The jury found a verdict for the defendant. In the ensuing Easter term Sir James Scarlett obtained a rule nisi, according to the leave reserved, against which in the last term cause was shown by

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[1] *Acc.:* Hall *v.* Crandall, 29 Cal. 567 (1866); Noyes *v.* Loring, 55 Me. 408 (1867); Bartlett *v.* Tucker, 104 Mass. 336 (1870).

Contra: Dusenbury *v.* Ellis, 3 Johns. Cas. 70 (1802); but this last case is disapproved in White *v.* Madison, 26 N. Y. 117 (1862). — Ed.

Campbell and *F. Kelly.*

Sir *James Scarlett* and *Lloyd*, *contra.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court.[1] . . .

On the argument, two points were made by the plaintiff's counsel. It was contended, in the first place, that although the defendant was not guilty of any fraud or deceit, he might be made liable as acceptor of the bill; that the second count was applicable to that view of the case; and that, after rejecting the allegations of fraud and falsehood in that count, it contained a sufficient statement of a cause of action against him, as acceptor. But we are clearly of opinion that the defendant cannot be made responsible in that character. It is enough to say that no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honor, which the defendant certainly was not.

This distinguishes the present case from that of a pretended agent, making a promissory note (referred to in Mr. Roscoe's Digest of the Law of Bills of Exchange, note 9, p. 47), or purchasing goods in the name of a supposed principal. And, indeed, it may well be doubted if the defendant, by writing this acceptance, entered into any contract or warranty at all, that he had authority to do so; and if he did, it would be an insuperable objection to an action as on a contract by this plaintiff, that at all events there was no contract with, or warranty to, him.

It was in the next place contended that the allegation of falsehood and fraud in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff: it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated, to induce another to act on the faith of it, in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud; and for this position was cited the case of Foster *v.* Charles, 6 Bingh. 396, 7 Bingh. 105, which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of Corbet *v.* Brown, 8 Bingh. 33. The principle of these cases appears to us to be well founded, and to apply to the present.

It is true that there the representation was made immediately to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here, the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have intended, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result.

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[1] The Chief Justice's statement of the case is omitted. — ED.

If, then, the defendant, when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.

It is of the greatest importance in all transactions, that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified, and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an accepted bill, and it was only in consequence of the false statement of the defendant that he actually had authority to accept, that the bill gained its credit, and the plaintiff sustained a loss. For these reasons we are of opinion that the rule should be made absolute to enter a verdict for the plaintiff.

Rule absolute.

SMOUT *v.* ILBERY.

EXCHEQUER. 1842.

[10 *M. & W.* 1.]

DEBT for goods sold and delivered, and on an account stated.

Pleas, first, except as to £6 7*s.*, parcel, &c., *nunquam indebitatus;* secondly, except as to the said sum of £6 7*s.*, parcel, &c., payment; thirdly, as to the sum of £6 7*s.*, parcel, &c., payment into court of that sum, and *nunquam indebitatus ultra.* The replication took issue on the first plea, denied the payment alleged in the second, and accepted the £6 7*s.*, in satisfaction as to so much of the debt demanded.

At the trial before GURNEY, B., at the Middlesex Sittings in Michaelmas Term, 1841, it appeared that the plaintiff was a butcher, and the defendant the widow of James Ilbery, who left England for China in May, 1839, and was lost in the outward voyage, on the 14th October, 1839. The news of his death arrived in England on the 13th of March, 1840. The plaintiff had supplied meat to the family before Mr. Ilbery sailed, and during his voyage, and the supply continued down to the time of the news of his death, and even afterwards. Upon the 14th October, 1839, the day of Mr. Ilbery's death, the amount of the debt was £52 13*s.* 11*d.* Between that day and the arrival of the news of the death, meat had been supplied to the amount of £19 9*s.*; and after that, the supply amounted to £6 7*s.*

This action was brought for these two sums (together) £25 16*s.* The defendant paid £6 7*s.* into court, and relied on a payment of £20, as discharging her from the plaintiff's claim for meat supplied after the date of her husband's death; and the counsel for the defendant gave in evidence the following receipt signed by the plaintiff, dated the 30th March, 1840: "Received of Mrs. Ilbery, £20." The plaintiff insisted that the £20 had been paid generally on account, and must be applied as a payment by the executors in part satisfaction of the debt of the husband; and called Mr. Dollman, the executor. From his evidence it appeared, that Mr. Ilbery had left the management of his affairs in his hands, and whenever Mrs. Ilbery wanted money she had it from him. Dollman and Mrs. Ilbery were, by Ilbery's will, appointed executor and executrix; but he alone proved the will, on the 21st March, 1840, power being reserved in the usual way for her to prove also. On the 28th March, Mr. Dollman gave Mrs. Ilbery five or six cheques, and among others, one for £20, payable to the plaintiff. This cheque she paid to the plaintiff, and took his receipt as above mentioned.

At that time it was supposed that Ilbery's estate was solvent. It turned out to be otherwise; and Dollman, who was engaged with him in the adventure to China, had become bankrupt.

The question left to the jury was, whether the £20 was paid on the executorship account, or on the account of Mrs. Ilbery only, and in discharge of that debt which (on both sides, as well as in the learned Judge's opinion) was taken to have been due from her.

The jury found that it was paid on the executorship account, and gave their verdict for the plaintiff for £19 9*s.*, the price of the meat supplied between the day of Mr. Ilbery's death, and the arrival of the intelligence of it. A rule having been obtained in Michaelmas Term to show cause why that verdict should not be set aside, and a new trial had, on the ground that the defendant was not liable for the meat supplied after, but before she had any knowledge of, her husband's death.

Hindmarch (*Jervis* with him) showed cause.

Erle, in support of the rule.

The judgment of the court was now delivered by

ALDERSON, B.[1] The point, how far an agent is personally liable who, having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt that in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible. But independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases, in which an agent who without actual authority makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. But there is a third class, in which the courts have held, that where a party making the contract as agent *bonâ fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences.

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[1] After stating the case. — ED

On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found, that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act.

Of the first, it is not necessary to cite any instance. Polhill *v.* Walter, 3 B. & Ad. 114, is an instance of the second; and the cases where the agent never had any authority to contract at all, but believed that he had, as when he acted on a forged warrant of attorney, which he thought to be genuine, and the like, are instances of the third class. To these may be added those cited by Mr. Justice Story, in his book on Agency, p. 226, note 3. The present case seems to us to be distinguishable from all these authorities. Here the agent had in fact full authority originally to contract, and did contract in the name of the principal. There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There was no *mala fides* on her part; no want of due diligence in acquiring knowledge of the revocation; no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come. We were, in the course of the argument, pressed with the difficulty, that if the defendant be not personally liable, there is no one liable on this contract at all; for Blades *v.* Free, 9 B. & Cr. 167; 4 Man. & Ry. 282, has decided, that in such a case the executors of the husband are not liable. This may be so; but we do not think that if it be so, it affords to us a sufficient ground for holding the defendant liable. In the ordinary case of a wife who makes a contract in her husband's lifetime, for which the husband is not liable, the same consequence follows. In that case, as here, no one is liable upon the contract so made.

Our judgment, on the present occasion, is founded on general principles applicable to all agents; but we think it right also to advert to the circumstance, that this is the case of a married woman, whose situation as a contracting party is of a peculiar nature. A person who contracts with an ordinary agent, contracts with one capable of contracting in his own name; but he who contracts with a married woman knows that she is in general incapable of making any contract by which she is personally bound. The contract, therefore, made with the husband by her instrumentality, may be considered as equivalent to one made by the husband exclusively of the agent. Now, if a contract were made on the terms, that the agent, having a determinable authority, bound his principal, but expressly stipulated that he should not be personally liable himself, it seems quite reasonable that, in the absence of all *mala fides* on the part of the agent, no responsibility should rest upon him; and, as it appears to us, a married woman, situated as the defendant was in this case, may fairly be considered as an agent so stipulating for herself; and on this limited ground, therefore, we think she would not be liable under such circumstances as these.

For these reasons, we are of opinion that the rule for a new trial must be absolute; but as the point was not taken at *Nisi Prius*, we think the costs should abide the event of the new trial.

Rule absolute accordingly.[1]

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[1] See Randell *v.* Trimen, 18 C. B. 786, 793 (1856). — ED.

JENKINS *v.* HUTCHINSON.

QUEEN'S BENCH. 1849.

[13 *Q. B.* 744.]

ASSUMPSIT. Declaration in the ordinary form on a memorandum of charter-party, not under seal, averred to be made by and between plaintiff and defendant, by which it was agreed that a ship called, &c., should sail to Constantinople. Breach, that the ship did not sail. Plea (amongst others), *Non assumpsit.*

On the trial, before ERLE, J., at the Durham Summer Assizes, 1848, a memorandum of charter-party not under seal was produced. It commenced: "It is this day mutually agreed between Mr. P. A. Barnes, of Jarrow, owner of the good ship," &c., "and Mr. Jenkins, merchant, that," &c. The instrument was one of the ordinary printed forms; and the blanks had been filled up by the defendant. It was signed by the plaintiff, and was also signed by the defendant, in the following form: "R. A. Hutchinson *pro* P. A. Barnes." This signature was attested in the following form: "Witness to the signature of P. A. Barnes *pr* Ralph Hutchinson, T. Wilson." It appeared in evidence that Barnes had given the defendant no authority to make this contract, but that the defendant, believing that he wanted such a charter-party, made it for him, and that Barnes, on its being communicated to him, refused to adopt it, having himself, without defendant's knowledge, already chartered his vessel. The plaintiff's counsel contended that under these circumstances the defendant was liable, and might be sued on the contract as principal. Verdict for the plaintiff, leave being reserved to move for a nonsuit. *Martin*, in Michaelmas Term, 1848, obtained a rule *nisi* accordingly.

Watson, *Overend*, and *Hugh Hill*, now showed cause.

Martin and *Seymour*, *contra.*

Lord DENMAN, C. J., delivered the judgment of the Court. . . .

It is not pretended that the defendant had any interest as principal: he signed as agent, intending to bind a principal, and in no other character. That he may be liable to the plaintiff in another form of action for any damage sustained by his representing himself to be agent when he was not, is very possible: but the question is here whether he can be sued on the charter-party itself, as a party to it. No reported case has decided that a party so circumstanced can be sued on the instrument itself. Mr. Justice Story, in his book on the Law of Agency, p. 322, 3d ed., in a note, states that the decisions in the American courts are conflicting on this point, and that in England it is held that the suit must be by a special action on the case; citing Polhill *v.* Walter, 3 B. & Ad. 114. That case does not perhaps establish the broad proposition, for the contract was a bill of exchange, an instrument differing in many respects from ordinary contracts; but even in the case of a bill of exchange the Court of Exchequer, in Wilson *v.* Barthrop, 2 M. & W. 863, did not at once repudiate the possibility that an agent might be so liable: the case, however, went off on the ground that he might have had authority to bind the principal, and did not appear to have acted *mala fide.*

In the absence of any direct authority, we think that a party who executes an instrument in the name of another, whose name he puts to the instrument and adds his own name only as agent for that other, cannot be treated as a party to that instrument and be sued upon it, unless it be shown that he was the real principal: and that this rule must be made absolute accordingly.

Rule absolute for a nonsuit.

LEWIS *v.* NICHOLSON.

QUEEN'S BENCH. 1852.

[18 *Q. B.* 503.]

DECLARATION stated that Messrs. Arliss & Tucker had assigned by bill of sale to plaintiff by way of security for £268 7*s.* certain goods; and that whilst the debt was unsatisfied Arliss & Tucker became bankrupts. That the goods were seized by their assignees, who were about to sell them; and plaintiff gave notice that he claimed the goods, and would forbid the sale. That, in consideration plaintiff would consent to the sale, defendants promised that the net proceeds of the effects included in the bill of sale should be paid to plaintiff to the extent of the balance then due to him. Averments of consent by plaintiff, and that the sale took place. Breach, that the net proceeds were not paid to plaintiff. There were also counts for money had and received, and on accounts stated.

Plea: *Non assumpserunt.* Issue thereon.

On the trial, before Lord CAMPBELL, C. J., at Guildhall, at the sittings after last Hilary Term, the material facts appeared to be that the defendants were solicitors to the assignees of Messrs. Arliss & Tucker, who had become bankrupts. The trade assignee had ordered a sale by auction of goods seized as the property of the bankrupts, when the plaintiff's solicitor gave notice that the plaintiff claimed part of the goods under a bill of sale by way of mortgage. The following letters were then proved.

Defendants to plaintiff's solicitor, 26th August, 1851.

"*Re* Arliss and Tucker. Sir: In consideration of Mr. James Henry Lewis, for whom you act, consenting to the sale, by Messrs. Lewis & Son, of the bankrupts' printing materials and other effects (part whereof is included in a bill of sale to Mr. J. H. Lewis by way of mortgage, dated the 16th of March, 1850), we hereby, on behalf of the assignees, consent that the net proceeds of the effects included in the said bill of sale shall be paid over to you or your client to the extent of the balance now remaining due under the bill of sale for principal and interest. We shall feel obliged by your sending us immediately a consent to the sale accordingly. Yours faithfully, Nicholson & Parker."

Plaintiff's solicitor to defendants, 27th August, 1851.

"*Re* Arliss and Tucker. Dear Sirs: In compliance with the undertaking given by you herein, and contained in your letter of the 26th inst., I hereby, on the part of Mr. James Henry Lewis, consent to the sale by Messrs. Lewis & Son of the bankrupts' printing materials and other effects (part of which is included in the bill of sale to Mr. J. H. Lewis by way of mortgage dated the 16th of March, 1850). I am, gentlemen, your obedient servant, J. H. F. Lewis, solicitor to the said J. H. Lewis."

The sale took place accordingly. The trade assignee of the bankrupts had authorized the writing of the letter of 26th August, 1851. The official assignee was absent at the time, and did not know of the writing of that letter till afterwards; he was called as a witness for the plaintiff, and proved that he never ratified the contract in that letter.

Some letters, written after the dispute had arisen, were put in evidence, which, as plaintiff contended, showed that defendants considered themselves as personally bound by the undertaking of 26th August.

The LORD CHIEF JUSTICE directed a nonsuit, with leave to move to enter a verdict if the Court should be of opinion that, on the documents and evidence, the plaintiff was entitled to recover.

Shee, Serjt., in the ensuing term, obtained a rule *Nisi* accordingly.

Bramwell and *Willes* now showed cause.

Shee, Serjt., and *Macnamara*, in support of the rule.

Lord CAMPBELL, C. J.[1] . . . Then the other point is to be considered. I think the facts raise it, as the trade assigneee had no authority to make the official assignee personally liable on such a collateral contract. He might give assent, binding on both, to the disposal of the goods or money; but this goes much beyond such authority. So, the principals not being bound, the question arises whether the defendants are liable in this form of action. In the note to Thomas *v.* Hewes, 2 C. & M. 519, 530, note (*e*), s. c. 4 Tyr. 335, 338, it is stated to have been said by Bayley, B., that, "where an agent makes a contract in the name of his principal, and it turns out that the principal is not liable from the want of authority in the agent to make such contract, the agent is personally liable on the contract." That is a high authority; but I must dissent from it. It is clear that it cannot apply where the contract is peculiarly personal; otherwise this absurdity would follow, that, if A., professing to have but not having authority from B., made a contract that B. should marry C., C. might sue A. for breach of promise of marriage, even though they were of the same sex. Perhaps this distinction would be enough to support the decision in Jenkins *v.* Hutchinson, 13 Q. B. 744, as there the contract might be said to be peculiarly made with the owner of the ship, which the defendant was not; but I go further. I think in no case where it appears that a man did not intend to bind himself, but only to make a contract for a principal, can he be sued as principal, merely because there was no authority. He is liable, if there was any fraud, in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not. In either way he may be made liable for the damages occasioned by the absence of authority. But I think that to say he is liable as principal is to make a contract, not to construe it. I think, therefore, that these defendants were liable, but not in this action; and that the nonsuit, therefore, was right.[1] *Rule discharged.*

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[1] After discussing the construction of the contract. — ED.

COLLEN *v.* WRIGHT ET AL.

EXCHEQUER CHAMBER. 1857.

[8 *E. & B.* 647.]

APPEAL from the decision of the Court of Queen's Bench on a case stated without pleadings. The case will be found stated in full in the report below. Collen *v.* Wright.[2] In substance it stated that the testator Wright was land agent for a gentleman named Gardner, and, as such, made an agreement with the plaintiff for the lease to him for 12½ years of a farm of Gardner's. A formal agreement between landlord and lessee was drawn up and signed by the testator in the following form: "Robert Wright, agent to William Dunn Gardner, Esquire, lessor." It was also signed by plaintiff. The plaintiff entered on the farm on the strength of this agreement. Mr. Gardner refused to execute any such lease, alleging accurately, as it proved, that he had conferred on the testator no authority to agree for a lease for so long a term. The plaintiff had commenced a suit in Chancery against Gardner for a specific performance. On discovering the ground of defence, his solicitors sent to Wright a formal notice that, unless they received from Wright notice to the contrary, the plaintiff would proceed with the suit at Wright's expense; and in the event of his bill being dismissed on the ground of the absence of authority, would commence an action to recover the costs and other damages by reason of Wright's want of authority. Wright's solicitor sent an answer, dated 11th

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[1] Concurring opinions were delivered by WIGHTMAN, ERLE, and CROMPTON, JJ. — ED.

[2] 7 E. & B. 301. See Simons *v.* Patchett, 7 E. & B. 568. — REP.

April, 1855, denying Wright's liability to any action, but not containing any admission that Wright had not had full authority. The suit was proceeded with, and the bill dismissed with costs, on the ground that Wright had no authority from Gardner to sign the agreement. The case in the Queen's Bench was stated after Wright's death, and submitted two questions to the Court: 1. Whether the plaintiff is entitled to maintain an action against the defendants, as executrix and executors of the said Robert Wright, to recover damages; 2. Whether, if so, the whole of the damages sustained by the plaintiff, including his costs of the said suit in Chancery can be recovered; or, if some of such damages and costs only can be recovered, which of them, and to what extent, without regard, however, to the exact amount. The case contained provisions for a judgment, subject to an arbitration to ascertain the amount of damages according to the principles laid down by the Court. The Court of Queen's Bench ordered that judgment should be "entered for the plaintiff for such amount of damages as shall include money laid out and costs of Chancery suit." The defendants appealed.

Phipson, for the appellants.

O'Malley, for the respondent.

WILLES, J., delivered the following judgment, in which POLLOCK, C. B., WILLIAMS, J., and BRAMWELL, WATSON, and CHANNELL, BB., concurred.

It appears to me that the judgment of the Court of Queen's Bench ought in all respects to be affirmed. I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed the contract would be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter. This was, in effect, the view taken by the Court of Queen's Bench, and to which I adhere. With respect to the amount of damages, I retain the opinion thrown out in the course of the argument, that all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by the defendant's testator, and *bona fide* acted upon by the plaintiff. That assertion was never withdrawn, not even in the letter of 11th April, 1855, in answer to the plaintiff's notice to the defendant's testator, long after the proceedings in Chancery had commenced and whilst they were in full progress. I am therefore of opinion that the judgment of the Queen's Bench was right, and that it ought to be affirmed.

Cockburn, C. J. I regret most unfeignedly to find myself differing in this case from so many of my learned brothers. . . . I believe I am justified in saying that this doctrine is altogether a novel one. . . . In the learned and elaborate works which treat of the law relating to agency, . . . not even a hint is to be found of any implied contract on the part of the agent as to the existence of the authority on which he professes to act.[1] . . . Nor is it to be wondered at; for, on looking to the reported decisions of our own and of the American courts, it will be found that at the time these learned authors wrote no such doctrine had ever been broached, but the remedy against a party contracting on behalf of another without authority was assumed to be either by an action on the case for the false representation, or by an action against him as principal on the original contract. The doctrine that a person professing to act as agent without sufficient authority might be made responsible as principal was only subverted at a comparatively recent period.[2] . . . The case of Polhill *v.* Walter, 3 B. & Ad. 114, . . . seems first to have given rise to a contrary impression, although that case turned mainly on the peculiar character of a bill of exchange as incapable of being accepted by any one but the drawee except for honor of the latter. But the more recent case of Jenkins *v.* Hutchinson, 13 Q. B. 744, laid down the position broadly that an action *ex contractu* could not be maintained against the professed agent as principal: and the same doctrine was fully confirmed and acted upon in the succeeding case of Lewis *v.* Nicholson, 18 Q. B. 503. In the mean time, the liability of a professed agent for the unwarranted assertion of authority in an action on the case underwent further consideration; and the doctrine of some writers, that any misrepresentation whereby another was induced to do, or omit to do, an act from which injury resulted, would render the party making it liable, underwent material modification, the modern decisions having established that such misrepresentation will not afford a ground of action where made in good faith and without knowledge that it was untrue. The effect of these doctrines being to leave a person who made a contract with another as agent without a remedy where the professed agent had acted under a mistaken impression as to his authority, it occurred to the judges of the Court of Queen's Bench who decided, in the case of Lewis *v.* Nicholson, 18 Q. B. 503, that an action would not lie against the agent as principal, to suggest that, possibly, the agent might, under such circumstances, be held liable on an implied contract that he had authority to contract in the name of the principal. And the opinion thus incidentally thrown out in that case has been acted upon in this. It was of course impossible, so long as the doctrine prevailed that the professed agent could be sued as principal, that he could be held to be liable on this implied contract. It would have been obviously inconsistent to say that upon one and the same contract a man could at the same time be liable upon an express and also upon an implied promise. To my mind it by no means follows that, because that which was believed to be the remedy in law turns out upon further consideration not to be so, we are therefore justified in resorting to the fiction of an implied contract hitherto unknown to our law. . . . I do not think we are justified in introducing such a remedy by the mere fiat of a judicial decree. I do not stop to discuss the expediency or policy of the proposed rule. Otherwise I think it might be shown that there are two sides even to this part of the case. I doubt whether there is any sufficient ground why erroneous representation, in the absence of falsehood or fraud, should create a greater responsibility in the case of a contract than in the case of any other transaction, especially as the other contracting party might always protect himself by insisting on communicating with the alleged principal, or by requiring a warranty of authority from the agent. . . . *Judgment affirmed.*[1]

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[1] Citing Story on Agency, § 264, and note; and 2 Smith's L. Cas. (4th ed.) 297. — Ed.

[2] Citing Paley on Agency, c. 6, sec. 1, p. 386 (3d ed.); Story on Agency, § 264; Jones *v.* Downman, 4 Q. B. 235; Smout *v.* Ilbery, *ante*, p. 499. — Ed.

KROEGER *v.* PITCAIRN.

SUPREME COURT OF PENNSYLVANIA. 1882.

[101 *Pa.* 311.]

CASE, by W. C. Kroeger against Albert Pitcairn, to recover the amount of the loss sustained by the plaintiff in consequence of certain acts and representations made by defendant.

On the trial, before KIRKPATRICK, J., the following facts appeared: On April 4th, 1874, The Birmingham Fire Insurance Company issued a policy of insurance to William C. Kroeger, the plaintiff, "on his stock of merchandise and fixtures contained in the two-story frame store-room and cellar, and in frame addition attached, situated at Enon Coal Company's works, about two miles west of Enon, &c."

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[1] *Acc.*: Baltzen *v.* Nicolay, 53 N. Y. 467 (1873); *In re* National Coffee Palace Co., 24 Ch. D. 367 (C. A., 1883).

See Jefts *v.* York, 10 Cush. 392, 395–396 (1852); Beattie *v.* Lord Ebury, L. R. 7 Ch. 777, 800 (1872), s. c. L. R. 7 H. L. 102 (1874); May *v.* Western Union Telegraph Co., 112 Mass. 90, 94–95 (1873); Weeks *v.* Propert, L. R. 8 C. P. 427, 437–439 (1873); Trust Company *v.* Floyd, 47 Ohio St. 525 (1890). — ED.

One of the printed conditions of the policy was in these words: "Or if the assured shall keep or have in any place or premises where this policy may apply, petroleum, naphtha, benzine, benzole, gasoline, benzine varnish, or any product in whole or in part of either; or gunpowder, fireworks, nitro glycerine, phosphorus, saltpetre, nitrate of soda, or keep, have, or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy shall be void."

In December, 1874, the premises so insured were totally destroyed by an accidental fire. Due notice was given the insurance company, and preliminary proofs furnished, but the company refused to pay. An action was then brought on the policy, and a judgment recovered to the amount of twenty-one hundred dollars. That judgment this court reversed. It had appeared on the trial that a barrel of carbon oil had been kept on the premises, and this was held to be an avoidance of the policy. Birmingham Fire Ins. Co. *v.* Kroeger, 2 Norris, 64.

Albert Pitcairn, the defendant, was the insurance company's agent who procured the issue of the policy. He solicited Kroeger to allow him to effect the insurance; went upon the premises, examined them, furnished the description of them, and had the policy underwritten, bringing it with his own hand to Kroeger, from whom he collected the premium. What took place at that time was thus testified to by Kroeger: "He procured the policy and brought it to me; I took the policy and read it over, and in reading it over I happened to come across this fine print and noticed about these articles that should be mentioned in the policy, — such as petroleum, and product of petroleum, and gasoline, and other things, I don't know what they call them, all strange names to me, and I told him about petroleum; says I, "Albert, you know there is a little petroleum kept there for the supplies to the mines;" I had to have that there all the time, as well as company supplies. He said, "Yes, I know that." Says I, "It says here it should be mentioned in the policy;" and he says, "That is never taken notice of, only where it is kept in large quantity, say several hundred barrels; in that case, where it is wholesale, it should be mentioned, but so long as it is not kept more than one barrel in the store at a time, it is considered as general merchandise and it is never taken notice of in any other way."

Cross-examination. "The outcome was as I say; I objected to the policy on account of the way it was in the fine print; it seemed to me it was not proper, and I spoke to Mr. Pitcairn about that and he said that the policy was proper; that the policies were all made out in that way; that carbon oil, as long as it was not kept more than one barrel in the store, was considered as general merchandise and not mentioned in the policy, but where it was kept in large quantity, a hundred barrels or so, then it must be so mentioned, and exception made of it."

It was conceded that Pitcairn, all through, acted as the agent of the insurance company. He admitted that he had no authority from his principal to represent to Kroeger that the printed condition as to petroleum was not binding except where oil was kept wholesale.

Plaintiff requested the court to charge that if the jury believed from the evidence that the defendant made to plaintiff the representations testified to by the latter and that the latter took said policy upon the faith thereof, and that the defendant had no authority from the Birmingham Fire Insurance Company to make such representations, that the premises insured were subsequently destroyed by fire, and that because of the terms of the policy in suit relating to petroleum the plaintiff failed in a recovery against said company, because of having a barrel of carbon oil on the premises, then he is entitled to recover against the defendant in this action the amount of the policy, with interest, from time of payment provided in said policy.

Affirmed *pro forma.*

Defendant then presented the following points.

1st. To sustain this action, the alleged misrepresentations must not only have been false, but it must be shown that defendant knew them to be false, and made them with intent to defraud the plaintiff.

Refused *pro forma.*

2d. That the alleged representation was the mere opinion of defendant as to the legal effect of the condition in the policy of insurance, and the conditions of the policy being open to the observation of plaintiff, plaintiff was bound to know the legal effect thereof, and cannot, for such opinion of defendant, recover in this action.

Refused *pro forma.*

3d. That if, when defendant, as agent of the Birmingham Insurance Company, delivered the policy to plaintiff, he made the alleged representation as to the keeping of carbon oil in the insured premises, and made them in accordance with the existing custom of that and other insurance companies in insuring stocks of merchandise in country stores, then plaintiff cannot recover.

Refused *pro forma.*

The court instructed the jury to find for the plaintiff, reserving the points presented as above. Verdict accordingly. Subsequently the court entered judgment for the defendant on the points reserved *non obstante veredicto.* Thereupon the plaintiff took this writ, assigning for error the action of the court in entering judgment for defendant *non obstante veredicto.*

Dalzell (with whom was *Hampton*), for the plaintiff in error.

Schoyer (with whom was *McGill*), for the defendant in error.

STERRETT, J. The subject of complaint, in both specifications of error, is the entry of judgment for defendant *non obstante veredicto.* It is contended that upon the facts established by the verdict, judgment should have been entered thereon in favor of plaintiff. The jury were instructed to return a verdict for the amount claimed by him, if they were satisfied the allegations of fact contained in the point presented by him were true. In view of this, the finding in his favor necessarily implies a verification of the several matters specified in plaintiff's point, and hence it must now be regarded as containing a truthful recital of the circumstances connected with the delivery of the policy and payment of the premium.

The transaction, as therein detailed, clearly amounted to a mutual understanding or agreement between the parties that the stock of merchandise, mentioned in the policy, should include one barrel of carbon oil; in other words, that the plaintiff should have the privilege of keeping that quantity of oil in connection with and as a part of the stock insured, without thereby invalidating his policy. It is impossible to regard the transaction in any other light. The jury found that plaintiff "took the policy upon the faith" of the representations made by defendant. These representations were not merely expressions of opinion as to the meaning of the policy. On the contrary, the defendant, acting as its agent and assuming authority to speak for the insurance company, asserted without any qualification that when carbon oil was kept as plaintiff was in the habit of keeping it — a single barrel at a time — it was unnecessary to mention the fact in the policy, or otherwise obtain the consent of the company; that no notice is ever taken of it unless "it is kept in large quantity, — say several hundred barrels. In that case, when it is wholesale, it should be mentioned; but, as long as it is kept, not more than a barrel in the store at a time, it is considered as general merchandise and is not taken notice of in any other way." Such was the language employed by defendant, evidently for the purpose of dispelling any doubt that existed in the mind of the plaintiff and inducing him to accept the policy and pay the premium; and, to that end at least, it was successful. What was said and done by defendant, in the course of the transaction, amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition, on behalf of the company he assumed to represent, that if the insurance was effected, it should be with the understanding that a barrel of carbon oil was included in and formed part of the insured stock of merchandise, without being specially mentioned in the policy. The plaintiff doubtless so regarded his declarations, and relying thereon, as the jury has found, accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance, authorizing him to keep in stock, as he had theretofore done, a small quantity of carbon oil. It was not until after the property was destroyed that he was undeceived. He then discovered that, in consequence of defendant having exceeded his authority, he was without remedy against the company. Has he any remedy against the defendant, by whose unauthorized act he was placed in this false position? We think he has. If the president or any one duly authorized to represent the company had acted as defendant did, there could be no doubt as to its liability. Why should not the defendant be personally responsible, in like manner, for the consequences, if he, assuming to act for the company, overstepped the boundary of his authority and thereby misled the plaintiff to his injury, whether intentionally or not? The only difference is that in the latter the authority is self-assumed while in the former it is actual; but that cannot be urged as a sufficient reason why plaintiff, who is blameless in both cases, should bear the loss in one and not in the other. As a general rule. "whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing for or on account of his principal." Story on Agency, 264. The same principle is recognized in Evans on Agency, *301; Whart. on Agency, 524; 2 Smith's Lead. Cases, 380, note; 1 Pars. on Cont. 67; and in numerous adjudicated cases, among which are Hampton *v.* Speckenagel, 9 S. & R. 212, 222; Layng *v.* Stewart, 1 W. & S. 222, 226; McConn *v.* Lady, 10 W. N. C. 493; Jefts *v.* York, 10 Cush. 392; Baltzen *v.* Nicolay, 53 N. Y. 467. In the latter case, it is said, the reason why an agent is liable in damages to the person with whom he contracts, when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal. The contract, though in form that of the principal, is not his in fact, and it is but just that the loss, occasioned by there being no valid contract with him, should be borne by the agent who contracted for him without authority. In Layng *v.* Stewart, *supra*, Mr. Justice Huston says: "It is not worth while to be learned on very plain matters. The cases cited show that if an agent goes beyond his authority and employs a person, his principal is not bound, and in such case the agent is bound." The plaintiff in error, in McConn *v.* Lady, *supra*, made a contract, believing he had authority to do so, and not intending to bind himself personally. The jury found he had no authority to make the contract as agent, and this court, in affirming the judgment, said: "It was a question of fact submitted to the jury, whether the plaintiff in error had authority from the School Board to make the contract as their agent. They found he had not. He was personally liable whether he made the contract in his own name or in the name of his alleged principal. It is a mistake to suppose that the only remedy was an action against him for the wrong. The party can elect to treat the agent as a principal in the contract."

The cases in which agents have been adjudged liable personally have sometimes been classified as follows, viz.: 1st. Where the agent makes a false representation of his authority with intent to deceive. 2d. Where, with knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and, 3d. Where he undertakes to act, *bona fide* believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self-constituted agent; and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable. In Story on Agency, the learned author recognizing the undoubted liability of those belonging to the first two classes says, "Another case may be put which may seem to admit of some doubt, and that is, where the party undertakes to act as an agent for the principal, *bona fide* believing he has due authority, and therefore acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice; for every person, so acting for another, by a natural if not a necessary implication, holds himself out as having competent authority to do the act; and he thereby draws the other party into a reciprocal engagement. If he has no such authority, and acts *bona fide*, still he does a wrong to the other party; and if that wrong produces injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it." Story on Agency, 264. This principle is sustained by the authorities there cited, among which is Smout *v.* Ilbery, 10 Mees. & Wels. 1, 9.

Without pursuing the subject further, we are of opinion that, upon the facts established by the verdict, judgment should have been entered for the plaintiff, on the question of law reserved.

Reversed.

PATTERSON *v.* LIPPINCOTT.

SUPREME COURT OF NEW JERSEY. 1885.

[47 *N. J. L.* 457.]

ON *certiorari* to the Court of Common Pleas of Atlantic County.

For the prosecutor, *J. J. Crandall.*

For the defendant, *Slape & Stephany.*

SCUDDER, J. An action of debt was brought in the court for the trial of small causes by Jacob M. Patterson against Barclay Lippincott, to recover the balance, $75, claimed under a contract in writing for the sale of the exclusive right to use, manufacture, and sell the plaintiff's patent "air-heating attachment," in Atlantic county, New Jersey.

The writing was signed "Geo. P. Lippincott, per Barclay Lippincott," on the part of the purchaser. The state of demand avers that by virtue of this agreement the plaintiff did in due form convey said patent right to said George P. Lippincott, that said George and Barclay, on request, have refused to pay said balance, and that, since payment became due, the plaintiff has found out and charges that said George is under the age of twenty-one years. He further avers that he never had any contract or negotiations with George, and that Barclay's warranty of authority to act for his minor son is broken, whereby an action has accrued to the plaintiff against the defendant.

The averment that the plaintiff never had any contract or negotiations with George, is not sustained by the proof, for the testimony of Joseph N. Risley, the agent who made the sale, which is the only evidence on this point that appears in the case, is, that the defendant told him he was going out of business and intended to transfer it to George; requested him to see George; he did so; talked with him; he looked at the patent; was satisfied with it, and talked with his father about buying it. The deed for the patent right in Atlantic county was drawn to George P. Lippincott. It is proved by the admission of the defendant, Barclay Lippincott, that at the time of such sale and transfer his son George was a minor. This admission is competent testimony in this suit against him.

A verdict of a jury was given for the plaintiff against the defendant in the court for the trial of small causes; and on the trial of the appeal in the Court of Common Pleas there was a judgment of nonsuit against the plaintiff. The reason for the nonsuit does not appear on the record, but the counsel have argued the cause before us on the case presented by the pleadings and proofs, the contention being here, as it was below, that the plaintiff could not aver and show the infancy of George P. Lippincott, and bring this action against Barclay Lippincott, as principal in the contract, in contradiction of its express terms.

On the face of the written agreement George P. Lippincott is the principal and Barclay Lippincott the agent. The suit on the contract should therefore be against the principal named, and not against the agent, unless there be some legal cause shown to change the responsibility. The cause assigned by the plaintiff is the infancy of George at the time the agreement was made in his name by his father. The authority on which he bases his right of action is Bay *v.* Cook, 2 Zab. 343, which follows and quotes Mott *v.* Hicks, 1 Cow. 536, to the effect that if a person undertakes to contract, as agent, for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible; and the agent, when sued on such contract, can exonerate himself from personal responsibility only by showing his authority to bind those for whom he has undertaken to act. Bay *v.* Cook was an action against an overseer who had employed a physician to attend a sick pauper, without an order for relief under the provisions of the act concerning the poor. As his parol contract with the physician was entirely without authority to bind the township, it was said that he had only bound himself to pay for the services rendered at his request.

Later cases have held that an agent is not directly liable on an instrument he executes, without authority, in another's name; that the remedy in such case is not on the contract, but that he may be sued either for breach of warranty or for deceit, according to the facts of the case. Jenkins *v.* Hutchinson, 13 Q. B. 744; Lewis *v.* Nicholson, 18 Q. B. 503; Baltzer *v.* Nicolay, 53 N. Y. 467; White *v.* Madison, 26 N. Y. 117, and many other cases collected in the notes in Whart. on Agency, §§ 524, 532, and notes to Thomson *v.* Davenport, 9 B. & C. 78, in 2 Sm. Lead. Cas. *358 (Am. ed.) Andrews, J., in Baltzer *v.* Nicolay, *supra*, says: "The ground and form of the agent's liability in such a case has been the subject of discussion, and there are conflicting decisions upon the point; but the later and better-considered opinion seems to be, that his liability, when the contract is made in the name of his principal, rests upon an implied warranty of his authority to make it, and that the remedy is by an action for its breach."

Although the state of demand in the present case is uniformly drawn, there is in the last sentence a charge that the defendant's warranty of authority in pretending to act for said minor is broken, whereby an action has accrued. This alleged breach of an implied warranty is founded on the assumption that the son could not confer any authority, during his minority, to his father to act for him in the purchase of his patent right. There are two answers to this position. The act of an infant in making such contract as this, which may be for his benefit in transacting business, either directly or through the agency of another, is voidable only, and not absolutely void, and therefore there is no breach of the implied warranty unless there be proof showing that the act of the agent was entirely without the infant's knowledge or consent. The mere fact of the infancy of the principal will not constitute such breach.

It was argued in Whiting *v.* Dutch, 14 Mass. 457, that a promissory note signed by Dutch for his partner, Green, who was a minor, was void as to Green, because he was not capable of communicating authority to Dutch to contract for him, and that, being void, it was not the subject of a subsequent ratification. But the court held that it was voidable only, and having been ratified by the minor after he came of age, it was good against him. See Tyler on Inf., c. 3, §§ 14, 18.

Another answer is, that the defence of infancy to this contract with the plaintiff can only be set up by the infant himself, or those who legally represent him. Infancy is a personal privilege of which no one can take advantage but himself. Voorhees *v.* Wait, 3 Gr. 343; Tyler on Inf., c. 4, § 19; Bingham on Inf. 49.

In this case the plaintiff seeks to disaffirm the infant's contract with him, in his own behalf, and sue a third party on the contract, whose authority to bind him the infant has not denied. The privilege of affirming or disaffirming the contract belongs to the infant alone, and the plaintiff cannot exercise it for him. The mere refusal to pay, charged in the demand and proved, is not a denial of the defendant's authority to bind the infant, for it may be based on the failure of consideration, the invalidity of the patent, fraudulent representations, or other causes.

The judgment of nonsuit entered in the Court of Common Pleas will be affirmed.

FIRBANK'S EXECUTORS *v.* HUMPHREYS AND OTHERS.

COURT OF APPEAL. 1886.

[18 *Q. B. D.* 54.]

APPEAL from the judgment of MATHEW, J., on the trial of the cause without a jury.[1] . . .

The defendants appealed, but before the appeal came on for hearing Firbank died, and his executors were substituted as plaintiffs.

Rigby, Q. C. (with him *R. S. Wright* and *H. H. Asquith*), Sir *Horace Davey*, Q. C. (with him *Cohen*, Q. C., and *W. Graham*), *H. D. Green*, Q. C., *Mackaskie*, and *D. Walker*, for various defendants.

Sir *R. Webster*, A. G., and *Finlay*, Q. C. (with them *H. Sutton*), for the plaintiffs.

Rigby, Q. C., in reply.

Lord ESHER, M. R. In this case there is a certain complication in the facts, but no difficulty as to the law when once the facts are ascertained. The plaintiff in the action was a railway contractor, and entered into a contract with the Charnwood Forest Railway Company to make the railway. Under that contract he was to be paid in cash as the work went on, on the certificates of the engineer. The railway company had no money of its own, and in order to carry out their scheme and fulfil their contract with Firbank they entered into a financial arrangement with Maddison, which it is not necessary minutely to consider, by which he undertook to place with the public certain debenture stock and shares which the company had power to issue. He was in fact to finance the company, and as part of the agreement he arranged that he would pay Firbank on the certificates. He entered into no agreement with Firbank, but his agreement was with the company, for whom he was agent. The work proceeded and certificates were given, and Maddison obtained money by placing debenture stock or otherwise, and paid Firbank on some of these certificates, but after a time he failed to do so, and I think there cannot be a doubt that in conjunction with the secretary he acted dishonestly by the company. He placed debenture stock and received the proceeds, and instead of keeping his contract with the company he and the secretary must have disposed between them of the greater part of the funds so obtained. His not paying Firbank was no failure of duty to or of contract with him, but a breach of the contract with the company. Firbank was by his agreement entitled to be paid cash by the company for the work done, and if they could not get it through Maddison they were, as between themselves and Firbank, bound to get it otherwise.

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[1] The reporter's statement is omitted. — ED.

I cannot say, without looking more minutely into the contract, whether Firbank could have thrown it up, or whether he would have been bound to continue to do the work. However that may be, it became necessary as a matter of business that a new arrangement should be made between Firbank and the company. [His Lordship then dealt with the dispute as to the facts, and continued : —] The matter stands, then, that Firbank was to have debenture stock issued to him in payment of his past claim, and was to go on with the works on the terms of the new agreement. I now come to the meeting of the 26th of July. All the directors were present at the meeting on that day, and it would be absurd to suppose that they did not know of the difficulties of the company, and that Firbank had not been paid. It is in evidence that the agreement was explained to all the directors present — what agreement? Not only that for continuing the work in future, for that would not by itself have set them free from their difficulty, but the whole agreement. Under these circumstances we are all of opinion that each of the directors had the matter explained and knew what was being done. What was done? The agreement was, that if Firbank would go on with the work he should be paid in a certain manner, but it was also part of the agreement that if he would accept debenture stock in lieu of his right to cash the company would issue debenture stock to him. None of the directors knew that this would be an over-issue of debenture stock, and the plan they adopted was the easiest way of getting rid of their difficulties. If they agreed to that arrangement that would be an agreement between Firbank and the company by which the company would be bound. There was then a binding contract with the company that he would accept debentures for the debt already due, and if they were issued go on with the work. If nothing had occurred but a breach of that agreement I apprehend that the directors would not have been liable. The arrangement of course was that valid debenture stock should be issued, and they must have known that they would have to issue it on behalf of the company. Under these circumstances what was done? At the meeting of the 26th of July the agreement was produced and explained, and the certificates for the debenture stock were also produced at that meeting, and were signed by two of the defendants. It seems to me that the defendants by agreeing that two of their number should sign the certificates authorized this issue as much as if every one of them had signed and handed over the certificates. They, therefore, issued them, and whether they were handed over that day or two days later is immaterial, whenever it was done it was by and for the directors. They did not know, but the truth was, that the certificates could not bind the company and were worthless to Firbank, because the powers of the company in this direction had already been exhausted, and this was an over-issue. Under these circumstances had Firbank any right to recover personally from the defendants? On the one side, it is said that according to the rule in Collen *v.* Wright, 7 E. & B. 301, 8 E. & B. 647, Firbank had a right to sue the directors. The way in which it is put is, that the directors were agents of the company and had authority to issue debenture stock binding on the company, provided the powers of issuing such stock had not been exhausted; but they had no authority to make any over-issue so as to bind the company. By issuing these certificates it is said that it must be implied that they had affirmed that they had authority to issue them, and that Firbank accepted them, relying on that affirmation of authority, and as by reason of want of authority he has been damaged, the defendants have made themselves personally liable within the rule laid down in Collen *v.* Wright, 7 E. & B. 301, 8 E. & B. 647. On the other hand, it is said that cannot be so, because this debenture stock was issued in fulfilment of a contract which was binding on the company, whereas in that case the contract which the agent professed to enter into on behalf of his principal was invalid as against the principal. I think the language used in Weeks *v.* Propert, L. R. 8 C. P. 427, and Dixon *v.* Reuter's Telegram Co., 3 C. P. D. 1, shows that the principle of Collen *v.* Wright extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is, "that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred."

That being the rule, I am of opinion that all these defendants by issuing this debenture stock asserted to Firbank that they had authority to bind the company by that issue, and whether that was in fulfilment of a binding or invalid contract is immaterial. The question then arises, for what damages they are liable. I do not say that in all such cases they would be liable for the nominal amount of the stock, — for instance, if the company had been solvent there was nothing to prevent Firbank suing for the debt due to him and recovering from the company. He might have been put to some expense by the postponement of his cash payments and by having to sue the company, and I am not by any means clear that the damages in such a case in an action against the directors would have been merely nominal. The damages, under the general rule, are arrived at, by considering the difference in the position he would have been in had the representation been true, and the position he is actually in, in consequence of its being untrue. If the assertion had been true he would have had valid debenture stock which would have been a first charge on the property of the company, and, as I understand, that would have been a good security. If he is postponed or thrown back on his right of action against the company, the company is in such a position that he will get nothing. Therefore, in the present case the damages are the difference between what the debenture stock would have been worth to him, and what he can get from the company on his claim, which is nothing, and therefore the damages are the full amount of the debenture stock, and the judgment for that amount must be affirmed.

LINDLEY, L. J.[1] Whether the contractor is entitled to recover this amount from the directors depends upon two questions, viz.: 1. Whether the directors are to be treated as having impliedly warranted that they, as agents of the company, had authority to issue £18,400 debenture stock? 2. What is the measure of damages for which they are liable if they are to be so treated?

The first question must in my opinion be answered in the contractor's favor. He could not know whether the company had or had not already issued the full amount of debenture stock which it was authorized to issue. He was justified in assuming that the directors had power to do what they did; and by giving him the debenture stock certificates they in truth represented to him that they had such power. Moreover, they in effect requested him not to insist on payment in cash, and to go on with the works in consideration of receiving debenture stock. These circumstances bring the case directly within Collen *v.* Wright, 7 E. & B. 301, 8 E. & B. 647, and that class of cases. There is the representation by the directors to the contractor and consideration given by him in the shape of action by him on the faith of such representation. Nothing more is necessary to make the principle laid down in Collen *v.* Wright applicable to the case. The fact that the directors were themselves deceived, and did not know or suspect that they had not the power to do what they did, is immaterial in cases of this description. Speaking generally an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well-established exception, viz., where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes. The present case is within this exception, and the directors are liable to the contractor for the misrepresentation they made to him.

The next question is as to the amount of damages to which the contractor is entitled. The directors cannot be treated as having warranted the solvency of the company, and if genuine debenture stock of the company had been worthless, the measure of damages would have been nil, but in this case the company's debenture stock is and always has been worth twenty shillings in the pound. Consequently the value of £18,400 genuine debenture stock is the measure of the contractor's loss. That is what he agreed to take in satisfaction of a larger demand, and that is what he has lost by reason of the misrepresentation made to him. This was the view taken by Mr. Justice MATHEW. I think it correct. The appeal is dismissed with costs.

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[1] After stating the case. — ED.

LOPES, L. J. I agree with the judgments that have been given, and I have nothing to add. *Appeal dismissed.*

MEEK *v.* WENDT & CO.

QUEEN'S BENCH DIVISION. 1888.

[21 *Q. B. D.* 126.]

CASE tried before CHARLES, J., without a jury. The facts and arguments appear in the judgment.

Bigham, Q. C., and *Joseph Walton*, were for the plaintiff.

Barnes, Q. C., and *Butler Aspinall*, were for the defendants.

CHARLES, J. In this case, which was tried before me without a jury, at Liverpool, the plaintiff seeks to recover damages from the defendants for breach of warranty of authority, under the following circumstances. The plaintiff was in 1887 the holder of two policies of insurance on the ship *Mindora*, effected with two insurance companies in San Francisco called the "Union," and the "Sun." Each policy was for £1,000, and provided thus for payment of any loss: "Loss if any hereunder payable by Messrs. the Anglo-Californian Bank in London three days after sight of the certificate of loss approved by E. E. Wendt of London, or Richard Lowndes of Liverpool, accompanied by this policy." A loss having occurred, and the companies having repudiated liability, an action was commenced in England against each company, and proceedings were duly taken for service of the writs out of the jurisdiction. The defendant companies did not appear, and judgment by default was signed for £1,000 against each company. Negotiations for a settlement thereupon took place between the plaintiff and the defendants, Messrs. Wendt & Co. of London, who represented the two companies in this country. A sum of £300 was in the early part of 1887 offered by each company, but was refused. In August, however, the plaintiff expressed his willingness to accept that sum, and on the 26th the defendants wrote to the plaintiff's solicitors, Messrs. Simpson & North, as follows: "As so long a time has now elapsed since the offer of our clients was first made, we cannot go further into the matter just now, but have at once written to San Francisco for instructions." On September 13, the Union Company wrote to the defendants stating that they would adhere to their offer, but no answer was received from the Sun. The defendants thereupon telegraphed on September 30 to San Francisco, and received an answer on October 1, which they supposed authorized them to accept the plaintiff's offer. The telegram of October 1 had not in fact been sent with the authority of the Sun. On receipt of this telegram the defendants wrote to the plaintiff's solicitors in these words: "We have now heard from our clients in San Francisco, and the Union and Sun Insurance Companies are prepared to abide by the offer they have made some time ago, although the same was not accepted at the time. Will you please send us up the policies? We can then doubtless arrange for an early settlement. Our clients insist that the judgments you have obtained against them must be cancelled in a formal manner." The policies and judgments were forwarded on October 3. On the 7th the defendants' solicitors sent the judgments to the plaintiff's solicitors, with releases indorsed for the plaintiff's execution. He executed them, and they were returned on the 8th. On the 10th the defendants' solicitors wrote to the plaintiff's solicitor: "We have received the judgments, with the releases indorsed thereon, and now forward you the policies with the certificates, and on presentation at the bank, the Anglo-Californian Bank in London, you will obtain payment. We should say you will be able to present the policies through your own bankers. The bankers have already had it notified to them that the certificates have been granted." Payment in respect of the Sun policy certificate was refused to the plaintiff by the Anglo-Californian Bank on instructions from the Sun Company cabled from America. Some correspondence between the solicitors of the plaintiff and the defendants took place in November and December, and the mistake under which the defendants had acted was fully explained. It was in no way disputed that the defendants had throughout acted *bona fide* in the matter.

On January 8 the plaintiff's solicitors wrote to the defendants: "Since the Sun Company repudiate your action in settling this matter, Mr. Meek instructs us to apply to you for the amount agreed to be paid to him as the consideration for releasing the judgment against the company." In reply the defendants' solicitors returned the release, which Messrs. Wendt & Co. had never parted with, and pointed out that Mr. Meek could cancel it, and remain with his remedy under his judgment for £1,000. The plaintiff's solicitors returned the release, notifying that Mr. Meek held the defendants liable for the sum of £300, to recover which and certain expenses thrown away this action was brought.

At the trial it was not seriously contested that the defendants had in their letter dated October 1 innocently represented themselves as having the authority of the Sun Company to settle the claim of the plaintiff for £300, and the question principally discussed was as to the proper measure of damages for the defendants' false representation of authority. The plaintiff contended that he was entitled to the full sum of £300, and the expenses he had incurred in negotiating the compromise. The defendants paid into Court a sum sufficient to meet such expenses as had been incurred subsequent to October 1, but denied any further liability. The matter therefore to be decided is, whether the plaintiff is entitled to any, and what, additional damages.

Now he is entitled to all the damages which are the natural and proximate consequence of the false assertion of authority. "The measure of damages," says Lord Esher, M. R., in *In re* National Coffee Palace Co., 24 Ch. D. 371, "in actions for breach of warranty of authority is always the same in every case. I will not consider what theoretically it ought to be, but I say we must decide it according to the rule which has been followed for a series of years. Spedding *v.* Nevell, L. R. 4 C. P. 212, and Godwin *v.* Francis, L. R. 5 C. P. 295, are cases in which the plaintiff was the intended purchaser, and Simons *v.* Patchett, 7 E. & B. 568, was a case in which the plaintiff was the intended vendor, and in all these cases the Court laid down that the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had had the authority he professed to have: in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made." Applying this rule to the present case, the plaintiff, by losing the particular contract which was to have been made, has *prima facie* lost the expenses thrown away, and the sum of £300, which I have no doubt he would have obtained without delay or difficulty in London from the Anglo-Californian Bank within three days after sight of the approved certificates. But then it is contended by the defendants that the plaintiff is in a position to enforce all his original rights against the company on the judgment and on the policy, and that these are worth at least as much as £300, so that the plaintiff has in truth lost nothing beyond the expenses thrown away. But with regard to the judgment, it was not disputed that the law as to enforcing foreign judgments is the same in the Courts of the United States as in our own, and according to our law the judgment could not be effectively put in suit in the Courts of the United States, inasmuch as the defendant company were not English subjects or resident in England either when the policy was issued or when the suit was commenced. This seems clear from the case of Schibsby *v.* Westenholz, L. R. 6 Q. B. 155, per Blackburn, J., at p. 160, and in this country the judgment has no present value, as the defendant company have no property here available for execution. With regard to the claim on the policy, no doubt the plaintiff has a claim which he may or may not be able successfully to enforce at San Francisco; a claim, however, which has been wholly repudiated, and which will be strenuously resisted. I cannot fix any pecuniary value on this claim, and I do not think that its existence ought to affect the amount which is *prima facie* the proper amount to be awarded to the plaintiff for the loss of the particular contract which was to have been made by the alleged principal. I therefore give judgment for the plaintiff with costs for £300 in addition to the money paid into Court.

LILLY, WILSON & CO. *v.* SMALES, EELES & CO.

QUEEN'S BENCH DIVISION. 1892.

[[1892] 1 *Q. B.* 456.]

CASE tried before DENMAN, J. The facts and arguments are sufficiently stated in the judgment.

Barnes, Q. C., and *W. A. Meek*, for the plaintiffs.

Robson, Q. C., and *W. H. Clay*, for the defendants.

Cur. adv. vult.

DENMAN, J., delivered the following written judgment. The plaintiffs in this case were owners of the ship *Pocklington;* the defendants, brokers and shipping agents. On April 28, Mr. F. Eeles, as representing the defendants, met Mr. F. Cattle, a representative of the firm of Wood, Cattle & Co., in London, who acted as agents of the plaintiffs, and produced a list of requirements of ships to fulfil several different kinds of engagements. Amongst others was one describing the freight offered as 3*s.* 9*d.* There was a conflict of evidence as to what took place at this interview; but it was arranged that Wood, Cattle & Co. were to have two hours in which to accept or reject the offer. Before the two hours expired the same parties met again; and I find as a fact, though Mr. Cattle's memory was a blank upon the point, that Mr. F. Eeles expressed a doubt as to whether there had not been a mistake as to the rate of freight offered by his principals in the telegram of which the list produced by him at the earlier interview was a translation. In fact, the rate 3*s.* 9*d.* was mentioned owing to a blunder of the telegraphic officials who transmitted the message. The freight actually offered by Reischer, the defendants' principal, was 3*s.* 4½*d.* The mistake arose from the alteration of a figure "4" into a figure "7" in the cipher number; the figure actually given in by the intending charterer having been a "4," which meant 3*s.* 4½*d.*, and not a "7," which meant 3*s.* 9*d.* The defendants, on receiving the charter signed by "Wood & Co., as agents," returned it signed "by telegraphic authority of Sam Reischer, Smales, Eeles & Co., as agents." It was contended by the plaintiffs that the defendants were liable in the action as having warranted or held themselves out as having an authority which they did not possess. The defendants, on the other hand, relied upon the form in which they had signed as negativing the warranty of authority which would have been implied if they had merely signed "as agents," and as amounting to a representation that they took no such risk upon themselves, but merely warranted that they had such authority as a possibly erroneous telegram might confer.

If the case depended merely upon the construction of such a signature as a matter of law, much is to be said on both sides. On the one hand, it is difficult to understand why such a mode of signing should be used if it left the agent signing under precisely the same liability as he would be under without it. On the other hand, there is force in the argument used by Mr. Barnes for the plaintiffs, that, inasmuch as the shipowner is often half the globe away when charters are made, there would be great inconvenience if in every case it was necessary to verify the correctness of telegrams before a firm contract could be relied on. But I do not think it necessary to consider all the arguments which were used as to the possible meaning of the words here adopted, because I think that it was not a question wholly of legal construction, but that the words adopted were words the true meaning of which was to be ascertained by the evidence of persons engaged in the business of commerce of this nature; and if I am right in this, I have no hesitation in finding that the defendants' witnesses established that this form of signing is well understood in the trade as meaning to negative the implication of a warranty by the charterer's agent, at all events, to a greater extent than warranting that he has had a telegram which, if correct, authorizes such a charter as that which he is signing.

It appeared from the evidence of trustworthy witnesses for the defendants, that whenever charters are entered into by brokers in accordance with telegraphic instructions, it is usual to sign in this form with the very object of avoiding the implication of an absolute warranty. I see no reason to doubt that this was the real object of the defendants in signing as they did; and, this being my opinion, I think that there can be no ground for fixing them with a warranty such as they never intended to give, and which would be wholly inconsistent with the general understanding of persons engaged in the business in which they were employed. I therefore give judgment for the defendants with costs.

Judgment for the defendants.[1]

SECTION III.

Authorized Contracts for a disclosed Principal.[2]

OWEN *v.* GOOCH.

NISI PRIUS. 1797.

[2 *Esp.* 567.]

ASSUMPSIT for work and labor, and goods sold and delivered, with the common counts.

Plea of *non assumpsit.*

The plaintiff was a paper-hanger, and the action was brought to recover a sum of money for work done for the defendant in the course of the plaintiff's business.

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[1] See Walker *v.* Bank of State of New York, 9 N. Y. 582 (1854); Hall *v.* Lauderdale, 46 N. Y. 70 (1871); Beattie *v.* Lord Ebury, L. R. 7 Ch. 777, 800 (1872); Newman *v.* Sylvester, 42 Ind. 106 (1873); Michael *v.* Jones, 84 Mo. 578 (1884). — ED.

[2] And see Chapter IV.

He proved the order given for the paper by the defendant, and the work done.

The defence relied upon was that, though the work had been ordered by the defendant, yet that it had not been ordered for himself, but for a person of the name of Tippell, and had been done at Tippell's house at Walthamstow, and that the plaintiff at the time of the order was informed that the work was on Tippell's account.

Defendant having given notice to produce the plaintiff's book, on being inspected, the entry was "Mr. Tippell by the order of Gooch."

The plaintiff contended that the name of Tippell being prefixed to the order was by no means a proof that the credit was given to him, but was merely identifying the order; that Tippell might be a person totally unknown to the plaintiff, but to whom Gooch the defendant was certainly known, so that the goods must be deemed to be ordered on Gooch's credit, and he be liable.

For the defendant it was insisted that Gooch by the order appeared to be only the agent, and the goods to have been furnished on Tippell's account.

Lord KENYON. The goods are ordered by Gooch, but at the time it is not pretended that they were for his own use; they were ordered for Tippell, and the entry is made in his name. We must keep distinct the cases of orders given by the parties themselves, and by others as their agents. If the mere act of ordering goods was to make the party who ordered them liable, no man could give an order for a friend in the country, who might request him to do it, without risk to himself. If a party orders goods from a tradesman, though in fact they are for another, if the tradesman was not informed at the time that they were for the use of another, he who ordered them is certainly liable, for the tradesman must be presumed to have looked to his credit only. So if they were ordered for another person, and the tradesman refuses to deliver to such person's credit, but to his credit only who orders them, there is then no pretext for charging such third person; or if goods are ordered to be delivered on account of another, and after delivery the person who gave the order refuses to inform the tradesman who the person is, in order that he may sue him, under such circumstances he is himself liable. But wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable.

In this case Owen, the plaintiff, was informed of all the circumstances, that Gooch was giving the order for Tippell; the goods are sent to Tippell's house, and the entry made in his name. I think there is no color for making Gooch the debtor.

The plaintiff was nonsuited.

Erskine and *Manley* for the plaintiff.

Gibbs and *Park* for the defendant.

PATERSON AND ANOTHER v. GANDASEQUI.

KING'S BENCH. 1812.

[15 *East*, 62.]

THIS was an action for goods sold, and upon the common money counts. At the trial before Lord ELLENBOROUGH, C. J., at the London sittings after last Trinity term, the following facts appeared: The defendant was a Spanish merchant, and a director of the Philippine trading company at Madrid, with which he was engaged in adventures to a large amount. In January, 1810, being then in London, he employed Messrs. Larrazabal & Co., of London, merchants, to purchase for him various assortments of goods for the foreign market, for which they were to charge a commission of 2 per cent. Larrazabal and Co. accordingly applied to the plaintiffs, requesting them to send to their counting-house an assortment of silk hose, with their terms and prices. Paterson, Jr., waited on them at the time and place appointed, with the patterns, terms, and prices, at which time the defendant was present at the counting-house; and the samples were handed over to him. He inspected them, and selected such articles as he required; and the terms and prices were also shown to him and left there. On the 6th of January the plaintiffs received from Larrazabal and Co. an order in writing for 574 dozen of silk hose, to be ready in town on or before the 20th of February next, the payment as agreed upon. (Signed) Larrazabal, Menoyo, and Trotiaga: and shortly after another order for 150 dozen more, with the like signature. Both these orders were given by Larrazabal & Co. for the use of and in execution of the orders received by them from the defendant. The goods were sold by the plaintiffs on the credit of Larrazabal & Co., the invoices were made out in their names and sent to them, and Larrazabal debited the defendant with the amount. Soon after, and before the credit had expired, Larrazabal and Co. became insolvent; and thereupon the plaintiffs demanded payment of the defendant; which being refused, the present action was brought. Lord ELLENBOROUGH, C. J., being of opinion upon these facts that the plaintiffs had dealt with Larrazabal & Co. upon their sole and individual credit, knowing that the purchases they made were on account of the defendant, directed a nonsuit. In the following term it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal to that of a dormant partner, where, though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner, when discovered. A rule *nisi* having been granted,

Sir *V. Gibbs*, A. G., *Marryat*, and *Littledale*, now showed cause against it.

Garrow, *Park*, and *Richardson*, *contra*.

Lord ELLENBOROUGH, C. J. The Court have not the least doubt that if it distinctly appeared that the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. But the doubt is whether that does sufficiently appear by the evidence. It appears that the defendant was present at the counting-house of Larrazabal, where one of the plaintiffs had come by appointment, and in his presence inspected and selected such of the articles as he required; that the goods were afterwards ordered by Larrazabal & Co., credit given to them, and the invoices made out in their name, and sent to them. The question is whether all this was done with a knowledge of the defendant being the principal? The law has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him; but that must be taken with some qualification, and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal, and had elected to take Larrazabal & Co. as their debtors, or I should not have nonsuited the plaintiffs; but as there may perhaps be a doubt upon the evidence, whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it reconsidered.

GROSE, J. I think that the plaintiffs in this case might have elected whom they would have for their debtor; and here they seem to have made their election. That, however, is the only doubt which is fit to be considered.

LE BLANC, J. It will be material to have the facts inquired into more fully, in order to ascertain whether the tradesmen sold to the agents with a knowledge of the party for whom they were buying; or whether, without such knowledge, they chose to give credit to the agents, whether buying for another or for themselves. Many of the cases may perhaps be found distinguishable from this by their not falling precisely within the doctrine applicable to principal and broker; and it may be necessary to consider in the present case, whether any distinction can be made between a home and a foreign principal.

BAYLEY, J. There may be a particular course of dealing with respect to trade in favor of a foreign principal, that he shall not be liable in cases where a home principal would be liable; that would be a question for the jury. I have generally understood that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot therefore afterwards charge the principal. I think it should be reconsidered in this case whether the plaintiffs did so. *Rule absolute.*

ADDISON *v.* GANDASEQUI.

COMMON PLEAS. 1812.

[4 *Taunt.* 574.]

THIS was an action for goods sold and delivered, and was tried before MANSFIELD, C. J., and a special jury, at the sittings at Guildhall, after Michaelmas Term, 1811, when it appeared that the defendant was a member of a Spanish trading corporation, called the Philippine Company, and was a director of that company, and had come over to England to select a large assortment of goods destined for Lima. Larrazabal, Menojo, and Trotiaga, a house established in London, assisted him in providing the goods, and they having applied to the plaintiff, with whom they had previous dealings for twenty years, the plaintiff went by appointment to the house of Larrazabal & Co. in the city, with patterns of goods; he found the defendant there, who examined various patterns, cheapened the prices, mentioned the market for which they were intended, told the plaintiff he should charge the long price, and he, the defendant, would himself receive the bounty on exportation, and stipulated for fifteen months' credit; he took goods home to his house in Clarges Street, and kept them a week to examine, and a clerk from the plaintiff's house frequently attended on him there to show and explain the patterns. The plaintiff received a written order from Larrazabal & Co. for a quantity of these goods; after which the defendant required of the plaintiff an abatement of £6 per cent on the prices of them, which the plaintiff refused to make, and the parties were about to terminate the treaty: but at length the defendant agreed to give the whole price required, and told the plaintiff he might proceed to execute the order. The plaintiff and his clerks repeatedly had other meetings with the defendant, and several other parcels of goods were ordered by Larrazabal & Co. which had been selected by the defendant at those meetings. Larrazabal & Co. referred the plaintiff to the defendant for instructions as to the mode in which the goods were to be packed for exportation, and the defendant gave those instructions. The invoices were all made out by the plaintiff to Larrazabal & Co., and they were debited in the plaintiff's books for the amount of the long price. Larrazabal & Co. in their books debited the defendant with the amount of the invoices, and also with a commission for purchasing them, of £2 per cent on the amount, which was their ordinary mode of dealing with the defendant, and they credited the plaintiff with the amount of the invoices. Upon an occasion subsequent to these sales, Larrazabal & Co. having applied to purchase some goods of the plaintiff, the plaintiff said he thought he had for that time extended his credit far enough to Larrazabal & Co., and declined furnishing the goods. Larrazabal & Co. gave the orders for packing and shipping the goods, and in their own names, but in pursuance of instructions given by the defendant, chartered a vessel to Lima, in which these goods were conveyed, and instructed the master not to part with the return cargo until payment of the freight and amount of Larrazabal's demand on the defendant. The master did not deliver the return cargo but in consequence of instructions from Larrazabal & Co., after a sum of £72,000 had been deposited by the defendant for their security. One of the partners in their house, which had become bankrupt, being examined, stated, that the house purchased these goods of the plaintiff on their own credit and account, as they would any other goods for which they had occasion in their trade, and Larrazabal & Co. had insured the goods in their own names, for which they had a further commission of a half per cent. The plaintiff contended that though the credit was given to Larrazabal & Co., yet that as the defendant had the goods, he was liable to pay for them; and that this was only the common case of a broker buying for his principal: the principal when disclosed is liable. MANSFIELD, C. J., left it to the jury whether Larrazabal did act as broker or not, and observed that as the defendant saw and handled the patterns, and was seen in the business, if he had been the purchaser, most probably the credit would have been immediately given to him, the jury under these circumstances, being of opinion that the goods were sold to Larrazabal as principal, found a verdict for the defendant.

Best, Serjt., for the plaintiff, in pursuance of liberty reserved at the trial, obtained, in last Hilary term, a rule *nisi* to enter a verdict for the plaintiff.

Shepherd, Serjt., showed cause.

Best and *Vaughan*, Serjts., in support of the rule.

Shepherd, in reply.

MANSFIELD, C. J., now gave the judgment of the Court. This is a motion made for a new trial, the verdict having been given for the defendant. The circumstances of the case are very singular. The motion is made on the ground that though the actual vendees of the goods were Larrazabal & Co., yet that the verdict ought to have gone against the defendant, as the person for whom the goods were bought by Larrazabal & Co. I left it to the jury to consider whether Larrazabal & Co. were acting as factors for the defendant, or whether the goods were bought by the defendant himself, who was acting for the Philippine Company. In certain cases it would undoubtedly be a monstrous thing to charge the defendant, but in this case there would be no such hardship, because the defendant had received the money of the Philippine Company.[1] . . .

I left it to the jury to say whether this were the common case of a merchant here buying for his correspondent abroad, on which he charged a commission, or whether it was a case of a factor buying goods for his principal; and they found for the defendant. None of the cases that have been cited at all resemble this case; for although it was not said expressly that the plaintiff did not look to the defendant, yet, upon all the circumstances of the transaction, it evidently appears that he did not. And if a man selling to another for the use of a third, who stands by and is known, may make the contract with the buyer, without making the third person responsible, certainly this is that case. . . . Now in this case if it had been intended that the sale should be to the defendant, and that Larrazabal & Co. were to be only sureties, the plaintiff would certainly have debited the defendant, and taken a guarantee from Larrazabal & Co. And only see what a state the defendant would be in, buying, as he does, such an immense amount of goods of the plaintiff, and other persons. And although it has been objected by the counsel that it is a hard case, that this money getting into the hands of Larrazabal & Co. should not find its way wholly to the plaintiff, of whom the goods were purchased, yet we cannot alter the law of the case, or the nature of the contract, on account of any subsequent events. The insolvency of Larrazabal & Co. may make an unfortunate difference in the case as to the consequences, but it will not alter their liability. We, who are called on to set aside this verdict, must, in order thereto, say on this evidence, that Larrazabal only was not to be the debtor, but that the defendant also, who was to buy these goods for the Philippine Company, was to be liable: but we can find no evidence to warrant us in that conclusion: the rule therefore must be

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[1] Here the facts were recapitulated. — ED.

Discharged.

KIRKPATRICK *v.* STAINER.

COURT OF ERRORS OF NEW YORK. 1839.

[22 *Wend.* 244.]

ERROR from the Supreme Court. This was an action of assumpsit, brought by Kirkpatrick against Stainer, for the breach of a contract alleged to have been made by the defendant, to cause insurance to be effected upon a quantity of coffee shipped by the plaintiff at New York for the port of Trieste. The vessel in which the coffee was shipped was lost at sea. The plaintiff alleged that no insurance had been effected, and claimed the value of the coffee, with anticipated profits. The cause was heard by referees, who made a special report, setting forth the evidence adduced before them. The principal evidence of the agreement rested in two letters: one written by the plaintiff to the defendant on the 27th August, 1830, and the answer thereto under date of the 30th August. The plaintiff's letter commences thus: "Sir: The object of the present is to confirm the verbal agreement made between ourselves respecting 1499 bags of coffee now discharging, of which I showed you invoices and bills of lading. The whole quantity is to be shipped on joint account. For the one half which you take on your account, you are to pay in cash, — are to advance me five-sixths of the value at the price of 5¾100 per pound; on this advance you are to charge me interest," etc. (specifying the terms of the advance). The plaintiff then proceeds: "The coffee must be shipped as soon as possible for Trieste, to the care of your friends, Messrs. Dutilh, Ticky, & Co., with orders for immediate sales and prompt remittances" (directing the mode of remittance). He then adds: "You will also take care that insurance be effected, either here or in Europe, on the invoice amount, with ten per cent additional, for probable gains." The defendant, in his answer of the 30th August, says: "I consent to the different points respecting the projected shipment to my friends, Messrs. Dutilh, Ticky, & Co. in Trieste, of your 1499 bags of coffee. It is understood that the above parcel will be shipped on joint account between you and Messrs. Dutilh, Ticky, & Co. For their half share, I shall pay cash here, at the price of 5¾100 short price per pound net; and on your half, which you consign for your account to my above Trieste friends, I have no objection to advance five-sixths of the above price, cash, charging the usual interest of six per cent per annum, from the time my above Trieste friends will remit the funds to cover my drafts on London." Then after adverting to the mode of remittance, he adds: "The insurance will be covered after your desire, with ten per cent imaginary gain on the invoice cost, either here or in Europe, as I'll judge more convenient." This letter from the defendant is signed, "Ed. Stainer." Sundry letters from Messrs. Dutilh, Ticky, & Co. to the plaintiff, relative to the non-arrival of the vessel, the insurance of the coffee at Trieste, and negotiations with the underwriters there in respect to the payment of the loss; and also several letters which passed between the plaintiff and the defendant on the same subject were read in evidence. The defendant also called a witness, who stated that he knew the mercantile house of Dutilh, Ticky, & Co. of Trieste, and also knew the defendant, who, in August, 1830, was residing in the city of New York as the agent of that house, and that it was understood by the house, of which the witness was a member, and he believed by merchants generally, that the defendant was in business only as agent of the Trieste house.

The counsel for the defendant insisted before the referees, that the defendant was not *personally* liable to the plaintiff in this cause, inasmuch as in the transaction in question, he acted only as the agent of Messrs. Dutilh, Ticky, & Co., and that, with the knowledge of the plaintiff. The referees made a report, setting forth the testimony in the cause, and that the above objection was raised to a recovery; they then state that they find that no insurance was effected by the house of Dutilh, Ticky, & Co., but whether or not the defendant is personally liable to the plaintiff for the breach of the agreement to effect such insurance, they say they are altogether ignorant, and pray the advice of the court; and if it shall seem to the court that the defendant is personally liable, then they find that there is due to the plaintiff $832.50; but if, &c., then that there is nothing due to the plaintiff. The Supreme Court rendered judgment in favor of the defendant. The following opinion was delivered by the Chief Justice: —

"*By the Court*, NELSON, C. J. Taking the two letters of the 27th and 30th August, 1830, as the evidence of the contract respecting the shipping of the coffee to Trieste, and it appears to me there cannot be a doubt that the defendant contracted merely as agent for the house of Dutilh, Ticky, & Co., and that it must have been so intended and understood by the plaintiff. The defendant had no interest in the adventure, and expressly says to the plaintiff, in his letter recognizing and ratifying the agreement, 'It is understood that the above parcel [alluding to the 1499 bags of coffee] will be shipped on joint account between you and Messrs. Dutilh, Ticky, & Co.' 'For their half share I shall pay cash here,' &c. There is no dispute but that defendant was the agent of the above house in the city of New York, and duly authorized to make for them the agreement in question. They recognized its validity, and opened immediately a correspondence directly with the plaintiff, which began January, 1831, and continued till October, 1831.

"Neither is there anything in the correspondence of the plaintiff with the defendant in the business, from which to infer he considered him personally holden; but the contrary. The case presented is the ordinary one of a private agent clothed with full authority, acting in behalf of his principal; not only disclosing it, but actually contracting in his name; for such is the form of the contract to be extracted from the letters of the 27th and 30th August, 1830. There can be no doubt, a person acting as agent of a foreign house, is not responsible, individually, if he discloses his principal, and acts only in his behalf, any more than an agent of a house in this country. There is no such distinction to be found of any authority in the books, nor is there any reason to support it. If an individual desire the personal credit and liability of the agent, he should make known the fact, and all parties will then understand it; if the agent declines, the vendor can refuse to deal with him." The plaintiff sued out a writ of error.

The cause was urged in this court by

G. Wood, for the plaintiff.

J. Prescott Hall, for the defendant.

By the CHANCELLOR. There is no question as to the general rule of law, where an agent or factor, who is duly authorized to contract for his principal discloses the fact of his agency, and the name of the person for whom he is acting, that he is not personally liable if he makes the contract in such form as to be binding upon his principal, unless it satisfactorily appear that he also intended to bind himself personally. The general rule on this subject is not questioned by the counsel for the plaintiff in error; but he insists, in the *first* place, that the fact that Dutilh, Ticky, & Co. were foreigners, residing at Trieste, in the Austria-German territories, takes the case out of the general rule, and renders the agent personally liable; and *secondly*, that the form of the contract was not such as to make it binding upon the defendant's foreign correspondents, — or, at least, that it appears from the contract itself, that it was the understanding of the parties that the defendant was to be personally liable for the performance thereof.[1] . . .

By Senator VERPLANCK. I concur with the Supreme Court in their understanding of this negotiation. Taking together the two letters of the parties on which the bargain was concluded, the defendant appears to have acted merely as the known agent of the house at Trieste, for and on account of whom he made the advances, and to whom the goods were consigned. He contracted for the foreign house and in their name, but made no undertaking for himself. This evidence of the correspondence is supported and confirmed by collateral proof of the general belief and understanding among New York merchants, that the defendant was in business only as the agent of the foreign house. In such dealings it is settled that the principals are alone responsible, unless there be some special circumstance to fix the responsibility upon the agent personally. I do not think that there is any such circumstance in this case; although the fact of the defendant being an agent of a house abroad, added to the authority of Judge Story, the reasons he assigns, and the unqualified language he uses as to the liabilities of factors purchasing for foreign merchants, occasioned at first some doubt in my mind. In his late valuable work on agency, Judge Story says: "On the ground of general convenience and the usage of trade, the general rule obtains that agents or factors, acting for merchants resident in foreign countries, are held personally liable upon all contracts made by them for their employers; and this, without any distinction whether they describe themselves in the contract as agents or not. In such cases, it is presumed not only that credit is given to such agents, but that it is exclusively given to them to the exoneration of their employers. Still the presumption is liable to be rebutted by proof that the credit was given to both principal and agent or to the principal alone." Story on Agency, § 268. See also the reasons assigned in the preceding section and in § 290. To the same effect a respectable recent English elementary writer speaks thus: "It seems that when a British agent contracts for a foreign principal, the agent is liable." Smith on Mercantile Law, p. 78. Now, if this be also the doctrine of our own commercial law, it may well be doubted whether the language of the correspondence, though showing Stainer "to describe himself in the contract as an agent," is yet sufficient, even with the collateral evidence (conclusive as the whole would be in the case of an agent for a domestic principal), to rebut such a positive legal presumption, and to prove that credit was given only to the Trieste house, so as to authorize the court to pronounce, on the facts submitted to them by the referees, "that the defendant was not personally liable upon the agreement." But upon examining the several cases cited in support of this rule, I am satisfied that Judge Story has stated the doctrine in too strong and unqualified terms, as if this presumption were a universal inference of law, applicable everywhere. I think, on the contrary, that this is a presumption founded altogether upon usage and the particular course of trade, and arises only when and where that usage is known or proved to exist; of course, then, that it is not an unvarying legal presumption, to be applied to any contract, made anywhere, by a factor or agent representing a person or commercial house in some foreign country. . . .

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[1] The remainder of Chancellor WALWORTH's opinion gave reasons for agreeing with the plaintiff in error as to both points; and, as to the first point, cited Gonzales *v.* Sladen, Bull. N. P. 130; De Gaillon *v.* L'Aigle, 1 B. & P. 368; Thomson *v.* Davenport, 9 B. & C. 87; Burgen *v.* Buck, 7 Shaw & Dunl. Sess. Cas. 824; 1 Bell's Illust. 153; Smith's Merc. Law, 2d ed., 104, 120; Paley Ag. 294; 2 Livermore's Ag. 249; Story Ag. § 268. — ED.

On the question being put, Shall this judgment be reversed? the members of the court divided as follows:

In the affirmative: The CHANCELLOR, and Senators HULL, H. A. LIVINGSTON, PAIGE, SPRAKER, VAN DYCK — 6.

In the negative: The PRESIDENT of the Senate, and Senators BEARDSLEY, FOX, FURMAN, HAWKINS, HUNT, HUNTINGTON, JONES, MAYNARD, MOSELEY, NICHOLAS, PECK, POWERS, SKINNER, STERLING, VERPLANCK, WAGER, WORKS — 18.

Whereupon the judgment of the Supreme Court was

Affirmed.[1]

WILLIAMSON *v.* BARTON.

EXCHEQUER. 1862.

[7 *H. & N.* 899.]

DECLARATION for goods sold and delivered. Plea: never indebted.

At the trial before BRAMWELL, B., at the London Sittings, after Trinity Term, 1861, it appeared that the plaintiff, who was a farmer in Pembrokeshire, being about to quit his farm, put up his farm produce for sale by auction. The auction took place on the 25th of September, 1857, when the defendant attended and bid for several lots of hay and corn, which were knocked down to him, as the highest bidder, for £150. Thereupon, the auctioneer asked him his name in the usual way, and he replied, "Barton," without saying whether he was purchasing for himself or any other person, and the auctioneer's clerk wrote it down as the name of the purchaser. The defendant had been, for some time previous to, and was at the time of the sale, foreman to one Smith, a government contractor, who was then executing certain works in Pembroke Dockyard; and the defence to the present action was, that the defendant bought the hay and corn, not for himself, but for Smith. The plaintiff was present at the sale, but took no part whatever. He knew that the defendant was Smith's foreman, but he knew nothing as to whether he was, on this occasion, purchasing for himself or Smith. The defendant had, however, on previous occasions, purchased stone of the plaintiff for Smith. The auctioneer knew nothing either of Smith or the defendant, or of their relation to each other, and a few days after the sale sent in the account to the defendant. The hay and corn were, without any direction or interference of the defendant, fetched away in carts belonging to Smith, and were consumed by Smith's horses before his death, which occurred about ten days after the sale. The conditions of sale (so far as material) were as follows: —

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[1] *Acc.:* Kaulback *v.* Churchill, 59 N. H. 296 (1879). — ED.

1. That the highest of two or more bidders shall be the purchaser, and in case of a dispute between the bidders, the lot shall be put up again for sale if the auctioneer shall think proper so to do; otherwise he is to determine which of the parties is to be the purchaser.

2. That each lot shall be considered as delivered on being knocked down, and on the highest bidder complying with the conditions next hereafter mentioned.

3. That the highest bidder shall, on being declared such, name a person present, to be approved of by the auctioneer, or his clerk, to join him or her as a partner for the lots sold, and that such person, on his or her consenting to become such partner, shall be considered jointly and severally answerable for the payment of the purchase-money with such highest bidder. And in case any such highest bidder shall neglect or refuse to procure the consent of any person or persons, to be approved of as aforesaid, the lot may be resold, and the first purchaser charged with any expenses and loss of such resale (if any) or he or she may be treated as a ready-money purchaser, and liable to be proceeded against for the recovery of the same, or the sale may be declared void, at the option of the auctioneer; but in case any such highest bidder shall procure the consent of any person, or persons, to be approved of as aforesaid, the same shall be considered under the conditions equivalent to having signed the sale book.

4. (By this condition the money for purchases at the sale was payable on the 25th January, 1858.)

The learned judge left it to the jury to say whether the defendant authorized the auctioneer to sign his name as the purchaser of the goods, telling them that, if they were of that opinion, the defendant was liable for the price. If, however, they should think that, although the defendant entered into a binding contract, the evidence showed that the goods were delivered, not to the defendant, but to some one else, he was not liable. The jury having found a verdict for the defendant, *Knowles*, in last Michaelmas Term, obtained a rule *nisi* for a new trial on the ground of misdirection, in leaving to the jury the question whether the defendant had entered into the contract, the evidence showing that he had; also on the ground that it was immaterial whether the defendant intended to act as agent or principal; also on the ground that it was immaterial whether the plaintiff knew that the defendant was bidding as agent or not; also on the ground that there was no evidence to support the learned judge's charge touching the delivery, as there was no evidence of any contract other than that with Barton; also on the ground that the verdict was against evidence.

Huddleston and *Garth* showed cause.[1]

Knowles and *Milward*, in support of the rule.[2]

WILDE, B.[3] On these facts, I am of opinion the defendant made himself liable. It it well settled that an agent is responsible, though known by the other party to be an agent, if by the terms of the contract, he makes himself the contracting party: see Higgins *v.* Senior, 8 M. & W. 834. And the late cases arising on charter-parties have illustrated this principle forcibly. Lennard *v.* Robinson, 5 E. & B. 125. Parker *v.* Winlow, 7 E. & B. 942.

Supposing, then, it was competent to the jury, on the above evidence, to find that the plaintiff actually knew that the defendant was buying for Smith, the question would still remain, whether the defendant, by what he did, made himself the contracting party.

It is clear to my mind that he did. He communicated to no one that he was acting as agent; he did nothing by word or act to indicate that he was not contracting himself, and for himself. There is not a single incident, however slight, in his conduct at the sale, to distinguish it from that of a man who was buying for himself. It was the ordinary conduct in all respects of a buyer at an auction.

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[1] The judges interrupted this argument thus: POLLOCK, C. B. "No doubt, the defendant might have been dismissed by Smith from his service shortly before the auction, but still, looking at all the circumstances, there was evidence from which the jury might infer that the defendant was acting for Smith, and that the plaintiff knew it." The same judge: "If a person buys goods in his own name, he is liable to pay for them, although he in fact acts as agent for another." WILDE, B. "The goods were knocked down to the defendant, and he was asked his name. He replied 'Barton.' Is not that evidence of an authority to the auctioneer to sign his name as purchaser?" POLLOCK, C. B. "The question is whether, the plaintiff being present, and well knowing that the defendant was the servant of Smith, it was necessary for the defendant to say, 'I was bidding for Smith.'" — ED.

[2] The judges interrupted this argument thus: WILDE, B. "Suppose a person goes into a shop and orders some cloth to be sent to a particular place; upon which the shopman asks him his name, and he gives it; *prima facie* he makes the contract on his own behalf; but suppose he was foreman to a tailor, and the shopman knew that fact, might not the jury find that the order was given on behalf of the tailor?" The same judge: "If the contract was with the defendant, it is immaterial whether or no he was an agent, but in ascertaining whether he did contract, it is important to inquire whether he was an agent." POLLOCK, C. B., in answer to a contention that the plaintiff might have objected to the admissibility of any evidence of agency for the purpose of varying the contract: "I think not. I agree with my brother WILDE that in investigating whether the defendant made the contract on his own behalf, evidence of the relation between him and Smith is important." — ED.

[3] After stating the case. — ED.

There was nothing, therefore, on which the jury could properly be invited to find that he did not make himself a contracting party. It is not too much to ask or expect of a man who walks into an auction room and becomes a purchaser, that when he gives his own name he should protect himself from being taken as the contracting party.

It is said to be a hard case on the defendant. But it is dangerous and unwise to throw doubts, even in a hard case, on the proper conclusions to be drawn from the ordinary events of an auction room. Sales by auction are far too common, and the effect of bidding and giving a name to the auctioneer as purchaser far too widely understood by the community, to admit of such doubts being sanctioned.

Without minutely adverting to the way in which the case was left to the jury, it is enough to say, that on these facts the judge ought, in my opinion, to have told the jury, that if they believed the plaintiff's evidence, though they equally believed the defendant's evidence, the defendant had made himself a contracting party at the sale, and that, having done so, he was liable though in fact he was only agent.

The jury having been left to find the contrary, the verdict ought in my judgment, to be set aside, and a new trial granted.

BRAMWELL, B. I think this rule should be discharged.

No doubt a person who is acting for another, and known by him with whom he deals to be so acting, may and will be personally liable if he contracts as a principal, and that whether he contracts by word of mouth or in writing. The difference is, that if the contract is by word of mouth, it is not possible to say, from the agent using the words "I" and "me" that he means himself personally; whereas, if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is, that he binds himself personally, and he is taken to do so; and then the other party is bound to him. Therefore, in this case, had the defendant himself signed the conditions of sale as a purchaser, it may be conceded that he would have been liable; but the plaintiff would also have been bound to him. But he did not sign the conditions of sale himself; they were signed by the auctioneer's clerk and unless the auctioneer's clerk had authority from him so to sign his name, the defendant is not bound by that signature. The question, therefore, was a proper one to leave to the jury, unless the admitted facts showed that the auctioneer's clerk had such authority. If they did, such question ought not to have been left to them, and there was a miscarriage. Now, the admitted facts relied on by the plaintiff were, that the defendant attended the sale, that he bid, that he was asked his name, gave it, and it was written down; and I agree that in ordinary cases a man so acting gives authority to the auctioneer to sign his name as a purchaser; and if the case stopped there the defendant would be bound. But he may show other facts which, taken in connection with those first named, alter their effect. Suppose, for instance, the defendant had said before he bid, "All my biddings are as agent for Smith, and what you knock down to me you must put down to him;" surely the auctioneer would have had no authority afterwards to write his name down, not even though he forgot what had taken place, and asked his name, and was told. So, if the defendant had said the same to the plaintiff, "Your agent, the auctioneer, is selling for you; I am buying for Smith; what I bid for must be put down to him," the same result would follow. The defendant did not say so here in words, but to my mind there is evidence to go to the jury which they may hold equivalent to his having done so. The plaintiff knew the defendant was Smith's foreman; his answer on that point is a discreditable shuffle. He knew the defendant was buying for Smith; he himself was close to the auctioneer; the goods were delivered to Smith's carts, not upon any order of the defendant, nor after any communication with him, as appears on the evidence. If the defendant was bound to the plaintiff, so was the plaintiff to the defendant. Can it be said he was in any way? Suppose there had been no writing (and there having been a delivery, none was necessary), would not the proper question have been left to the jury? If not, what difference does the writing make? Suppose the defendant, on being asked his name, had said, "Barton, Smith's foreman." But if the defendant was concluded by the writing, and a party to the contract, surely he is discharged by the plaintiff delivering the goods to the principal without requiring payment. The conditions of sale were misunderstood by the plaintiff's counsel. The purchaser not having given security, and the seller not electing to put up the lot again, the transaction became a ready-money one; the stipulation that the goods should be considered delivered does not apply, and the seller had a lien for the purchase money. Yet he thinks fit to deliver the goods to the principal without requiring payment, and thereby, as I think, discharges the agent, if ever he was bound.

But it was said that the other question was improperly left to the jury. I think not. It was a right question, unless the matter was concluded by the evidence. If the goods were delivered to Smith, not upon the contract with Barton, the action for goods sold and delivered could not be maintained. Now, the evidence was that they were delivered to Smith's carts. How or why, it did not appear. It was for the plaintiff to make out that that was a delivery to Barton. There was some other loose and untrustworthy evidence of Barton's not denying his liability, which precluded my withdrawing the case from the jury; but still it was for them to say if they were satisfied that the plaintiff had proved that delivery; and they might well say they were not satisfied, not only because it was not shown how the goods came to be delivered to Smith's carts, but also for the considerations I have adverted to relating to the first question.

I cannot help adding, it certainly will be strange if the defendant is liable to this action. He did not think he was buying, nor making himself liable; nor did the plaintiff; nor did he think he was selling to the defendant. The auctioneer, who did not know the truth, may have thought so; yet the defendant is to be made liable to the plaintiff contrary to the belief and intention of both of them.

CHANNELL, B. I concur in the judgment of my brother WILDE, and in the reasons on which it is founded.

POLLOCK, C. B. In this case I am of opinion that the rule ought to be discharged. It is contended for the plaintiff that the defendant is liable, because he attended at an auction of the plaintiff's goods, conducted by the auctioneer as agent for the plaintiff, and, the lot being knocked down to him, he was asked what his name was, which he gave, and which the auctioneer wrote down as the name of the buyer, making a written contract. I think, if the plaintiff was present, and perfectly well knew that the defendant, from his position in life, could not be, and therefore was not bidding for himself, and the defendant had no intention of bidding or buying for himself, but gave his name because he was asked what his name was, whatever may have been the impression or intention of the auctioneer, no contract was, in point of fact, made between the plaintiff and the defendant. The defendant did not mean to buy, and the plaintiff was aware of that. The plaintiff also did not mean to sell to the defendant, but to his principal only. I think there were circumstances from which the jury might infer that such was the real state of things, and if the jury had any evidence, I am not disposed to disturb their verdict.

The Court being equally divided in opinion the rule dropped.

WORTHINGTON *v.* COWLES AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[112 *Mass.* 30.]

CONTRACT to recover back money paid by the plaintiff to the defendants for a promissory note signed by one Hanson, the indorsement upon which was forged.

Trial in the Superior Court, before LORD, J., who, after a verdict for the plaintiff, allowed the defendants' bill of exceptions, from which it appeared that the defendants were note brokers, and were known as such by the plaintiff; that they were acting as brokers for Hanson in selling the note, and that they paid him the purchase-money, less a commission, before the forgery was discovered. The defendants testified that, during the negotiations which resulted in the plaintiff's purchase of the note they informed him that they were selling the note as brokers for Hanson, who had employed them to sell it. There was also other testimony tending to show that the plaintiff knew or had reasonable cause to know these facts. The plaintiff denied any such information or knowledge, and offered evidence tending to show that there was no disclosure of the principal, and nothing to lead him to suppose that the defendants were not themselves the owners of the note.

The defendants asked the court to rule that if the defendants were in fact agents for Hanson, and disclosed their agency to the plaintiff, or the plaintiff knew it, or had reasonable cause to know it, the defendants would not be liable. But the court refused so to rule; and ruled that the question was, from whom did the plaintiff understand that he was buying the note, — from the brokers or from Hanson? that, upon the uncontroverted facts, *prima facie*, the transaction was with the defendants, and to relieve them from liability there must have occurred such a state of facts that the plaintiff understood, or ought to have understood as a man of reasonable intelligence, that he was dealing with Hanson.

G. Putnam, Jr., & H. W. Putnam, for the defendants.

W. A. Field, for the plaintiff.

MORTON, J. This is an action of contract upon the implied warranty of the genuineness of the signature to a note sold by the defendants to the plaintiff. The plaintiff claimed that in the purchase of the note he dealt solely with the defendants, and upon their credit. The defendants claimed that they were acting as agents of Hanson in the transaction, and that their principal was disclosed to the plaintiff. Upon these points the evidence was conflicting. The defendants asked the court to rule "that if the defendants were in fact agents for Hanson, and disclosed their agency to the plaintiff, or the plaintiff knew it, or had reasonable cause to know it, the defendants would not be liable."

Considered as an abstract proposition of law, this is too broad. It omits the necessary element that, in the dealing or transaction in question, they were acting as such agents. It may be true that the defendants were agents of Hanson, and known to be such by the plaintiff, and yet if, in the purchase of this note, it was understood by the parties that the plaintiff was dealing with and upon the credit of the defendants, they would be liable. An agent may deal so as to bind himself personally; it is always a question of the intention and understanding of the parties. The presiding judge properly refused to give the instructions in the form requested by the defendants. Instead thereof, he ruled in substance that the question was, from whom did the plaintiff understand that he was buying the note, — from the brokers or from Hanson? and that if such a state of facts occurred, that the plaintiff understood, or ought to have understood as a man of reasonable intelligence, that he was dealing with Hanson, the defendants would not be liable.

These instructions were correct, as applied to the facts of the case. The plaintiff dealt with the defendants. His evidence tended to show that he contracted with them as principals. To meet this *prima facie* case, the defendants undertook to show that in this transaction they were dealing as agents of a disclosed principal. Unless from their disclosures or other sources the plaintiff understood, or ought as a reasonable man to have understood, that he was dealing with Hanson, he had a right to assume that he was dealing with the defendants as principals. The instructions given were to this effect, and were as favorable to the defendants as the instructions requested, with the addition of the necessary qualification that the defendants were in this transaction dealing as the agents of Hanson. Wilder *v.* Cowles, 100 Mass. 487; Merriam *v.* Wolcott, 3 Allen, 258. *Exceptions overruled.*[1]

DIE ELBINGER ACTIEN-GESELLSCHAFT *v.* CLAYE.

QUEEN'S BENCH. 1873.

[*L. R.* 8 *Q. B.* 313.]

DECLARATION, that it was mutually agreed between the plaintiffs and the defendant that defendant should sell and deliver to plaintiffs, and plaintiffs should buy and accept from defendant, certain goods, to wit, 150 sets of Russian wheels and axles, upon the terms, amongst others, that the said goods should be delivered at Hull free on board during February or March, 1872. Allegations of performance of all conditions precedent; breach, non-delivery, alleging special damage.

Plea, *inter alia*, that it was not mutually agreed between the plaintiffs and defendant, as alleged; issue joined.

At the trial before MELLOR, J., at the sittings in London after Hilary Term, it appeared that the plaintiffs are a company established in Elbing, in Prussia, for the purpose of manufacturing railway rolling stock; and in December, 1871, they entered into an agreement with a Russian railway company to supply 1000 railway wagons; and in order to carry out this contract Mr. Hambruck, one of the managing directors of the plaintiffs' company, came to this country, and through the agency of Messrs. Seebeck, Wolff, and Co., commission merchants in London, proceeded to negotiate some contracts with English ironfounders. Amongst others, Messrs. Seebeck & Co. communicated with the defendant, an ironfounder at Long Eaton; and, in consequence, the defendant came to London, and on the 29th of January, 1872, had an interview with Mr. Seebeck, one of the partners, and Mr. Hambruck, at Messrs. Seebeck & Co.'s office. The defendant was informed of the company's contract, and was asked to make tenders for wheels, &c., Mr. Hambruck producing the drawings, but Mr. Seebeck being the chief interlocutor. The defendant then signed in a diary kept by Mr. Seebeck certain memoranda, of which the following only is material:

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[1] *Acc.*: Seaber *v.* Hawkes, 5 Moo. & Payne, 549 (1831). — ED.

"Mr. Claye also offers to supply 150 sets of Russian wheels and axles, 5 feet gauge, with iron tires and axles, but cast-iron bosses, to be delivered during February and March this year, at the price of £31 per set of 4 wheels and 2 axles, delivered f. o. b. in Hull, less 2½ per cent commission, payment in three months bankers' bill (at par), or 1¼ per cent discount for cash payment, fourteen days after shipment from Hull. Three years guarantee.

"This offer to remain open until Saturday, the 3d of February.

"S. J. CLAYE."

On the 31st of January the defendant wrote to Seebeck, Wolff, & Co. that he could not proceed with the wheels and axles until he had a working drawing, and saying, "Please telegraph to your clients to this effect." And again, on the 1st of February he wrote, "Hoping to have confirmation of order for the 150 sets to-morrow."

On the 3d of February Seebeck, Wolff, & Co. telegraphed to defendant, "We confirm order for 150 sets of wheels and axles, Russian pattern, with cast-iron bosses, at your price of £31 less 2½ and 1¼, delivered f. o. b. in Hull during February and March this year, with your guarantee for the wheels and axles of three years."

On the same day Seebeck, Wolff, & Co. wrote a letter to the defendant as follows: —

"Since we have had the pleasure of seeing your chief at our office, we have received both your favours of 31 Jan. and 1st inst., contents of which we noted, and communicated to our friend the railway-carriage builder abroad.

"Although we have received in the mean time lower quotations of nearly £2 per set for the 150 sets of wheels and axles of the Russian pattern, we confirmed you to-day this order by telegram, as we are desirous of commencing business with you, and believe that you will turn out first-rate quality and keep strictly to your engagement as to delivery. We consequently telegraphed to you this morning as follows:" [The telegram was then repeated.] "Enclosed we hand you a copy of these Russian wheels and axles, but with wrought-iron bosses; we hope, however, it will be sufficient for your purpose, and have in the mean time asked our friend to send us the correct drawing."

On the 3d of February the defendant wrote to Messrs. Seebeck, Wolff, & Co.: "I reply to your telegram of this day, for which I thank you, confirming personal order for 150 sets of wheels, &c."

The invoices of the wheels and axles, when delivered, were made out to Seebeck, Wolff, & Co., and they paid the defendant for them. But the defendant failed in delivering most of the sets of wheels and axles within the time limited, upon which this action was brought.

It was objected, *inter alia*, on behalf of the defendant, that the defendant's contract was not with the plaintiffs, but with Messrs. Seebeck, Wolff, & Co.

The learned judge left it to the jury to say whether the contract was made by the defendant with the plaintiffs, or with Messrs. Seebeck, Wolff, & Co.

The jury found for the defendant.

Butt, Q. C., moved for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence.

BLACKBURN, J. I do not entertain the slightest doubt that there is no ground whatever for granting a rule in this case. The facts appear to be that a foreign company, being desirous of having a quantity of goods supplied in England, in the ordinary course of trade, got Seebeck & Co., commission merchants resident in London, to make the contract with Mr. Claye. At the time that contract was made, Mr. Claye was well aware that the goods were ordered for the foreign company, but the offer which was afterwards accepted by Seebeck & Co. was made by him in writing in the book of Seebeck & Co. without any mention of the foreign company; and even if it had not been in writing, the ordinary course of trade would have been that the contract would be with Seebeck & Co., who would pledge the credit of their firm. I quite agree that a man may, as agent, make a contract upon such terms as not only to bind himself but also so as to bind the principal; in other words, so that the principal shall be party to the contract, and may then either sue or be sued. I must say I think that the two things are correlative. A man cannot make a contract in such a way as to take the benefit, unless also he take the responsibility of it. But although such a contract may be where the principals are English; yet where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain showing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner. The *dicta* which I referred to of Chief Justices Sir J. Mansfield (Addison *v.* Gandasequi, 4 Taunt. at p. 580, Paterson *v.* Gandasequi, 15 East, 62) and Lord Tenterden (Thomson *v.* Davenport, 9 B. & C. at pp. 87, 89) and of Bayley, J. (*ib.*) are to this effect; and the passage which I read from the judgment in Armstrong *v.* Stokes (L. R. 7 Q. B. at p. 605) expressly enunciates this proposition; and I think it is quite plain that in the present case the presumption was that Mr. Seebeck was not acting under authority from the Elbinger Company to pledge their credit to Claye, and that Claye did not trust the foreigners at all, but Seebeck & Co. only.

There might, no doubt, be a contract made in a different way between the two parties bargaining together, and there might be evidence of that in the present case. My Brother MELLOR left the question to the jury: Was the contract made with the foreigner or not? But I cannot see any evidence on which the jury could find that in the affirmative: my only doubt is whether he ought not to have directed the jury that there was no evidence on which to find for the plaintiffs against the defendant; but he left the question for the jury, and the jury found for the defendant; and I should have felt greatly surprised if they had found otherwise. I do not, therefore, see the slightest reason to say that there was any misdirection, or that the verdict was contrary to the weight of evidence.

LUSH, J. I quite agree with Mr. Butt that an agent may make a contract by which he may become personally liable, while he still makes it on behalf of his principal, so that the other party has a choice to go against either the one or the other; that is, that the contract may be such as to make the principal as well as the agent himself a party to the contract. But if the principal be made a party to the contract, he must be both able to sue and liable to be sued; for, here, I also agree with my Brother BLACKBURN that he cannot be a party so as to be able to sue, and yet not a party so as to be liable on it. The evidence here excludes the one altogether, because, as I understand the evidence, the foreign principal was known to the defendant, and, in fact, was present at the time of the offer; and the jury have said in substance — and I think there is evidence to justify that conclusion — that what the defendant said in effect was, I know the goods are not for you, Seebeck & Co., but I will not deal with your foreign principal, but only with you. That being so, the foreigner is excluded both for the purpose of liability and for the purpose of suing and taking the benefit of the contract.

MELLOR, J. I am entirely of the same opinion.

Rule refused.[1]

COVELL, RESPONDENT, *v.* HART AND ANOTHER, APPELLANTS.

SUPREME COURT OF NEW YORK, THIRD DEPARTMENT. 1878.

[14 *Hun*, 252.]

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon a case and exceptions.

The action was brought to recover the value of services rendered by the plaintiff in examining a set of books, in pursuance of directions received from the defendants, a firm of attorneys, and for which he sought to hold them liable in this action.

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[1] On a subsequent day, *W. Williams*, Q. C., applied on behalf of the plaintiffs for leave to appeal, but the Court, having no doubt in the matter, refused leave. — REP.

E. F. Babcock, for the appellants.

Turner, *Dexter & Van Duzer*, for the respondent.

BOCKES, J. The defendants were attorneys and counsellors of this court, and formed a professional partnership the second time in November, 1873. Their former partnership, which terminated several years previously, need not be here noticed. During several years prior to November, 1873, the defendant, Hart, had in charge, for one of the parties, an action involving the settlement of an extinct partnership. The management of this action remained with Hart after his professional connection with McGuire in 1873. In order to prepare the case for trial, it became necessary to have an examination of the partnership books. The plaintiff, who was an experienced bookkeeper, was employed, as he alleged, by the defendants, then partners, to perform this service; and he was engaged in such service for a considerable time. The action is brought to recover for those services.

The defendants denied the alleged employment, and especially controverted any joint liability; and also insisted that the services were performed for their client as principal debtor; hence, that they were not, nor was either of them, liable in this action. The questions raised on this appeal are presented by the various exceptions to the rulings of the learned judge at the trial, on submitting the case to the jury. Of those exceptions, but two need to be here considered.

It must be assumed that the jury found a joint employment by the defendants of the plaintiff to perform the services. Still, in this view of the case, it was an employment by known agents for services to be performed for the benefit of a principal, whose name and relation to the subject-matter of the service were known to the plaintiff at the time of the employment. It is laid down as a general rule that, where a person is known to act as a mere agent, and the principal is known, and there is no express agreement by the agent for a personal liability, and there are no circumstances from which it may properly be inferred that the credit is given to him, the agent is not personally liable, though he be the person who makes the contract. So, an agent is not liable when he keeps within the limits of his authority, and discloses the name of his principal at the time of making the contract. This principle of law is applicable to the case of attorney and client. Judson *v.* Gray, 11 N. Y. 408, 411, and cases there cited. The rule is there quoted with approval, that, in conducting the suit, so far as third persons are concerned, the attorney is simply the agent of his client.

This rule may not be applicable to services performed for an attorney by a public officer, who is bound by law to act in the matter entrusted to him by an attorney. Judson *v.* Gray, *supra;* Campbell *v.* Cothran, 56 N. Y. 279. The case in hand is one, however, of voluntary engagement by the plaintiff, hence the ordinary rule applicable to principal and agent obtains. The services contracted for were not such as pertained to the duties of an attorney in his professional character. Yet they were such as he might cause to be performed for the benefit of his client. He might bind his client to any service necessary to the preparation of the case for trial. Here, however, this latter point is of little importance, as enough appeared in the evidence to warrant an approval of the engagement by the client. In this case, then, the plaintiff could not recover against the defendants, inasmuch as the former knew of their agency and that they were acting for a well-known principal, unless they contracted for themselves and gave the plaintiff their personal credit. This could only be established against the defendants under the undisputed facts in the case, by an express promise on their part to be themselves personally liable, on proof of facts and circumstances equivalent to an express promise by them. We are now brought to the consideration of a request for an instruction to the jury on this branch of the case, which instruction was refused. The learned judge was requested to charge the jury in substance and effect, that if the defendants employed the plaintiff to perform the service under authority from their client, and the plaintiff had knowledge that the employment was for their client, then the plaintiff could not recover against them, but must take his remedy against their client. This is not the exact language of the request, but embodies its spirit and fair meaning. An employment for their client must be understood to mean an employment on his behalf and on his responsibility. If such was the employment it was not on the personal liability of the defendants. The defendants were entitled to have this instruction given as requested, as they were also entitled to the instruction asked for, that if the defendants employed the plaintiff for and on behalf of their client to do the work as in their judgment necessary in their client's suit, then the client was liable to the plaintiff therefor, although the plaintiff, when he began the work, did not know who the client was or that the work was for him. The proposition was sound in law; and, under the evidence in this case, being contradictory on almost every point connected with the subject of the plaintiff's employment, it was not so foreign to the question to be considered by the jury as to be absolutely immaterial. It is true these instructions were refused save as the subject had been already charged upon. But on looking into the general charge it will be seen that the ideas intended to be put forth in the request were not specifically advanced.

For the reasons above suggested the judgment and order appealed from must be reversed.

LEARNED, P. J., and OSBORN, J., concurred.

Judgment and order reversed; new trial granted, costs to abide event.

CHAPTER IV.

PARTIES TO WRITINGS.[1]

SECTION I.

Instruments neither Negotiable nor Sealed.

ALFORD *v.* EGLISFIELD.

COMMON PLEAS. 1564.

[*Dyer,* 230 b.]

NOTE, by the opinion of the Justices of the Bench, that if a purveyor, factor, or servant, make a contract for his sovereign, or master, for fat beasts, for a certain sum of money, and make a bill of receipt for the beasts to the use and behoof of the sovereign or master, and besides, by the same bill bind himself to payment at a day certain, but do not seal the bill, this is not such a contract as shall charge the purveyor or servant by writ of debt counting upon a buying, but an action on the case will serve on this occasion upon an assumpsit.

BATEMAN *v.* PHILLIPS.

KING'S BENCH. 1812.

[15 *East,* 272.]

THE plaintiff counted upon a promise made to him by the defendant to pay the debt of David Williams, if he did not pay it, in consideration of the plaintiff's forbearing to sue Williams for a week: and having recovered a verdict before WOOD, B., at Hereford.

Peake now moved to set it aside, and enter a nonsuit, upon the ground that there was no sufficient evidence of the defendant's promise in writing within the 4th section of the statute of frauds. He stated the facts to be, that the plaintiff was about to sue Williams for a debt of £80, and had employed Mr. Gwyn his attorney for that purpose, when the defendant addressed the following letter to Mr. Gwyn, dated Monday. "Sir, the bearer David Williams has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid." (Signed by the defendant.) Mr. Gwyn was called as a witness at the trial to prove that this letter was addressed to him as the attorney for the plaintiff; that it was brought to him by Williams; and the amount of the debt due from Williams to the plaintiff was also proved. It was now observed that the name of the plaintiff was not mentioned in the letter, nor the amount of the debt; and that if this could be received in evidence to charge the defendant within the statute, it was open to the plaintiff's attorney by parol evidence to have applied the letter to any other person, or for any other sum, in direct contravention of the statute, which meant to exclude all parol evidence of an agreement to pay the debt of another, by requiring the writing to contain the agreement, that is, the whole agreement. . . . That Gwyn was the attorney for the plaintiff depends entirely upon his parol evidence: he might have applied the letter to any client of his to whom Williams was indebted. [BAYLEY, J. If you had shown that Williams was indebted at the time to another client of Gwyn's, that might have made a doubt.] . . .

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[1] And see Chapter V.

Lord ELLENBOROUGH, C. J. The parol evidence received did not go to extend the terms of the agreement in writing: it only went to show that the letter was addressed to him as the attorney for the plaintiff, and not as the principal and creditor of Williams. Would it be contended to be necessary to state the very sum to be paid where it appeared that the defendant meant to say to the plaintiff, whatever sum Williams owes you I engage to pay it if you will not sue him? If the defendant did not know the exact amount of the debt, might he not contract to pay it in those terms? The parol evidence does not enlarge any term of the letter: and I think it would be holding the statute too strictly to say that this was not sufficient evidence of the contract.

LE BLANC, J. If the doctrine were to be pushed the length now contended for, we must say that a man could not contract in writing with another to pay him for all the goods with which he had furnished a third person in the course of the antecedent month. Or suppose the writing had only contained a promise to pay the debt of Williams; would not that be sufficient without mentioning the amount?

PER CURIAM, *Rule refused.*

JOHN EVANS AND JAMES THOMAS *v.* DAVID EVANS.

KING'S BENCH. 1834.

[3 *Ad. & E.* 132.]

DEBT. The declaration stated the defendant to be indebted to the plaintiffs in the sum of £85 "for the use and occupation of certain lands with the appurtenances by the defendant at his special instance and request, and by the sufferance and permission of the said plaintiffs for a long time before then elapsed, had held, used, occupied, and enjoyed;" also in £85 for the use and occupation of lands with the appurtenances of the said plaintiffs, by the said defendant at his special, etc., and by the sufferance and permission of the said plaintiffs, for a long time, etc. (as before); also in other sums for monies lent, paid, had, and received, and on an account stated. Plea, the general issue. At the trial before GURNEY, B., at the Cardigan Spring Assizes, 1834, the case for the plaintiffs was as follows: David Jones, being tenant of the lands in question, and being indebted both to the plaintiffs and to the defendant, made an arrangement with the plaintiffs, who were auctioneers in partnership, that they should let the lands by auction upon the conditions after-mentioned, should pay Jones's landlord the rent then coming due and the rent for the next year, should also pay the rates and other charges on the farm, and, after such payments, should retain to their own use the overplus of the rent at which the lands might be let, and should have a certain allowance for collecting. The lands were let by auction. The conditions, which were read at the letting, were in these words: —

"Fields let by auction at Veniog, in the parish of, &c., on the 16th day of October, 1832 (being the farm of Veniog), subject to the following conditions: —

"By Messrs. Evans and Thomas, auctioneers.

"First, the fields are let from to-day till Michaelmas next, free from all rates (tithes excepted).

"Secondly, the rent is to be paid into the hands of John Evans or James Thomas, auctioneers, or to their order, at two moieties or payments, that is to say, one half on the 10th day of July next, and the remaining half on the 29th day of September following.

"Approved of the above conditions.

"By me, DAVID JONES."

After which followed a description of the lots. The defendant took the lands and occupied them. The plaintiffs received rent from him in respect of them, and paid it over to the landlord. At the close of the plaintiffs' case the defendant's counsel contended that there must be a nonsuit, for that the plaintiffs, who let as auctioneers, could not maintain an action for use and occupation; and Jarvis *v.* Chapple, 2 Chit.

Rep. 387, was cited. The learned judge overruled the objection, saying that in the present case there was an express contract between the plaintiffs and the defendant. Evidence was then given on the defendant's part, to show that no such arrangement existed between Jones and the plaintiffs as above stated; that they let the premises and received the rents merely as his agents, and that the defendant took the lands upon an understanding with Jones (previous to his supposed arrangement with the plaintiffs), that he should make a reduction from the rent in respect of the sum which he owed the defendant. The learned judge left it to the jury whether the plaintiffs had disposed of the lands as agents for Jones, or on their own behalf as creditors, and to reimburse themselves for money which they had advanced; adding that, in the latter case, the defendant could not, after having heard the conditions of sale read, and agreed to pay the rent to the plaintiffs, avail himself of an alleged private arrangement between himself and Jones to defeat the plaintiffs' claim; and that, even if such arrangement existed, it made no difference, as the defendant had agreed to pay the plaintiffs. The jury found for the plaintiffs, and said they thought that the plaintiffs had let to the defendant under the agreement between them and David Jones, on their own account as creditors, and not as agents. In the ensuing term *John Evans* obtained a rule *nisi* for a nonsuit to be entered upon the objection above stated, or for a new trial.

Maule now showed cause.

Sir *W. W. Follett*, with whom was *Evans*, *contra*.

Lord DENMAN, C. J. If it clearly appeared that the defendant was aware of such an arrangement as has been suggested, between the plaintiffs and David Jones, that might vary the case. But it is manifest that the defendant took under the conditions of sale. Now the conditions merely import that fields are to be let by auction by the plaintiffs, auctioneers, and it cannot be doubted that the defendant knew that David Jones was owner. Then come the words, "The rent is to be paid into the hands of John Evans or James Thomas, auctioneers, or to their order," in certain instalments; and then follows, "Approved of the above conditions, by me, David Jones." Looking at these conditions, which in fact constituted the agreement, there is no proof whatever that the defendant considered that he should hold from the plaintiffs. On the contrary, the signature of David Jones showed that he was not to hold from them.

LITTLEDALE, J. I am of the same opinion. The words, "by Messrs. Evans and Thomas, auctioneers," show that they represented themselves as the mouthpiece of the person really letting. Then, "The rent is to be paid into the hands of John Evans or James Thomas, auctioneers, or their order," and at the end is added, "Approved of the above conditions, by me, David Jones." It was known, therefore, that he was the owner; and the meaning was, "I, David Jones, authorize you to let." That is the only authority given. It is true that he goes on to say, "Pay the rent into the hands of John Evans or James Thomas," and payment to them would have been a discharge. But they are merely agents. The lessor is David Jones: he is therefore the only person to sue.

Patteson, J. The question here does not turn upon the objection stated as a ground of nonsuit. There must be a new trial on the question of fact, not on any point of law. The question of fact is, by whose permission did the occupation take place, and by whom was the contract made? That is in general a matter to go to the jury; but if the question depend upon the construction to be put on a document which is in evidence, then it rests with the Court. Here the conditions of sale constitute the only document, and upon that I can see no doubt. If the plaintiffs let for themselves, why is David Jones's name added? The plaintiffs would in that case have been the persons to sign. The document does not say by whom the premises are let. It is true that the rent is to be paid into the hands of "Messrs. Evans and Thomas, auctioneers;" but this amounts only to an authority given by Jones to pay into their hands; indeed it is more than authority; it is an express direction. This was not put to the jury by the learned judge. He has, therefore, not explained to them the proper construction of the document.

Coleridge, J. At first I thought that the fact was properly left to the jury. But as it was to be determined by the construction of a document, the effect of that document should have been properly explained to them by the judge. Here the letting was, professedly, by the plaintiffs as auctioneers, and Jones signed the conditions. There may have been an understanding between the plaintiffs and Jones, that the plaintiffs should pay themselves out of the rents. But as to the contract of the defendant, there was clearly a misdirection.

Rule absolute for a new trial.[1]

JONES *v.* LITTLEDALE AND OTHERS.

King's Bench. 1837.

[6 *Ad. & E.* 486.]

Assumpsit for not delivering a quantity of hemp, alleged to have been bought by the plaintiff of the defendants at the price of £155 14*s.* 11*d.* There was also a count for money had and received, and on an account stated. The defendants pleaded to the first count, and all but £52 in the second count, *non assumpserunt;* and as to that £52 a tender. The particulars of demand claimed £155 14*s.* 11*d.*

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[1] See Fisher *v.* Marsh, 6 B. & S. 411 (1865); Woolfe *v.* Horne, 2 Q. B. D. 355 (1877). — Ed.

On the trial before PATTESON, J., at the last Liverpool assizes, it appeared that the plaintiff had (in 1836), bought, by auction, at the rooms of the defendants, who were brokers at Liverpool, the hemp in question, to be paid for at certain times then agreed on: that the defendants afterwards sent an invoice of the goods, headed, —

"——— Jones,
"Bought of J. and H. Littledale,
"Sixty-four bales of hemp. Payment fourteen days and six months. Received on account £100, October 31.
"Settled November 26.
"(Signed by defendant's clerk.)"

That the plaintiff, on the 31st of October, paid the defendants £100, and afterwards, on the 26th of November, the residue, £52; and on the latter day asked for a delivery order. An order on Messrs. Coupland and Duncan was given him, which on presentation the same day was refused; and one of the defendants, being applied to, said that he would see his attorney, and procure the delivery; but the defendants never did procure the delivery. In answer, the defendants offered to prove that the hemp was advertised in two newspapers, which the plaintiff was in the habit of seeing, for sale, at the rooms of the defendants, brokers, with a reference to Coupland and Duncan, merchants.[1] That it was sold by auction at the defendants' rooms under printed conditions of sale, describing the defendants as the seller's brokers, but not mentioning the name of the seller; that the defendants had made advances to Messrs. Coupland and Duncan on these and other goods; and that the custom at Liverpool was for brokers, when they had made advances, to deliver invoices in their own names, in order to secure the passing of the purchase-money through their hands. That Messrs. Coupland and Duncan became bankrupts, and that a fiat issued on the 25th of November.[2] The learned judge thought that these facts, if proved, constituted no defence to the action; and directed a verdict for the plaintiff.

Cresswell now moved for a rule to show cause why there should not be a new trial, on the ground of misdirection.

Lord DENMAN, C. J. On moving to set aside this verdict, the counsel for the defendants argued that the sale by auction was the contract, from which, and the previous advertisement, it was apparent that the plaintiff knew that the defendants were only agents, and who the principals were, and that the learned judge should have left to the jury to say whether the contract was made with the defendants, or the principals; urging also that, if the purchase-money had been paid at the proper time, the plaintiff would have obtained the goods; and contending that the £100 must be taken as paid to the principals, and might be proved under the fiat against them, and that the £52 paid after the fiat had been tendered. And he cited Moore *v.* Clementson, 2 Camp. 22, to show that the form of the invoice made no difference, but evidence was admissible to show who was the real contracting party; contending that, from the evidence of the facts and the custom, the invoice had the same effect as if it had stated that the plaintiff bought of the defendants for Coupland and Duncan, payment to be made to the defendants.

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[1] The advertisement, after describing the goods, added, "Apply to Coupland and Duncan, merchants, or Littledale and Co., brokers." — REP.

[2] It was admitted, on the trial, that the defendants had tendered the £52. — REP.

There is no doubt that evidence is admissible, on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the Statute of Frauds, until the invoice, by which the defendants represent themselves to be the sellers: and we think that they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals; but in so doing they have made themselves responsible; and we think it impossible to read the invoice in the sense proposed. *Rule refused.*[1]

HIGGINS *v.* SENIOR.

EXCHEQUER. 1841.

[8 *M.* & *W.* 834.]

SPECIAL assumpsit, to recover compensation for the non-delivery of certain quantities of iron, pursuant to agreement, whereby the defendant agreed to sell to the plaintiffs, and the plaintiffs, at the request of the defendant, then agreed to buy of and from the defendant a certain large quantity of iron, to wit, &c.

Pleas, first, that the defendant did not promise *modo et formâ;* secondly, that the plaintiffs did not agree or promise *modo et formâ.* Issue thereon.

At the trial before ROLFE, B., at the last Liverpool Assizes, it appeared that the plaintiffs were iron merchants at Liverpool, and the defendant was also an iron merchant and iron commission agent, trading there in the name of John Senior & Co. On the 20th of July, 1840, a person of the name of Mead, who was employed by the plaintiffs to purchase iron, applied to William Senior, a brother of the defendant

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[1] Compare Holding *v.* Elliott, 5 H. & N. 117 (1860). — ED.

(and who was then acting for him in his absence from home), to know if he sold for the Varteg Iron Company, and on being answered in the affirmative, Mead said he had a large order for a good house; but William Senior then declined to enter into any contract with him. On the following day, however, the 21st of July, on being again pressed by Mead, he took the order, and Mead went to his office, and in a short time returned to William Senior at the defendant's office, and delivered to him the following bought note: —

"LIVERPOOL, 21st July, 1840.

"Bought of the Varteg Iron Company, per John Senior & Co.

"One thousand tons of good merchantable bar iron of common sizes, of flat, square, and round, at £6 per ton — free on board at Newport, less five per cent for cash payment, on receipt of invoice and bill of lading, for every parcel of one hundred tons or upwards.

"Two hundred to be delivered by the 20th August, four hundred tons in all September, and the remaining four hundred tons by the 14th October, and the whole to be shipped at the lowest rate of freight offering, except in any case where a ship is sent expressly for a cargo.

"SAMUEL MEAD,
for Messrs. V. Higgins & Sons,
Iron Merchants, Liverpool."

William Senior wrote and delivered to Mead the following sold note: —

"LIVERPOOL, 21st July, 1840.

"Mr. S. Mead.

"We have this day sold, through you, to Messrs. V. Higgins & Sons, one thousand tons of Varteg, or other merchantable bar iron of common sizes, of flat, square, and round, at £6 per ton, free on board at Newport, less five per cent for cash payment, on receipt of invoice and bill of lading for every parcel of one hundred tons or upwards. Five hundred tons to be delivered by the 20th August, four hundred tons in all September, and the remaining four hundred tons by the 14th October, and the whole to be shipped at the lowest rate of freight offering, except in any case where a ship is sent expressly for a cargo.

"We are, &c.,
"John Senior & Co.
"WILLIAM SENIOR.

"Mr. Mead excludes the Maesteg iron. — W. S."

The plaintiffs put in evidence the sold note only, contending that that was the contract between the parties. No iron ever was delivered, though frequent applications were made to the defendant to deliver it according to the contract, both by letter and otherwise. Mead was called as a witness for the plaintiffs, and he proved that there had been a contract made out for Varteg iron on the company's account, which he had made out, but that William Senior gave him the above sold note instead; and that William Senior said he was not sure that he could deliver the whole in Varteg iron, but would take the order to deliver any other iron as good. He also proved that it was a common occurrence for contracts to be exchanged, and that William Senior said the one he gave would accord more with his brother's views. The following letters from the plaintiffs to the defendant were given in evidence by machine copies, a notice for the production of them having been proved: —

"July 29th, 1840.

"Annexed we hand you specifications for part of our contract, made by Mr. S. Mead on our account, which we wish consigned to the King's Dock here, freight not to exceed 7*s.* per ton in full."

"3rd August, 1840.

"As a portion of our contract with you is to be delivered on or before the 20th instant, we have particularly to request that the above specifications have the precedence; as they are required for immediate shipment, let them be quite separate and marked with white paint as above; and be pleased to instruct the captain to call upon us previous to coming into dock, as he will have to go alongside a vessel: the iron to be in clean blue condition."

"13th Aug. 1840.

"Annexed we hand you two specifications as part of our contract of the 21st of July, 1840, and we shall feel obliged by your having them immediately shipped at a low freight, so as to be here if possible within three weeks from this date.

"Please to inform us whether your friends can complete the specifications within the above time."

"20th August, 1840.

"According to the terms of our contract with you, you are bound to deliver, on or before this day to our order in Newport, 200 tons of iron, which we hope has been attended to, although from our not having received any advice, we fear the contrary; we therefore deem it necessary to inform you, should the terms of the contract not be adhered to, we shall hold you responsible for any loss that we may incur thereby."

No answer was returned to any of the above letters.

At the end of the plaintiff's case, *Cresswell*, for the defendant, submitted that the plaintiffs were bound to put in the document signed by Mead; that the plaintiff's promise was proved to be in writing, and must be put in. It was answered for the plaintiffs, that the paper was signed by the defendant's brother, and which had been substituted for the other at his request, was the only contract. On the part of the defendant, William Senior was called, who proved the making of the contract, as above stated, with Mead: that afterwards Mead brought the bought note to him, and that he, William Senior, wrote the sold note, and they exchanged the one for the other.

The learned judge, in summing up the case to the jury, said that if the writing signed by William Senior was the contract. the defendant, in point of law, was liable, whether he intended to act for himself or the company; that the defendant was notoriously an agent, but still if he chose to sign a contract in his own name, he was responsible; that if he had acted as agent, not having authority to make the contract, he was liable for so acting; and that he was responsible whether the party knew he so acted or not; that knowledge made no difference. And he left it as a question to the jury, whether this (viz. the sold note) was the contract by which the parties intended to be bound, or whether the two papers constituted the contract. If the latter, the plaintiffs were not entitled to recover, but if the former, they were. The jury found for the plaintiffs, with £1500 damages, leave being reserved to the defendant to move to enter a nonsuit. *Cresswell*, in Easter Term last, obtained a rule accordingly, either for a nonsuit or a new trial.

Dundas and *Creighton* showed cause.

Cresswell, *J. Henderson*, and *R. Denman*, in support of the rule.

Parke, B. The question in this case, which was argued before us[1] in the course of the last term, may be stated to be, whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue on the plea of *non assumpsit*, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts, at the time when the agreement was made and signed. Upon consideration, we think that it was not; and that the rule for new trial must be discharged.

There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to,[2] and charge with liability on the other,[3] the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange[4] signed by a person, without stating his agency on the face of the bill; but as to other written contracts, namely, the cases of Jones *v.* Littledale, 6 Ad. & Ell. 486; 1 Nev. & P. 677, and Magee *v.* Atkinson, 2 M. & W. 440. It is true that the case of Jones *v.* Littledale might be supported on the ground that the agent really intended to contract as principal: but Lord DENMAN, in delivering the judgment of the Court, lays down this as a general proposition, "that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." And this is also laid down in Story on Agency, sect. 269. Magee *v.* Atkinson is a direct authority, and cannot be distinguished from this case.

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[1] Parke, Alderson, Gurney, and Rolfe, BB. — Rep.

[2] Garrett *v.* Handley, 4 B. & Cr. 664; Bateman *v.* Phillips, 15 East, 272. — Rep.

[3] Paterson *v.* Gandasequi, 15 East, 62. — Rep.

[4] Sowerby *v.* Butcher, 2 C. & M. 371; 4 Tyr. 320; Lefevre *v.* Lloyd, 5 Taunt. 749; 1 Marsh. 318. — Rep.

The case of Wilson *v.* Hart, 7 Taunt. 295; 1 Moore, 45, which was cited on the other side, is clearly distinguishable. The contract in writing was, on the face of it, with another person named Read, appearing to be the principal buyer; but there being evidence that the defendant fraudulently put forward Read as the buyer, whom he knew to be insolvent, in order to pay a debt from Read to himself with the goods purchased, and having subsequently got possession of them, it was held, on the principle of Hill *v.* Perrott, 3 Taunt. 274, and other cases, that the defendant was liable; and as is observed by Mr. Smith, in the very able work to which we were referred (Leading Cases, vol. ii. p. 125), that decision turned altogether upon the fraud, and if it had not, it would have been an authority for the admission of parol evidence to charge the defendant, not to discharge Read.

Rule discharged.[1]

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[1] Compare Wake *v.* Harrop, 1 H. & C. 202 (Ex. Ch. 1862).

In Fisher *v.* Marsh, 6 B. & S. 411, 416 (1865), BLACKBURN, J., said:—

"The general rule is, that when an agent makes a contract, naming his principal, the contract is made with the principal, and not with the agent. But even where the principal is known, a contract in writing may be made by an agent with a third person, in such terms that he is personally bound to the fulfilment of it; as if he says, 'I for my own self contract,' in such a case there is a personal contract by the agent, and he may sue or be sued on it, although the principal may interfere and claim the benefit of it, as was decided in Higgins *v.* Senior. . . . In the present case the plaintiff on putting up this land for hire in effect said, 'I let the land, and I undertake upon the price being paid to me that the person taking the land shall have the enjoyment of it.' Then the defendant having bid for it, and being the highest bidder, there is a clear contract by the defendant to become tenant. The terms of the contract were not reduced to writing; but does the fact of the plaintiff being auctioneer prevent the contract being with him? If not, there was evidence to go to the jury."

In Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 57–58 (1893), WINSLOW, J., delivering the opinion of the Court, said:—

"The defendant claimed that he only acted as a broker between the plaintiff and the Liverpool firm for the sale of the soda ash in question, and upon the trial offered much testimony, consisting of letters and telegrams which passed between himself and the plaintiff, and which led up to and finally culminated in the written contract of sale. . . . This testimony was offered for the purpose of showing that defendant acted simply as a broker, and that the contract should be construed simply as a broker's sold note. This testimony was all rejected by the trial court, upon the ground that it tended to vary and contradict the terms of a written contract. This ruling was strictly right. The contract which defendant executed, and under which the goods were delivered,

BRAY *v.* KETTELL AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[1 *Allen*, 80.]

CONTRACT, brought by the master of the schooner *Moro*, on a charter-party executed in the city of New York, and signed on the part of the charterers as follows: —

"We agree to the above and will furnish cargo and pay freight accordingly, and hereby bind ourselves as above.

"Albert Freestone Quarries, by Kettell, Collins, & Co., Agents.

"Per A. W. Bowman, Att'y."

The defendants, Kettell, Collins, & Co., admitted the authority of Bowman to sign their names to the charter-party as agents. At the trial in this court, it was proved or admitted that there was not, at the time when the charter-party was executed, any corporation or company having the name of "Albert Freestone Quarries." But it was also proved or admitted that Christopher D. Archibald, of London, a British subject, was then the proprietor of certain quarries in the province of New Brunswick, styled "Albert," and that he was in the habit of using the name "Albert Freestone Quarries" in transacting business respecting his quarries; and that about a year afterwards a corporation by that name was established in New Brunswick. A paper by which said Archibald appointed the defendants his agents, dated August 9, 1856, was introduced in evidence; but it did not appear that the plaintiff knew of this paper, or knew that Archibald was the party intended by the words "Albert Freestone Quarries."

A breach of the contract contained in the charter-party having been proved, METCALF, J., ruled, for the purpose of ascertaining the damages, that the plaintiff was entitled to maintain this action; and a verdict was taken by consent for the plaintiff, subject to the opinion of the whole court, upon the question of the defendants' liability upon the facts above reported.

W. Brigham, for the defendants.

S. H. Phillips, for the plaintiff.

BIGELOW, C. J. The plaintiff does not controvert the general rule of law, that an agent is not personally responsible upon an instrument executed in the name of his principal. But he rests his claim against the defendants upon the ground that the present case falls within a

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was a plain and unambiguous contract of sale, and upon familiar rules previous negotiations could not change its legal effect. There was nothing to prevent the defendant from making a contract binding himself personally if he chose to do so, notwithstanding his ordinary business may have been simply that of a broker, and notwithstanding also the fact that he may have preliminarily negotiated in the capacity of a broker in this very transaction. Having made such a contract, he cannot now relieve himself from responsibility thereunder by showing that he was acting simply as agent or broker for a principal, whether such principal was disclosed or undisclosed." — ED.

recognized exception to the rule, because the defendants acted in making the contract, in behalf of a foreign principal, resident "beyond seas." It is certainly true that some of the earlier English cases seem to sanction the doctrine, that where an agent acts for a foreign principal, the presumption is that credit is given exclusively to the agent, and he only is liable on contracts entered into in the name and on behalf of his principal. Gonzales *v.* Sladen, Bul. N. P. 130; De Gaillon *v.* L'Aigle, 1 B. & P. 368; Thomson *v.* Davenport, 9 B. & C. 87; Smyth *v.* Anderson, 7 C. B. 21. The same doctrine is stated in Paley on Agency (4 Amer. ed.), 248, 2 Livermore on Agency, 249, and especially in Story on Agency, §§ 268, 290, where it is enunciated as a general rule that agents acting for merchants residing in a foreign country are held personally liable on all contracts made by them for their employers, and this without any distinction whether they describe themselves in the contract as agents or not. We are inclined to think that a careful examination of the cases which are cited in support of this supposed rule will show that this statement is altogether too broad and comprehensive. Certain it is, that if it ever was received as a correct exposition of the law, it has been essentially modified by the more recently adjudged cases. It doubtless had its origin in a custom or usage of trade existing in England, by which the domestic factor or agent was deemed to be the contracting party to whom credit was exclusively given; and it was confined to cases where the claim against the agent was for goods sold, and was not extended to written instruments. But it is going quite too far to say that this usage or custom is so ingrafted into the common law as to become a fixed and established rule, creating a presumption in all cases that the agent is exclusively liable, to the entire exoneration of his employer. The more reasonable and correct doctrine is that when goods are sold to a domestic agent or a contract is made by him, the fact that he acts for a foreign principal is evidence only that the agent and not the principal is liable. It is in reality, in all cases, a question to whom the credit was in fact given. Where goods are sold, it is certainly reasonable to suppose that the vendor trusted to the credit of a person residing in the same country with himself, subject to laws with which he is familiar, and to process for the immediate enforcement of a debt, rather than to a principal residing abroad, under a different system of laws, and beyond the jurisdiction of the domestic forum. But even in such a case, the fact that the principal is resident in a foreign country is only one circumstance entering into the question of credit and is liable to be controlled by other facts. So in the case of a written contract; it depends on the intention of the parties. But this, as in all other cases of written instruments, must be determined mainly by the terms of the contract. There may be cases where the language of the contract is ambiguous, and it is doubtful to whom the parties intended to give credit, in which the circumstance that the principal is resident abroad may be taken into consideration in determining the question of the liability of the agent. But where the terms of the contract are clear and unambiguous, it must be deemed the final repository of the intention of the parties; and its construction and legal effect cannot be varied or changed by any reference to facts or circumstances affecting the convenience of the parties or the reasonableness of the contract into which they have entered. In such a case, therefore, it makes no difference whether the principal is a foreigner or not. If by the language of the contract the agent and not the principal is bound, such must be its construction; and, on the other hand, if it clearly binds the principal, and is in form a contract with him only, the agent must be exonerated, without regard to the fact that the principal is resident in a foreign country. This rule can work no hardship, because parties can in all cases make their contracts in such form as to bind those to whom they intended to give credit. Mahony *v.* Kekulé, 14 C. B. 390; Green *v.* Kopke, 18 C. B. 549; Lennard *v.* Robinson, 5 El. & Bl. 125; Kirkpatrick *v.* Stainer, 22 Wend. 244; 2 Kent Com. (6th ed.) 631, note; Paley on Agency, (4th Amer. ed.) 248, note.

These principles are decisive of the case at bar. The written contract on which the plaintiff relies contains no words from which any intent to bind the defendants can be inferred. On the contrary, it is executed in the precise form required by law to bind the principal only and to exonerate the agent. The name under which the principal conducted his business is signed by the defendants as his agents. It would have been open to more question if the defendants had signed their own names for their principal; but the contract is executed by the agents in the precise and technical form in which, by the strictest rule of law, it should be signed in order to bind the principal only. Story on Agency, § 153. There can be no doubt that if the principal resided in this country, he alone could have been sued on the contract. In like manner he only is responsible, although a foreigner, because he is the sole party to it, and there is nothing to control the intent manifested by this mode of executing the contract. The defendants are in no sense parties to it, and are not liable in this action for damages occasioned by the neglect of their principal to comply with its terms.

Verdict set aside; judgment for the defendants.

FAIRLIE *v.* FENTON.

EXCHEQUER. 1870.

[*L. R.* 5 *Ex.* 169.]

ACTION for the non-acceptance of cotton, tried before **KELLY, C. B.,** at Guildhall, on the 10th of December, 1869.

The contract sued on was one made by bought and sold notes, signed by the plaintiff, a broker in the city of London. The bought note was in the following words: "London, Aug. 20, 1869. — Messrs. J. & R. Fenton, per Messrs. Ronaldson and Stringer. I have this day sold you on account of Mr. Illins A. Timmins, of Manchester, to arrive in Liverpool per *Evelyn*, from Bombay, on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed, 100 bales Omrawattie cotton, on the basis of 10¾*d.* per lb. for fair. No allowance to sellers, but in case of inferiority of quality the cotton to be taken by the buyers at an allowance to be settled by arbitration in the usual manner. To be taken from the warehouse. Any slight variation in marks not to vitiate the contract. Brokerage, per cent. (Signed) Evelyn Fairlie, broker."

The plaintiff obtained a verdict for £1,748, leave being reserved to the defendants to move to enter a nonsuit, on the ground that the plaintiff only made the contract as broker, and was himself no party to it. A rule having been obtained accordingly,

Pollock, Q. C., and *Barnard*, showed cause. The plaintiff was himself a contracting party. There is nothing in the fact that a man is acting as agent to prevent him from contracting in his own name, and the use of the words "I have," shows that he was here doing so: Sargent *v.* Morris, 3 B. & A. 277, per Bayley, J., at p. 280; Parker *v.* Winlow, 7 E. & B. 942; Tanner *v.* Christian, 4 E. & B. 591; Lennard *v.* Robinson, 5 E. & B. 125; Mahony *v.* Kekulé, 14 C. B. 390. Moreover, as a rule, a broker, like an auctioneer, can sue in his own name upon contracts made by him for his principal: Williams *v.* Millington, 1 H. Bl. 81; Chitty on Pleading, 7th ed. vol. i. p. 8.

[MARTIN, B., referred to Lush's Practice, vol. i. p. 11 (3d ed.).]

Brown, Q. C., and *Mellor*, in support of the rule. The case of an auctioneer is wholly distinct from that of a broker. His right to sue, like that of a factor, rests upon his interest in the contract, and his lien on the goods and on their price. This is clearly shown in Williams *v.* Millington, *supra*; Robinson *v.* Rutter, 4 E. & B. 954; and Fisher *v.* Marsh, 6 B. & S. 411; which are all expressly based upon that ground. But a broker has no possession of the goods, and no lien on them or on the price, and has no right to sell in his own name or to receive payment. The case is therefore left to the general principle laid down by Blackburn, J., in Fisher *v.* Marsh, 6 B. & S. at p. 416; that where the principal's name is disclosed in a contract made by the agent, the principal only can sue, unless the agent, by distinct words, makes the contract his own. Here, on the contrary, the plaintiff both names his principal and signs as broker, the inference from which is that he acted merely as agent. The case is directly within the authority of Bramwell *v.* Spiller, 21 L. T. (N. S.) 672; and the only words in the contract which appear to lead to an opposite conclusion, "I have sold, &c.," are shown by Fawkes *v.* Lamb, 31 L. J. (Q. B.) 98, not to have any such operation.

KELLY, C. B. The numerous cases cited to us show that in certain contracts the agent may himself sue as principal; but in none does it appear that a broker has successfully maintained an action on a contract made by him as broker. He may, no doubt, frame a contract in such a way as to make himself a party to it and entitled to sue, but when he contracts in the ordinary form, describing and signing himself as a broker, and naming his principal, no action is maintainable by him. Though innumerable contracts of this nature daily take place, yet no instance has occurred within my own recollection, nor has any instance been cited to us, where an action has been brought by a broker describing himself as such in the contract, and not using words which expressly or by necessary implication make him the contracting party. Without further arguing the point, it is enough to refer to this unbroken rule as the settled law upon the subject.

MARTIN, B. I am of the same opinion, though I had certainly been under the impression that a broker could sue in his own name. I find that it is so laid down in Chitty on Pleading, vol. i. p. 8. It was also so stated in Hammond on Parties, an extremely able work, from which the statement was probably adopted by Mr. Justice Lush into his very valuable book of Practice (Lush's Practice, 3d ed. p. 11). My opinion was probably founded on those authorities, and on a general notion that a broker had an interest in the contract which entitled him to maintain an action. But that can only be where he has such an interest in fact; and I am entirely satisfied, even without authority, that when he states on the face of the contract that he is acting as broker, that is, as a middleman between the two parties, he has no interest, and cannot sue. If he could sue, he could also be sued; and it is obvious on the face of the contract that he does not contract to deliver the goods sold, but only that he has authority to enter into the contract on behalf of the principal he names. The words "I have," are of no importance to show him a contracting party.

PIGOTT, B. I am of the same opinion. On the plain construction of the contract the plaintiff is no party to it; but only signs, as broker, bought and sold notes for the respective parties. Baring *v.* Corrie, 2 B. & A. 137, shows the difference between the position of a broker and a factor, and that the broker has no right to sell in his own name; in the present case, I do not think that he has, in fact, done so.

CLEASBY, B. I am of the same opinion. There is no doubt a broker cannot sue; he has no authority to sell in his own name, or to receive the money, and has nothing to do with the goods. This is so laid down in Story on Agency, secs. 28–34, 109: "To use the brief but expressive language of an eminent judge, 'a broker is one who makes a bargain for another, and receives a commission for so doing.' Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in this own name, but in the names of those who employ him. When he is employed to buy or to sell goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or to sell them in his own name" (sec. 28). "So, a broker has ordinarily no authority *virtute officii*, to receive payment for property sold by him" (sec. 109). The distinction between a broker and an auctioneer has been already pointed out in argument. My only doubt has been whether the use of the words "I have," &c., ought to be held to import a personal participation in the contract, the usual course being departed from; but my opinion is, it ought not. The form is also in some other respects a little peculiar, as in its reference to the rules of the Cotton Brokers' Association; but it has not been shown that those rules treat the broker as a principal in the transaction. The rule must, therefore, be made absolute.

Rule absolute.[1]

CALDER AND ANOTHER *v.* DOBELL.

COMMON PLEAS AND EXCHEQUER CHAMBER. 1871.

[*L. R.* 6 *C. P.* 486.]

ACTION for not accepting cotton pursuant to contract. The cause was tried before BRETT, J., at the last assizes at Liverpool. The facts were as follows: —

The plaintiffs were cotton brokers in Liverpool trading under the name of Wright & Co. The defendant was a merchant there. In January, 1870, one Cherry, a broker, proposed to the defendant to buy cotton "to arrive." The defendant consented to buy 100 bales, but declined to allow his name to appear in the transaction. Cherry thereupon offered to buy of the plaintiffs 100 bales, but they refused to trust him, and Cherry, being pressed, disclosed the name of the defendant as his principal. A contract was then entered into between the plaintiffs and Cherry for the sale of 100 bales at a given price, and a sold-note was sent by the plaintiffs to Cherry, — "Mr. P. Cherry. We have this day sold to you 100 bales cotton," &c., &c., and a bought-note was sent by Cherry to the plaintiffs, — "I have this day bought of you 100 bales cotton," &c., &c. Cherry at the same time sent the defendant an advice-note, as follows: "I have this day bought for you from Wright & Co. 100 bales cotton," &c. This note was kept by the defendant till the month of August. An invoice was sent by the plaintiffs to Cherry charging him as the buyer of the cotton, and Cherry was debited for it in the plaintiffs' books, and, after the arrival of the cotton, he was repeatedly applied to to accept and pay for it, both by the plaintiffs and by their attorneys; and, failing to obtain payment from him, and the market falling, the plaintiffs sold the cotton and sued the defendant for the difference between the price at which the cotton was sold and the market price at the time of the breach.

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[1] As to auctioneers, see Williams *v.* Millington, 1 H. Bl. 81 (1788); Robinson *v.* Rutter, 4 E. & B. 954 (1855); Thompson *v.* Kelly, 101 Mass. 291 (1869); Grice *v.* Kenrick, L. R. 5 Q. B. 340 (1870); Woolfe *v.* Horne, 2 Q. B. D. 355 (1877). — ED.

The learned judge left the following questions to the jury: 1. Did the defendant authorize Cherry to make the contract for him? 2. Did Cherry assume to make the contract for the defendant, and did the defendant, knowing this, ratify his act? 3. Did the plaintiffs, knowing that Cherry was acting as agent for the defendant, elect to contract with Cherry as principal, upon the terms of giving credit to him and him alone?

The jury answered the first and second questions in the affirmative, and the third in the negative, and a verdict was thereupon entered for the plaintiffs for £530, leave being reserved to the defendant to move to enter a verdict for him or a nonsuit, if, assuming the facts found by the jury to be true, they could not properly be given in evidence, having regard to the written contract; or if, having regard to the whole evidence, the learned judge ought to have directed the jury, as matter of law, to find for the defendant.

Jan. 12. *Holker*, Q. C. (*Herschell* with him) moved to enter a verdict for the defendant, or a nonsuit, pursuant to the leave reserved, or for a new trial on the grounds of misdirection, and that the verdict was against the weight of evidence. Dobell's name having been disclosed at the time, it was not competent to the plaintiffs to say they contracted with him, and not with Cherry. Where the name of the principal is not disclosed, parol evidence is admissible to show that there was a principal. But, where the principal is known at the time, and the seller chooses to contract with the agent in his own name only, to allow the seller to say that he contracted with the principal, and not with the agent, would be to admit parol evidence to contradict the written contract.

[BOVILL, C. J. Have you any authority to support that distinction?]

There is no distinct authority upon the subject; but it is submitted that it must be so in principle.

[MONTAGUE SMITH, J. It is opposed to the doctrine of Parke, B., in Higgins *v.* Senior, 8 M. & W. 834.]

[BRETT, J. There is nothing in the notes to Thomson *v.* Davenport, 2 Sm. L. C. 6th ed. 338, to warrant it; and the reasoning of all the cases is against it.]

The insertion of the agent's name in the contract, the principal being known at the time, was a conclusive election on the sellers' part to look to the agent only; and the learned judge ought to have so directed the jury, as matter of law.[1] . . .

BOVILL, C. J. The jury having found a verdict for the plaintiffs, my Brother BRETT reserved leave to the defendant to move to enter a nonsuit or a verdict for him, if, assuming the facts found by the jury to be true, they could not properly be given in evidence, having regard to the written contract; or if, having regard to the whole evidence, the jury ought to have been directed, as matter of law, to find for the defendant.

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[1] Citing Paterson *v.* Gandasequi, *ante*, p. 527; Thomson *v.* Davenport, *post*, p. 637; Priestly *v.* Fernie, *post*, p. 698; Smethurst *v.* Mitchell, 1 E. & E. 623; Addison on Contracts, 6th ed. 605. — ED.

The first ground upon which Mr. Holker has moved to enter a verdict for the defendant is founded on the first part of the leave. For this purpose the facts found must be taken to be true; and the question is whether parol evidence was admissible to show that the contract was made on behalf of the defendant as principal. Now, the written contract was made with Cherry in his own name; and it is contended that, the defendant's name having been disclosed at the time, the defendant cannot be sued; in other words, that parol evidence was not admissible to show that the defendant was the real principal. It has for many years been a generally received impression that, where a broker makes a contract for an undisclosed principal, the latter may sue upon it, and equally that, when discovered, he may be made responsible for its performance. There can be no doubt that the defendant might have sued upon the contract so made by Cherry; and I am equally of opinion that he may be made responsible, provided the parol evidence was admissible to show that he was the real principal. The rule is clearly laid down by Parke, B., in Higgins *v.* Senior, 8 M. & W. 834, 844. . . . The principal may sign by the hand of another in his own name, or in a fictitious name, or by means of a stamp, and so become a party to the contract in various ways. The ground upon which this doctrine rests is explained also by Parke, B., in Beckham *v.* Drake, 9 M. & W. 79, 96, where, dealing with a similar matter, he says: "The doctrine rests upon this principle, that the act of the agent was the act of the principal, and the subscription of the agent was the subscription of the principal." And he proceeds to say, "I am not aware of the existence of any cases in which a distinction has been suggested between a contract which has been entered into by one individual for another, or by two individuals for themselves and another, as to the liability of the principal to be sued." He then refers to the case of a bill of exchange, which he treats as an exception, standing upon the law-merchant. The same principle is exemplified by the Court of Queen's Bench in the case of Trueman *v.* Loder, 11 Ad. & E. 589. There the agent was acting for a foreign house, and the Court say: "If the defendant chose to appoint an agent to carry on trade for him in the name of Higginbotham, he clearly authorized that person to do all that would be necessary for him so to carry it on; among other things, to employ a broker to sell for him; and it does not lie in his mouth to deny that the name of Higginbotham so inserted by the broker in the sold-note is the defendant's own name of business." There are other observations to the same effect, and it is held that the evidence is admissible, and that the signature is the authorized signature of the principal. The evidence does not contradict the written contract. It is true, as has been said, that the agent may be personally charged, and that where he has given his signature to the contract, he is estopped from saying that he did not contract personally. That, however, is a very different thing from saying that the real principal when discovered cannot sue or be sued. The suppression of the principal's name is entirely consistent with the practice of many trades, to conceal transactions of speculation. The effect is that if the broker enters into contracts in his own name, and has a principal, those whom he contracts with will have the responsibility both of the principal and of the broker. There is nothing inconsistent in thus giving an option to hold either responsible. I am of opinion that, in accordance with all the authorities, the parol evidence was admissible.

The next point is raised upon the latter part of the leave reserved. It seems to me to be impossible to say, as matter of law, that the learned judge was bound to direct the jury to find for the defendant. There was evidence which could not have been withdrawn from the jury. I am, therefore, of opinion that that ground for the motion fails.

Then it is said that the plaintiffs had elected to treat Cherry as the principal. For the purpose of this point we must assume that there was a principal who authorized Cherry to make the contract. Now, it is contended that the very fact of the plaintiffs' entering into the contract with Cherry was evidence of election. But, if the parol evidence was admissible, that argument fails. Election must be a matter of fact; and it appears that, at the time of entering into the contract, the plaintiffs expressly refused to trust Cherry. The next ground of alleged election was the demand of payment made on the broker. That, however, was an equivocal act. If the plaintiffs have got the responsibility of a principal, the demands made upon the agent may have been made upon him on behalf of his principal. There are many trades in which the practice prevails of referring to the brokers alone; and it is a very convenient practice. Where shipping documents have to be tendered, they are almost invariably sent to the brokers for that purpose. I think the evidence relied on to show an election was extremely slight, especially where the only action brought was brought against the principal. It was clearly for the jury, and the learned judge would not have been justified in withdrawing it from them. The jury, as men of business, have arrived at a conclusion upon it of which I see no reason to complain; and my Brother Brett does not report to us that he is dissatisfied with the verdict.

Then it was said that there was no evidence of authority to Cherry to make the contract in the form in which he made it. That rests entirely upon the evidence of the defendant himself; Cherry was not called. It was proved that advice was sent by Cherry to the defendant of a contract with Messrs. Wright & Co. for 100 bales of cotton, and there was also evidence that Cherry had authority to make that contract, and evidence of ratification by the defendant; and the jury found that the defendant did authorize and did ratify the contract so made, and my Brother Brett is not dissatisfied with that finding. It was further objected that the learned judge was wrong in leaving it to the jury to say whether the plaintiffs elected to treat Cherry as principal.

and to give credit to him, and him only. That, however, was in favor of the defendant. I think it was not, as matter of law, a contract made with Cherry alone, and that the jury were well warranted in finding as they did. It was further contended that my Brother Brett should have told the jury that the plaintiffs were bound to make their election at once, or, at all events, in a reasonable time. That point was not and could not have been raised at the trial. For the purpose of this question all the rest must have been assumed against the defendant. I further think that there is no ground for saying that the verdict was against the weight of evidence. There will, therefore, be no rule.

WILLES, J. I am of the same opinion. When it is borne in mind that there is no difference, except when introduced by Act of Parliament, between a contract by word of mouth and a contract in writing not under seal, the whole argument must fail. The contention on the part of the defendant is founded upon the fact of there being a contract in writing, and on that part of it which contains the name of the agent. Consider how the matter would have stood if what passed between the plaintiffs and Cherry had been all without writing. It would have stood thus, — Dobell authorized Cherry to buy cotton for him. Cherry proposes to buy cotton of the plaintiffs; but, being told that the sellers do not choose to rely on his credit, he named Dobell as his principal. The plaintiffs thereupon sell to Dobell through Cherry as his agent. Upon that state of things, Dobell would alone have been liable, and not the agent. Superadd to this that, at the time of entering into the contract, the sellers had said to Cherry, "We insist upon having the liability of you, Cherry, just as if you were dealing with us without disclosing the name of your principal;" and suppose Cherry had assented to that. In that case, Dobell would have been liable to the plaintiffs as the principal buyer, and Cherry would also have been liable because he had agreed that he should stand in the same situation as if he had bought as broker for an undisclosed principal. The result would have been that the sellers would have had a right to elect to sue either the agent or the principal. Now, what was the effect of the writing here? A bought-note is handed to the sellers, in which Cherry's name only is mentioned, but which did not preclude the sellers from showing that Cherry had a principal. That had the effect of making the principal answerable, assuming that his name had not been disclosed at the time; and it had the further superadded effect of making the agent liable, by reason of the peculiar character of the writing, by which he undertook to be liable as if the name of his principal had not been disclosed. This is the sole effect of Higgins *v.* Senior, 8 M. & W. 834. The case does not stand barely on that. There is another writing, viz., the advice-note which was handed to Dobell, and which ran thus: "I have this day bought for you from Messrs. Wright & Co.," &c. These bought and sold-notes very often vary, as in Cropper *v.* Cook, L. R. 3 C. P. 194, and yet form part of the same transaction. It would be a remarkable contract if the buyer could sue the sellers upon it, and yet the sellers be precluded from suing the buyer. The result is that the defendant must show that his liability was put an end to by the election. That is what Lord Tenterden meant when he said, in Thomson *v.* Davenport, 9 B. & C. 78, that, "if at the time of the sale the seller know not only that the person who is nominally dealing with him is not principal, but agent, and also know who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him alone, then, according to Addison *v.* Gandasequi, 4 Taunt. 574, and Paterson *v.* Gandasequi, 15 East, 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." I do not agree with Mr. Holker that two persons cannot be severally liable on the same contract. The question is whether there was anything in the circumstances of this case to negative or exclude the liability of both principal and agent, or to substitute the liability of the latter for that of the former. The facts were properly submitted to the jury; and they have come to a conclusion upon them to which it was competent to them to come. There is nothing to prevent the seller from insisting upon having both principal and agent liable to him at the same time, with the additional advantage of knowing the principal's name at the time. The very object of the plaintiffs' insisting upon being informed of the name of the principal was to make him liable; and Cherry's name was inserted in the contract for the purpose of enabling them to charge him, at their option. To hold that asking the name of the principal at the time is to discharge the principal, would seem to me to be contrary to common sense. Several cases were referred to in the course of the argument; but the only one to which I desire to call attention, and which has a close resemblance to the present case, is Mortimer *v.* M'Callan, 6 M. & W. 58. I do not refer to that case for the usages of the Stock Exchange, which are subject to change. The decision proceeded on a usage of that market which involved circumstances very like those of the present case. There, one Taylor, a stock-broker, had applied to the plaintiff, a stock-jobber, for the purchase of £5000 stock for the defendant. The plaintiff, not having any stock of his own, applied to Ward, who agreed to transfer, and did accordingly transfer, stock standing in his name to the defendant. Evidence was given that it was the usage on the Stock Exchange to give credit to the broker, even although the principal were disclosed, though credit is sometimes given to the principal, and his cheque taken when the broker's credit is not thought sufficient. The judge in summing up told the jury that, although by the regulations of the Stock Exchange the broker was the party considered liable, it did not follow that the principal might not be liable also; and he left it to them to say whether the plaintiff had ever given credit to or taken the responsibility of Taylor, or ever consented to release the defendant as the principal. The Court held this to be a proper direction; and, the jury having found that the plaintiff had not released the principal, the verdict was upheld. Lord Abinger, who was eminently experienced as to what is the proper question to be left to the jury in a case of this sort, there says (6 M. & W. at p. 66): "I do not apprehend the rules of the Stock Exchange would make any difference as to the right of a party who sells stock to choose to what person credit shall be given, if he thinks proper; and the evidence shows that it was the case sometimes to look to the principal. That, then, brings it to a question in this particular case whether or not the plaintiff meant to take the credit of Taylor only, and give up that of the defendant, or whether he insisted on the credit of the defendant. Now, that was a question for the jury." It is enough to say that it never seems to have occurred to the minds of the counsel or of the Court that the mention of the name of the principal at the time made any difference as to the liability of either principal or agent. I would conclude by saying that, but for the law laid down in Higgins v. Senior, 8 M. & W. 834, Dobell, the principal, only would have been liable here; and that case only goes to superadd the liability of the agent, and not to detract from the liability of the principal. Apart from the written contract, the principal only would have been liable; and the clear effect of the writing was only to superadd the liability of Cherry, the agent.

MONTAGUE SMITH, J. I am of the same opinion. The written contract made by the plaintiffs with Cherry upon the face of it purports to be his contract, and his contract alone; and the first question is, whether parol evidence was admissible to show that he was contracting for a principal. It is not denied that such evidence might be received if the principal had not been disclosed at the time; but it was strenuously contended that it cannot be received where the principal is known. I must confess I do not see any principle upon which the supposed distinction can rest. The rule is that evidence is admissible to show that the person contracting was acting for a principal, because the admission of such evidence does not contradict the written contract. It is so put by Parke, B., in Higgins v. Senior, 8 M. & W. 834, 844. . . . The evidence is admissible on this principle, viz., that, for the purpose of that contract, the principal has allowed the agent to sign it in his own name in the place of himself. It has been held, no doubt, that evidence is not admissible to show that the person named as the contracting party is not liable. . . . I have felt some doubt as to the soundness of that distinction. However, it has been followed in a great number of cases, and is now well established; and, although technical, it appears to consist with the practical business habits of mankind. Whether strictly logical or not, it is recognized by the law. The other principle, which is well laid down and is perfectly intelligible, viz., that parol evidence may be given to show that the signature, though by an agent, is intended to bind his principal, is quite sufficient to dispose of this case, unless the distinction suggested by Mr. Holker is well founded. I cannot find ground for any such distinction, so far as the admissibility of evidence is concerned. The second question is whether the plaintiffs, knowing at the time of the making of the contract, that there was a principal, and also who that principal was, did not by the form of the contract elect to treat Cherry as the principal and the only principal. That is the point which seems to me to require the most consideration. Mr. Holker was bound to contend that the entering into the contract with Cherry in his own name, was, under the circumstances, conclusive evidence that the plaintiffs had elected to treat Cherry alone as the principal. I agree that it was strong evidence; but, if the parol evidence was admissible, it shows what the real transaction between the parties was. Being employed to buy cotton for the defendant, with an injunction not to allow the defendant's name to appear, Cherry buys in his own name; but the sellers, for reasons of their own, insisting upon knowing who the principal was, Cherry, disregarding his instructions in that respect, disclosed the defendant's name. The plaintiffs required the principal's name, with a view of fixing him; but, because he desired that his name should not appear, the contract was made out in the name of the agent. The plaintiffs clearly never intended to make the bargain with Cherry alone. At all events, it was a question for the jury; and it is impossible to say that it could have been properly withdrawn from them. Mr. Holker contended that the election was made, and conclusively made, at the time of the contract. The cases show that the seller may make his election whenever the principal is discovered; and the only difference in principle between the case where the principal is disclosed and where he is not disclosed, is, that, in the former case, the election may be made at the very time the contract is made. If there were any estoppel, there might be some force in Mr. Holker's argument; but, when we come to a question of evidence, the argument fails. The only other question is as to the mode in which the questions were put to the jury. I think, however, they were put in a perfectly intelligible manner, and that the finding of the jury was well warranted by the evidence.

BRETT, J. The first point made by Mr. Holker was, that parol evidence that Cherry was acting as agent for the defendant ought not to have been received, because the existence of a principal and his name were known at the time the contract was entered into, and therefore the parol evidence would contradict the written document. Where the principal is undisclosed, it is conceded that parol evidence that there is a principal is admissible, inasmuch as that does not contradict the written contract. I cannot follow the distinction. I see no reasoning to support it. It was further urged that, inasmuch as by the written contract, the agent was made liable by election, the principal could not be liable also, because that would be making two persons severally liable upon the same contract at the same time. This argument would be equally applicable to a case where the principal is undisclosed; and there, though from the time the contract is made the agent is liable, the principal also is liable. If Mr. Holker's major proposition is incorrect, there is no more reason why the minor should be sustainable.

As to the point of nonsuit, it is said that I ought to have told the jury, as matter of law, that the plaintiffs, by the insertion of Cherry's name in the contract, conclusively elected to treat him and him alone as the buyer. If, however, the first point fails, this also must fail. It must be a question of fact upon the whole evidence, and I could not withdraw it from the jury. Mr. Holker finds fault with all the questions I left to the jury. As to the first and second, they were mere matters of form. There was abundant evidence that Cherry did make the contract with the authority of the defendant, and that he did ratify it; for, the advice-note being sent to him, he kept it for five months without objection. The jury, therefore, were well warranted in answering both those questions affirmatively. As to the question of election, I left that question to the jury, having Thomson *v.* Davenport, 9 B. & C. 78, before me; and the jury, with their knowledge of Liverpool business, were perfectly well qualified to deal with that; and I cannot say that they came to a wrong conclusion. *Rule refused.*

Against this judgment an appeal was brought in the Exchequer Chamber, and the case was argued on the 16th of June before KELLY, C. B., MARTIN, B., BLACKBURN, J., CHANNELL, B., LUSH, J., HANNEN, J., and CLEASBY, B.

June 16. *Holker*, Q. C. (*Herschell* with him), for the defendant.[1]

Quain, Q. C. (*C. Russell* with him), for the plaintiffs, was not called upon.

KELLY, C. B. I think this case is free from doubt or difficulty. The contract was made in the name of Cherry, the agent; but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal at their election. No doubt, the election being once determined, there is an end of the matter; as, where the agent has been sued to judgment. Here, however, nothing was done to determine the election at the time this action was brought against the principal. The question was, I think, properly left to the jury, and upon proper evidence; and the verdict was quite right. There is no ground for granting a rule.

MARTIN, B. The true rule was laid down by Parke, B., in Higgins *v.* Senior, 8 M. & W. 834. The fact of his name having been mentioned at the time, did not make Dobell the less a principal.

BLACKBURN, J. I apprehend that where a man is acting as agent, the principal is not the less bound because the contract is so drawn as to make the agent also liable. There are many cases where, although a man is acting for another, he is not contracting for another. The distinction suggested by Mr. Holker is new to me. Contracts are frequently made by masters of ships, charter-parties, and other contracts; nobody ever doubted that the owners might sue and be sued upon them.

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[1] Citing Short *v.* Spackman, 2 B. & Ad. 962. — ED.

Hannen, J., referred to Story on Agency, § 160 a., where it is said: "If the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, the agent will be liable to be sued and be entitled to sue thereon, and his principal also will be liable to be sued and be entitled to sue thereon, in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it."

The rest of the court concurred. *Judgment affirmed.*

CHANDLER *v.* COE AND ANOTHER.

SUPREME COURT OF NEW HAMPSHIRE. 1874.

[54 *N. H.* 561.]

Assumpsit, by Horace J. Chandler against E. S. Coe & S. R. Bearce, brought to recover a balance claimed to be due from the defendants for cutting and drawing logs in the winter of 1865 and 1866, and for delivering the same in the Androscoggin River in the spring of 1866. Plea, the general issue. The writ is dated October 8, 1870.

It appeared that some time in October, 1865, the plaintiff and one L. E. Dunn had a conversation in regard to cutting and hauling the logs; that the plaintiff explored the land from which they were to be cut, and, during the latter part of November, 1865, made a verbal bargain with said Dunn to cut and haul and deliver as aforesaid what logs the plaintiff might be able to do with four horses and four oxen, properly manned and equipped, at four dollars per thousand feet; that immediately after this verbal contract was made, the plaintiff commenced the work and continued until the fore part of April, 1866; that Dunn made advances to the plaintiff to the amount of $550 before December 28, 1865, at which time he reduced the contract to writing, describing himself therein as the party with whom the plaintiff contracted, and not mentioning the names of the defendants, and the plaintiff and Dunn signed it. The plaintiff was a witness, and was permitted, against the defendants' objection, to testify that Dunn at the time of making the contract said he was acting for the defendants in making it; and on cross-examination he testified that it was his understanding that Dunn was acting for the defendants in making the contract. Dunn testified that he did not represent to the plaintiff, at the time the contract was made or at any other time, that he was acting in the capacity of agent for the defendants, or as agent for anybody, but that he was acting for himself alone.

The plaintiff claimed that the defendants were the principals in said contract; that the contract was made in the name of Dunn for them, and that he was their agent in doing the business; and that they had allowed and permitted him, as their agent, to contract and act for them, for a long time, in his own name, in making contracts for cutting and hauling timber; and the plaintiff introduced evidence tending to prove that such had been their way of doing business. The defendants objected, and contended that after the written contract had been read in evidence (as it was for the plaintiff), parol testimony should not be admitted to prove that the defendants were the real parties in interest. But the court overruled the objection and admitted the evidence, and the defendants excepted. The defendants' counsel argued to the jury, that, if the plaintiff was to be believed, the defendants were not undiscovered principals, but that at the time of making the contract he was informed by Dunn that he was acting as agent in the matter, and that his principals were the defendants; and thereupon, before the plaintiff's counsel commenced his argument to the jury, moved for a nonsuit on that ground. The court declined to order a nonsuit, and the defendants excepted. But the court at that time informed the counsel that the law would be held to be, that if at the time of executing the written contract the plaintiff knew and was informed by Dunn that he was acting as agent in the matter, and that the defendants were his principals, he could not recover in this suit, and read to the counsel, in the hearing of the jury, the following minute, which had been previously prepared as an instruction to be given to the jury: "I think if the plaintiff knew at the time of making the contract that Dunn was acting as agent in the affair and not on his own behalf, and also knew for whom he was acting, and then entered into this contract in writing, which on its face is a contract with Dunn as an individual, his only remedy is against Dunn, and these defendants cannot be held liable." The court then proposed to submit to the jury the three following questions, which had also been previously prepared in writing: "(1) Was Dunn acting as the agent of the defendants in making the contract? (2) Did the plaintiff at the time of making the contract know that Dunn was acting as the agent of the defendants in making it, and did Dunn so inform him? (3) Has the plaintiff been paid for the timber he got out under the contract? If not, how much is due him, including interest?"

The plaintiff's counsel said he did claim that Dunn informed the plaintiff that he was acting as the agent of the defendants in making the contract, and that the plaintiff understood from Dunn that he was entering into a contract with the defendants through Dunn as their agent. The second question was thereupon struck out, and the court informed the counsel that the first and third questions would be submitted to the jury, in order that the results of the trial might not be lost in case the view of the law suggested by the court as to the second question should be held to be erroneous. The plaintiff's counsel argued to the jury that the fact that at the time the contract was made Dunn said he was the agent of the defendants was a strong circumstance to prove that issue in favor of the plaintiff.

The jury answered the first question in the affirmative and the third in the negative, and assessed the plaintiff's damages at $1,694.26. Upon considering the foregoing exceptions and the questions arising on the motion for a nonsuit, this court is to make such order as to judgment as may be proper.

G. A. Bingham and *Ray & Drew*, for the plaintiff.

Fletcher & Heywood and *Burns & Heywood*, for the defendants.

HIBBARD, J. The plaintiff claims to be entitled to recover against the defendants, for labor performed by him under a contract entered into with L. E. Dunn, and reduced to writing and signed by Dunn in his own name, upon the ground that the real contracting party was the defendants carrying on business in the name of L. E. Dunn, who acted as their agent in making the contract, and so informed the plaintiff at the time of making it. The plaintiff's position is not merely that Dunn was the agent of the defendants, duly authorized to make the written contract in their behalf, which the plaintiff understood at the time it was made, but that it was the contract of the defendants carrying on business in the name of L. E. Dunn.[1] . . .

It is very clear that if the defendants carried on business in the name of L. E. Dunn, and Dunn executed this contract in his own name as their agent, it is binding upon them whether he did or did not inform the plaintiff of his agency. The law is the same even in the case of negotiable instruments, which under some circumstances stand on a different ground from simple written contracts, as will hereinafter appear.

But is it indispensable for the plaintiff to prove that the defendants adopted the name of L. E. Dunn as their business name? May he not recover if Dunn acted as their duly authorized agent in making the contract, although he may not have done other business for them in his own name? If the contract had been verbal, the case would have been free from difficulty. In that event, if the principals had been known at the time it was made, the presumption would have been that it was their contract, but if the agent had contracted on his own account, and the plaintiff had elected to look to him rather than to the principals, he would have been bound by his election. If they had been unknown, he would have been entitled to make his election whether to look to the agent or to the principals, within a reasonable time after discovering them. . . .

But the contract between these parties was reduced to writing, and it does not contain the names of the defendants; and this presents a perplexing question, which has given rise to a great variety of contradictory and irreconcilable decisions. . . .

We are of the opinion that where a principal is sought to be charged upon a contract in writing, made in the name of his agent, the rule of evidence, which prohibits the parties to a written contract from contradicting or varying its terms by parol testimony, applies if the principal was known, but not if he was unknown.

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[1] The omitted passages deal chiefly with the law as to partners and undisclosed principals. — ED.

We have already shown that there is no difficulty in sustaining an action upon an express verbal contract against or in favor of an unknown principal, while if the principal was known it is to be presumed that he was the contracting party, unless it clearly appears that the agent contracted on his own account, and that with a knowledge of the facts the opposite party elected to look to the agent. Now, so far as the question of election is concerned, it is the same whether the contract was verbal or written, except as a written contract may furnish evidence of an election to deal exclusively with the agent whose name was inserted in it. But does it not furnish conclusive evidence of such election? Is parol testimony admissible for the purpose of charging a principal upon a written contract made in the name of his agent? In order to determine this question, it may be useful to ascertain the reason for the rule of evidence to which we have referred, and whether it actually calls for the rejection of such testimony, either in the case of a known or of an unknown principal, or of both. The reason assigned by Lord Coke is, that "it would be inconvenient that matters in writing, made by advice and on consideration, and which fully impart the certain truth of the agreement of the parties, should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory." Countess of Rutland's case, 5 Rep. 26a. In other words, the reason for the rule is, that the written instrument furnishes the best evidence of the actual agreement; that it is more probable that the contract which the parties intended to make can be correctly ascertained from what was written than from the testimony of witnesses. But the party seeking to bring in an unknown principal starts by admitting that the contract was writter according to the agreement; that his intention was to look to the agent alone, just as he would admit his intention was if the contract had been merely verbal. How could he deny, whether the contract was verbal or written, that he intended to look to the agent, if he did not know that any principal existed? The spirit of the rule, therefore, is not violated by giving him a right, in the case of a written as in the case of a verbal contract, to bring in the party who had the beneficial interest in the transaction; and this is accomplished, not by contradicting or varying the terms of a written instrument, but by applying and giving effect to an established rule of law.

But if the principal was known when the contract was made and signed, the case is different. If the party who received from an agent a written contract executed in the name of the agent, knowing that he acted for a principal, seeks to hold the principal, it must be upon the ground that it was intended to be and was received by him as the contract of the principal; because, if he received it as the contract of the agent, knowing that he was an agent, that constitutes a conclusive election to look alone to the agent. Parol evidence, therefore, if admitted in such a case, does show that the contract which the parties intended to make was not what the writing indicates, but different. It shows that an error was committed in writing it. Its admission, therefore, allows "the uncertain testimony of slippery memory" to come in and control what the parties have deliberately written and signed, and this is inadmissible because the writing furnishes the best evidence of the actual contract. . . .

In accordance with these views, no judgment can be rendered upon the findings of the jury in this case. Although the jury found that Dunn in making the contract did act as the agent of the defendants, yet the plaintiff having testified and his counsel insisted that when it was made he was fully informed by Dunn of his agency, and having prevented the judge from submitting that question to the jury, we might, were there no other point in the case, assume that to be so, and order judgment for the defendants, upon the ground that the written contract, as it cannot be contradicted or varied by parol testimony, furnishes conclusive evidence of an election by the plaintiff to look to Dunn alone as the other contracting party; but the plaintiff, as was shown at the commencement of this opinion, was entitled to a verdict if the contract was entered into by Dunn, as agent for the defendants, in his own name as their business name. If that was so, it is immaterial whether the plaintiff was or was not informed of the agency. The judge therefore erred in not submitting that question to the jury, unless this was waived by the plaintiff. The defendants claim that the plaintiff took no such position at the trial; but the plaintiff insists that he did distinctly take the position at the trial, and that the reserved case expressly so states. Whether the language of the reserved case will bear such a construction is not very clear, but it is evident that this may be an important question between these parties, and that the case was tried by counsel under a misapprehension of the law; and, after some hesitation, we have concluded that we ought to hold the trial to have been a mistrial in this respect, and, before ordering judgment for the defendants, to give to the plaintiff an opportunity to go to the jury upon the question whether the contract was entered into by Dunn as agent for the defendants in his own name as their business name. On the other hand, although Dunn, being called by the defendants, testified that he gave the plaintiff no information in regard to the agency — in fact, that none existed — and the jury have found that Dunn in making the contract did act as the agent of the defendants, this court is not at liberty to assume that the testimony of Dunn upon this point was true and that of the plaintiff untrue, for the purpose of ordering judgment in favor of the plaintiff against the defendants as undisclosed principals. Therefore, in the view we take of the law, if we assume the findings of the jury to be correct, this case is peculiar in this, that the defendants were not entitled to a verdict, unless the testimony of their agent, who was called by them as a witness, was false; and the plaintiff, so far as the case rests on the relation of principal and agent alone, was not entitled to a verdict, unless his own testimony was false, although he may have been entitled to it on another ground. *Case discharged.*[1]

GADD *v.* HOUGHTON AND ANOTHER.

COURT OF APPEAL. 1876.

[1 *Ex. D.* 357.]

THIS was an action for non-delivery of oranges sold by the defendants to the plaintiff. At the trial before POLLOCK, B., at the Liverpool spring assizes, 1875, the following facts were proved: The plaintiff, a fruit merchant in Liverpool, having had some communication with the defendants, who were fruit brokers in Liverpool, as to the purchase of oranges with the brand of James Morand & Co., wrote to the defendants on the 4th of November, 1874, as follows: "Please telegraph out an order on my account for 2000 cases Valencia oranges (all 420s) of the brand James Morand & Co. Shipment from commencement of season to not later than the 7th of December next, at 12*s.* 9*d.* per case, f. o. b." The defendants accordingly telegraphed to James Morand & Co. at Valencia, in Spain, that they had this offer, and having on the 7th of November received a reply by telegram from Morand & Co. that they accepted the offer, the defendants, on the 9th of November, wrote to the plaintiff as follows: "Mr. George Gadd. We have this day sold to you on account of James Morand & Co., Valencia, 2000 cases Valencia oranges (all 420s.) of the brand 'James Morand & Co.,' at 12*s.* 9*d.* per case, free on board. Shipment from commencement of season, to not later than 7th of December next. Payment as usual. J. C. Houghton & Co." The contract not having been performed, the plaintiff brought this action. The defendants' counsel contended that upon this contract Morand & Co., and not the defendants, were liable, and they called several brokers and other witnesses, who gave evidence of usage in Liverpool as to the non-liability of brokers upon contracts in the present form, but the evidence became immaterial in the view taken of the contract by the Court of Appeal. A verdict was then entered for the defendants, with leave to the plaintiff to move to enter it for him, on the ground that the defendants were personally liable on the contract, the damages, if necessary, to be settled by a referee.

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[1] In Trueman *v.* Loder, 11 Ad. & E. 589, 594-595 (1840), Lord DENMAN, C. J., delivering the opinion of the court, said: —

"If, then, the defendant chose to appoint an agent to carry on trade for him in the name of Higginbotham, he clearly authorized that person to do all that could be necessary for him so to carry it on; among other things, to employ a broker to sell for him; and it does not lie in his mouth to deny that the name of Higginbotham so inserted by the broker in the sold note is the defendant's own name of business. Then, as the bought and sold notes, where they are not inconsistent, form the contract, here is a good compliance with the Statute of Frauds in the two instruments signed by the broker, one containing the name of the plaintiffs, the other the trade name by which the defendant thought proper to instruct his agent to deal for him.

"Among the ingenious arguments pressed by the defendant's counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, whose name is inserted in it, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own." — ED.

An order *nisi* having been obtained accordingly, was, after argument on the 11th of January, 1876, made absolute by the Exchequer Division (KELLY, C. B., POLLOCK and HUDDLESTON, BB.), on the ground that the case was undistinguishable from Paice *v.* Walker, L. R. 5 Ex. 173.

From this decision the defendants appealed.

Benjamin, Q. C. and *Bigham*, for the appellants.

Herschell, Q. C., and *M'Connell*, for the plaintiff.

JAMES, L. J. I think the judgment of the Exchequer Division ought to be reversed. The case is not, in my opinion, in any way governed by Paice *v.* Walker, for whatever the decision was in that case upon the words "as agents," the words in the present case "on account of," are not at all ambiguous, and it would be impossible to make them words of description. The *ratio decidendi* in Paice *v.* Walker was that, having regard to the contract and all the circumstances of the case, the words "as agents" must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain "on account of" another person. Those are the very words used in the present case. When a man says that he is making a contract "on account of" some one else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. As to Paice *v.* Walker, I cannot conceive that the words "as agents" can be properly understood as implying merely a description. The word "as" seems to exclude that idea. If that case were now before us, I should hold that the words "as agents" in that case had the same effect as the words "on account of" in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description, but I do not think the words "as agents" were words of description.

Mellish, L. J. I am of the same opinion. The question is whether on the true construction of this contract, Houghton & Co. sold the goods themselves or entered into a contract on behalf of Morand & Co. The language used must be interpreted according to its plain and natural meaning. As is said in the note to Thomson *v.* Davenport, 2 Sm. L. C. 6th ed. 344, when a man signs a contract in his own name he is *prima facie* a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him. But if there are plain words to show that he is contracting on behalf of somebody else, why are we not to give effect to them? I can see no difference between a man writing "I, A. B., as agent for C. D., have sold to you," and signing "A. B.;" and his writing, "I have sold to you," and signing "A. B. for C. D. the seller." When the signature comes at the end you apply it to everything which occurs throughout the contract. If all that appears is that the agent has been making a contract on behalf of some other person, it seems to me to follow of necessity that that other person is the person liable. This is one of the simplest possible cases. How can the words "on account of Morand & Co." be inserted merely as a description? The words mean that Morand & Co. are the people who have sold. It follows that the persons who have signed are merely the brokers and are not liable. I agree also that the circumstances of Paice *v.* Walker are to be distinguished from the present, and that the judgment of the Exchequer Division ought to be reversed.

Baggallay, J. A., concurred.

Quain, J. The case appears to me plain. It seems extraordinary that there should be any doubt whether this binds the principal or the agent. It is said that in order to relieve the agent from liability, he must sign "as agent" or "on account of" Morand & Co. I cannot see the necessity for adding those words to the signature if you can gather from the contract that he makes it on account of Morand & Co. Those words at the end of the signature would add nothing to what has been stated in the body of the contract. The agent, therefore, does not render himself personally liable by not adding them.

Archibald, J. I am of the same opinion. The usual way in which an agent contracts so as not to render himself personally liable is by signing as agent. That, however, is not the only way, because, if it is clear from the body of the contract that he contracted only as agent, he would save his liability. No words could be plainer than the words "on account of Morand & Co." to show that the defendants contracted only as agents.

I also agree that Paice *v.* Walker is to be distinguished from this case. *Judgment reversed and rule discharged.*[1]

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[1] See Hough *v.* Manzanos, 4 Ex. D. 104 (1879), s. c. 48 L. J. n. s. Ex. 398. — Ed.

BYINGTON AND ANOTHER *v.* LUCY SIMPSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[134 *Mass.* 169.]

HOLMES, J. This is a suit to recover a balance due under a building contract. The contract was in writing, and purported on its face to be made by the plaintiffs with J. B. Simpson. It provided that the work should be done under the direction of J. B. Simpson, agent, and was signed "J. B. Simpson, agent." J. B. Simpson was in fact contracting as agent for the defendant, his wife, and this was known to the plaintiffs at the time the contract was made.

The defendant contends that she was not bound by this contract under the foregoing circumstances. The fact that the contract purports to be under seal, although not sealed, has not been relied on as affecting the case, which, especially in view of the inartificial nature of the instrument, it ought not to do; but the argument is, that, inasmuch as the plaintiffs knew of the existence of a principal before the contract was made, and then were contented to accept a written agreement which on its face bound the agent, they must be taken to have dealt with, and to have given credit to, the agent alone; just as, upon a subsequent discovery of the undisclosed principal, they might have determined their right to charge him by a sufficient election to rely upon the credit of the agent.

We are of opinion that the plaintiffs' knowledge does not make their case any weaker than it would have been without it. Whatever the original merits of the rule, that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency. Huntington *v.* Knox, 7 Cush. 371, 374; Eastern Railroad *v.* Benedict, 5 Gray, 561; Lerned *v.* Johns, 9 Allen, 419; Hunter *v.* Giddings, 97 Mass. 41; Exchange Bank *v.* Rice, 107 Mass. 37, 41; National Ins. Co. *v.* Allen, 116 Mass. 398; Higgins *v.* Senior, 8 M. & W. 834, 844. And it is evident that words which are sufficient on their face, by established law, to bind a principal, if one exists, cannot be deprived of their force by the circumstance that the other party relied upon their sufficiency for that purpose. Yet that is what the defendant's argument comes to. For the same parol evidence that shows the plaintiffs' knowledge of the agency may warrant the inference that the plaintiffs meant to have the benefit of it, and to bind the principal.

The only reasons which have been offered for the admissibility of oral evidence to charge the alleged principal confirm this conclusion. That suggested in Higgins *v.* Senior, *ubi supra*, is the same which is usually given for the liability of a master for his servant's torts, that the act of the agent is the act of the principal (see 1 Bl. Com. 432; Laugher *v.* Pointer, 5 B. & C. 547, 553; Williams *v.* Jones, 3 H. & C. 602, 609); the meaning of which, in its latter application at least, is, as was stated long ago, that master and servant are "fained to be all one person." West's Symboleography, Part I. sec. 3, "Of the Fact of Man." The most plausible explanation which has been attempted pursues the same thought more clearly. It is said that the principal is liable "because he is taken to have adopted the name of the [agent] as his own, for the purpose of [the] contract." 2 Smith Lead. Cas. (8th ed.) 408, note to Thomson *v.* Davenport; Trueman *v.* Loder, 11 Ad. & El. 589, 595; S. C. 3 P. & Dav. 267, 271. If this is to be accepted, there is obviously the strongest ground for saying that the principal has adopted the agent's name for the purposes of a given contract when it is shown that both parties have acted on that footing.

The most that could fairly be argued in any case would be, that, under some circumstances, proof that the other party knew of the agency, and yet accepted a writing which did not refer to it, and which in its natural sense bound the agent alone, might tend to show that the contract was not made with any one but the party whose name was signed; that the agent did not sign as agent, and was not understood to do so, but was himself the principal. But these are questions of fact, and, as a matter of fact, it is obvious, and it is found, that the defendant was the principal, and that the contract was made with her.

The objection that two persons cannot be bound by the same signature to a contract, if sound, would be equally fatal when the principal was not known. There is a double obligation, although there can be but one satisfaction.

Our decision is in accordance with a thoroughly discussed English case which went to the Exchequer Chamber, and with the statement of the law by Mr. Justice Story there cited. Calder *v.* Dobell, L. R. 6 C. P. 486; Story Agency, § 160 *a*.

Judgment for the plaintiffs affirmed.

J. H. Benton, Jr., for the defendant.

S. L. Powers (*G. W. Sanderson* with him), for the plaintiffs.

SECTION II.

Sealed Instruments.

WILKS AND ANOTHER *v.* BACK.

KING'S BENCH. 1802.

[2 *East*, 142.]

THE defendant being indebted upon an account to the plaintiffs Wilks and Browne, who were formerly in partnership as millers, it was agreed to refer the matter to arbitration; and accordingly bonds of submission were entered into by the parties as after mentioned: and the arbitrators by their award dated 14th August, 1801, reciting that by two several bonds dated 15th June, 1801, under the respective hands and seals of M. Wilks and J. Browne, millers, and late partners, and of W. Back, the parties became mutually bound to abide the award, &c., proceeded to award the sum of £407 9*s.* 7*d.* to be due on the balance of accounts from the defendant to the plaintiffs, &c.

Upon a motion to set aside the award, the question was at last resolved into this, whether Wilks had competent authority to bind Browne, his late partner, by executing the bond of submission for him. As to which it appeared that by an indenture dated 28th August, 1799, between Wilks and Browne, the latter for the considerations therein mentioned did constitute and appoint Wilks to be his attorney irrevocable to ask, demand, sue for, compound, and receive all the debts and effects of the said partnership; with full power for Wilks to sign, seal, and deliver in the name of Browne any deed, &c., whatsoever necessary for the purposes therein mentioned, &c. By virtue of this authority Wilks executed the bond of submission in question in this form: "Mathias Wilks" (L. S.). "For James Browne, Mathias Wilks" (L. S.), and it was sealed and delivered by Wilks for himself, and also for his late partner Browne; but the latter was not present at the time.

Garrow and *Parnther*, in showing cause against the rule, did not dispute that according to Combe's case, 9 Rep. 76 b., where any has authority, as attorney, to do an act, he cannot do it in his own name, but in the name of him who gave the authority. But they contended that here the sealing and delivery was done by Wilks in the name of Browne as well as of himself, which he had authority to do by virtue of the power of attorney of August, 1799, and that the signing of his own name twice was not material, as he also signed the name of Browne, and declared that it was done for him. The form of words used cannot invalidate the act where the authority is sufficient to warrant the act done. If there had been only one seal, yet if the instrument were sealed and delivered for himself and his partner, he having authority so to do, it would have been sufficient, according to the case of Ball *v.* Dunsterville, 4 T. R. 313. It is true that was done in the presence of the other partner; but that was only material in that case, as showing that it was done by his particular authority, and here was a special authority by deed to do the act.

Erskine and *Comyn*, *contra*. It is clear from Harrison *v.* Jackson, 7 T. R. 207, that one partner cannot as such bind another by deed. Then if the authority be derived from the power of attorney, Wilks ought to have executed it in the name of Browne the principal, and not in his own, according to what was said in Combe's case, and confirmed by Lord C. B. Gilbert in 4 Bac. Abr. 140, and by Lord Kenyon in White *v.* Cuyler, 6 T. R. 177. So in Frontin *v.* Small, 2 Lord Raym. 1418, s. c. 1 Str. 705, a lease made by an attorney in her own name, though stated to be made "for and in the name of" the principal, was holden void, and that no action of covenant lay thereon. Now here it was signed by Wilks "for Browne;" whereas the signature ought to have been in the name of Browne, though made by Wilks. Therefore as Browne would not be bound by the award, it is void for want of mutuality.

Grose, J. No doubt the award must be mutual, and for this purpose the bond must be executed by Browne as well as by Wilks; but this is a sufficient execution by both. I accede to the doctrine in all the cases cited, that an attorney must execute his power in the name of his principal, and not in his own name; but here it was so done, for where is the difference between signing J. B. by M. W. his attorney (which must be admitted to be good), and M. W. for J. B.; in either case the act of sealing and delivering is done in the name of the principal and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done.

Lawrence, J. No doubt, in point of law, the act done must be the act of the principal, and not of the attorney who is authorized to do it. The whole argument has turned upon an assumption of fact that this was the act of the attorney, which is not well founded. This is not like the case in Lord Raymond's Reports where the attorney had demised to the defendant in her own name, which she could not do; for no estate could pass from her, but only from her principal. But here the bond was executed by Wilks for and in the name of his principal; and this is distinctly shown by the manner of making the signature. Not that even this was necessary to be shown; for if Wilks had sealed and delivered it in the name of Browne, that would have been enough without stating that he had so done. However, he first signs his own name alone opposite to one seal to denote the sealing and delivery on his own account, and then opposite the other seal he denotes that the sealing and delivery was for James Browne. There is no particular form of words required to be used, provided the act be done in the name of the principal.

Le Blanc, J. Wilks first signed it in his own name, as for himself, and then to denote that the act was also done in the name of Browne, he signed it again for James Browne. I cannot see what difference it can make as to the order in which the names stand.

Rule discharged.[1]

TAFT *v.* BREWSTER AND OTHERS.

Supreme Court of New York. 1812.

[9 *Johns.* 334.]

This was an action brought against the defendant and Thaddeus Loomis and Joseph Coats, on a bond dated the 16th of April, 1810, by which the defendants, "by the name and description of Jacob Brewster, Thaddeus Loomis, and Joseph Coats, trustees of the Baptist Society of the town of Richfield," acknowledged themselves bound to the plaintiff in the sum of $3,600, to be paid, &c., conditioned, that if the defendants, as trustees of the Baptist Society of the town of Richfield, their heirs, &c., should pay the plaintiff the sum of $1,800, with interest, at the several times therein mentioned, &c. The bond was signed "Jacob Brewster, Thaddeus Loomis, and Joseph Coats, trustees of the Baptist Society of the town of Richfield," and sealed by them respectively.

The plaintiff assigned two breaches: 1. That after the making the bond, &c., a large sum of money, to wit, $126, being the interest for one year then elapsed, was then due and owing; and, 2. That another large sum of money, to wit, the sum of $1,100, became due, and was owing, to the defendants on the 1st of June, 1811, which, with the $126, was still in arrear and unpaid.

The defendants, after craving oyer of the bond and condition, demurred, and assigned for causes of demurrer: 1. That the bond was executed by the defendants in a corporate and not in their individual capacity; 2. That the declaration was double, in assigning two distinct breaches of the condition of the bond; and, 3. That in assigning the breaches, it is not said "according to the statute," &c.

The plaintiff joined in demurrer, and the same was submitted to the court without argument.

Per Curiam. The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist Church; and if the defendants are not bound, the church certainly is not, for the church has not contracted either in its corporate name or by its seal. The addition of trustees to the names of the defendants is, in this case, a mere *descriptio personarum.* But there is one special cause of demurrer well taken, and that is, that the declaration is double, in assigning two distinct breaches.[1] . . . Judgment must, therefore, be given for the defendants, with leave, nevertheless, to the plaintiff to amend on the usual terms.

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[1] *Acc.:* Mussey *v.* Scott, 7 Cush. 215 (1851). — Ed.

STINCHFIELD *v.* LITTLE.

SUPREME COURT OF MAINE. 1821.

[1 *Me.* 231.]

IN an action of covenant upon the issue of *non est factum*, the plaintiff offered in evidence the deed declared on, which was in these words: "Know all men by these presents, that I, Josiah Little of, &c., by virtue of a vote of the Pejepscot Proprietors, passed on the first day of September, 1784, authorizing and appointing me to give and execute deeds for and in behalf of said proprietors, for and in consideration of the sum of thirty-seven pounds to me in hand paid by Thomas Stinchfield of, &c., the receipt whereof I do hereby acknowledge, have given, granted, released, conveyed, and confirmed unto him the said T. S., his heirs and assigns forever, two hundred acres, &c. To have and to hold the above granted and bargained premises with all the privileges and appurtenances thereof to him the said T. S. his heirs and assigns forever, as an absolute estate of inheritance in fee simple forever: hereby covenanting in behalf of said proprietors, their respective heirs, executors, and administrators to and with the said T. S. his heirs and assigns to warrant, confirm, and defend him and them in the possession of the said granted premises, against the lawful claims of all persons whatsoever. In testimony that this instrument shall be forever hereafter acknowledged by the said proprietors as their act and deed, and be held good and valid by them, I, the said Josiah Little, by virtue of the aforesaid vote, do hereunto set my hand and seal this nineteenth day of February," &c., with the defendant's name, and a seal. To this the defendant objected that the deed and the covenants therein were the deed and covenants of the Pejepscot Proprietors, and not of the defendant; and so not proving the declaration. And THACHER, J., before whom the cause was tried, thereupon directed a nonsuit, with leave for the plaintiff to move that the nonsuit should be set aside and the action proceed to trial, if the Court should be of opinion that the deed and covenants therein were the deed and covenants of the defendant.

Belcher and *R. Williams*, for the plaintiff.

Little and *Longfellow*, for the defendant. Proprietors of lands, incorporated by the provisions of our statutes, have no common seal, and must always grant by vote, or convey by deed, executed by agent or attorney authorized for that purpose. . . .

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[1] The omitted passage deals with duplicity only. — ED.

Preble, J. In this case two questions are presented for the consideration of the Court. 1. Is the deed declared on the deed of the Pejepscot proprietors? 2. Admitting it not to be deed of the Pejepscot proprietors, is it the deed of Josiah Little, the defendant?

Where a contract is entered into or a deed executed in behalf of the government by a duly authorized public agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the government, who alone is responsible, and not of the agent. Unwin *v.* Wolseley, 1 D. & E. 674; Mabeath *v.* Haldimand, id. 172; Hodgson *v.* Dexter, 1 Cranch. 345; Dawes *v.* Jackson, 9 Mass. 490; Sheffield *v.* Watson, 3 Caines, 69. But the same rule does not obtain in relation to the agent or attorney of a private person or corporation. It seems to have been settled or recognized as law in courts of justice by judges, distinguished for their wisdom and learning, in successive generations and under different governments, that in order to bind the principal or constituent and make the instrument his deed, the agent or attorney must set to it the name and seal of the principal or constituent, and not merely his own. In the year 1614 it was resolved in Combes' Case, 9 Co. 76, that "when any has authority as an attorney to do any act, he ought to do it in his name who gives the authority, — and the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act, of him who gives the authority." There, however, the act done by attorney was the surrender in court of certain copyhold lands, in doing which, as is well known, neither signing nor sealing constituted any part of the ceremony. A case where a question, relating to the receiving of such a surrender was agitated, came before the Court of K. B. in 1701, — Parker *v.* Kett, 1 Ld. Raym. 658, — in which Ld. C. J. Holt seems to be dissatisfied with the rule in Combes' Case, and expresses an opinion that, though the act were done in the attorney's own name, provided he had sufficient authority, it would be good without reciting his authority, though not so regular and formal. The rule, however, as laid down in Combes' Case, is cited by Ld. Ch. Baron Comyn, as good law. Com. Dig. Attorney (c. 14) and 1 Rol. 330, *l* 35, is quoted as supporting it. Upon the same authority it is stated, that if an attorney has a power by writing to make leases, if he makes a lease in his own name, it will be void. This latter principle was recognized as law in 1726 in Frontin *v.* Small, 2 Ld. Raym. 1418. In that case also the attorney in the body of the instrument for, and in the name, and as attorney of the principal, demised, &c.; but the court held, that a person empowered by warrant of attorney to execute a deed for another, must execute it in the name of the principal. In conformity with this decision is the language of Ld. C. J. Kenyon in 1795, in White *v.* Cuyler, 6 D. & E. 176. "In executing a deed for the principal under a power of attorney, the proper way is to sign in the name of the principal." And at a still later period, in 1802, in Wilkes *v.* Back, 2 East, 142, the doctrine, that an attorney must execute his power in the name of his principal, and not in his own name, was recognized by the whole Court as sound law. The same rule seems to obtain also in the courts of law in this country. Thus in Simond *v.* Catlin, 2 Caines, 66, C. J. Kent not only admits the authority of Frontin *v.* Small, but adds, "when a man acts in contemplation of law by the authority and in the name of another, if he does an act in his own name, although alleged to be done by him as attorney, it is void." So also in Fowler *v.* Shearer, 7 Mass. 14, C. J. Parsons, in delivering the opinion of the Court, says: "If an attorney has authority to convey lands, he must do it in the name of the principal. The conveyance must be the act of the principal, and not of the attorney; otherwise the conveyance is void. And it is not enough for the attorney in the form of the conveyance, to declare that he does it as attorney, for, he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name." This, it is manifest, is only a combination of the principles of the two cases of Combes and Frontin *v.* Small, and as such, is a recognition on the part of the Court of the law as laid down in those cases. But in the case of Elwell *v.* Shaw, 16 Mass. 42, this subject was again brought in review before the Court. There the deed in question commenced with a recital at full length of the power of attorney from Jonathan to Joshua Elwell; and the attorney, professing to act only in virtue of that power, proceeds to convey, &c., and then concludes, "In testimony whereof, I have hereunto set the name and seal of the said Jonathan," &c., but affixes his own name and a seal. In delivering their opinion the Court say, it is impossible that any one should doubt the intention of the parties, but, yielding to the weight of the authorities, they held the deed not to be the deed of Jonathan. Now, when we advert to the deed under consideration, we find the case of Elwell *v.* Shaw a much stronger one than the present. There the attorney professing to set the name and seal of the principal, set a seal, but signed his own name. Here the attorney did not even profess to set the name or seal of the principal, but professedly as well as actually, set his own. It has indeed been intimated in argument that the case of Elwell *v.* Shaw is an extreme one, bordering at least exceedingly near on the line. Be it so. All cases bordering exceedingly near on the line are extreme cases. We do not rest the decision of this cause upon that case merely, however safely we might do so, but upon well-settled and established principles in other cases which have been too long and too often recognized to be now called in question. Applying those principles to the case at bar we are of opinion that the deed in question is not the deed of the Pejepscot proprietors.

This is not the case of a deed good in point of form but void for want of power in the person assuming to act as attorney. In such a case, whether the attorney is bound by the instrument itself, or only responsible in an action on the case, it is not necessary for us now to consider. For the purpose of this inquiry, and in the form in which the question is presented for consideration, it is granted that Little had sufficient authority to bind the Pejepscot proprietors. If he had properly exercised the powers confided to him, it will be readily admitted he could not have been made personally responsible whatever injury the plaintiff might have suffered for any breach of the covenants contained in the deed. It would then have been the deed of the Pejepscot proprietors and not Little's; whereas as the case now stands, it is not their deed, but his own. Thus C. J. Parker, in Stackpole *v.* Arnold, 11 Mass. 27, "It is also held that, whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself and no other person." See also Mahew *v.* Prince, id. 54. So in Afridson *v.* Ladd, 12 Mass. 173. "It is not sufficient that a person, in order to discharge himself from a promise in writing, should show that he was in fact the agent of another, but it should be made to appear that he treated as agent, and actually bound his principal by the contract." Nor is it sufficient that the agent describe himself in the deed or contract, as acting for, and in behalf, or as attorney of the principal, or as a committee to contract for, or trustees of a corporation, &c.; for if he do not bind his principal, but set his own name and seal, such expressions are but *designatio personæ*, — it is his own act and deed, and he is bound personally. Fowler *v.* Shearer, *supra;* Appleton *v.* Binks, 5 East, 148; Tippets *v.* Walker, 4 Mass. 595; Tucker *v.* Bass, 5 Mass. 164; Taft *v.* Brewster, 9 Johns. 334. See also Thacher *v* Dinsmore, 5 Mass. 299; Barry *v.* Rush, 1 D. & E. 691; Sumner *v.* Williams, 8 Mass. 162; Long *v.* Colburn, 11 Mass. 97. Besides, since the deed cannot *proprio rigore* operate as the deed of the Pejepscot proprietors, the last clause of it might well be considered, perhaps, as is contended by the plaintiff's counsel, under a fair construction of it, the personal covenant of the defendant that the Pejepscot proprietors should acknowledge that instrument to be good and valid, and equally obligatory on them, as though it were their own act and deed. See Mann *v.* Chandler, 8 Mass. 335; Appleton *v.* Binks, and Tippets *v.* Walker, *supra.* But without resorting to such construction, we are of opinion that the deed is the deed of Josiah Little the defendant; and accordingly the nonsuit is set aside, and a

New trial granted.[1]

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[1] *Acc.*: Stone *v.* Wood, 7 Cow. 453 (1827). — ED.

HOPKINS *v.* MEHAFFY.

SUPREME COURT OF PENNSYLVANIA, 1824.

[11 *S. & R.* 126.]

THIS was a writ of error to the District Court for the city and county of Lancaster, in an action brought by Joseph Hopkins against John Mehaffy, upon the following sealed instrument: —

"Articles of agreement, made and agreed upon this nineteenth day of October, A. D., one thousand eight hundred and thirteen, between the president, managers, and company of the Manchester turnpike road of the one part, and Joseph Hopkins, of the borough of Marietta, Lancaster county, and state of Pennsylvania, of the other part, witnesseth; that the said Joseph Hopkins, for and in consideration of the covenants hereafter mentioned, on the part of the president, managers, and company of the said road, doth by these presents for himself, his heirs, executors, and administrators, covenant and agree, to and with the said president, managers, and company, their successors and assigns, that he, the said Joseph Hopkins, will at or before the first day of March next ensuing, make and finish, in a complete, substantial, and workmanlike manner, the mason work of the bridge across the Conowago gut on said road, at such place as the said president, managers, and company may direct, and agreeably to the plan laid down for the same; and find all the materials requisite for building the same; all the stone work to be done without mortar; and have the two piers done on or before the first day of February next. And the said president, managers, and company of the Manchester turnpike road, covenant and agree, to and with the said Joseph Hopkins, his executors and administrators, that the said president, managers, and company will pay, or cause to be paid, to the said Joseph Hopkins, his executors and administrators, for and in consideration that he shall make the mason work of said bridge complete, and in a workmanlike manner, agreeably to the plan laid down for the same, at or before the time above-mentioned and agreed upon, the sum of one dollar and seventy-five cents for every perch of mason work done, of mason measurement, as follows; viz., five hundred dollars thereof as soon as the two piers are finished, and the remainder as soon as he has the work completed as aforesaid. And for the true and faithful performance of all and singular the covenants, agreements, and stipulations in these presents contained, the parties hereto bind themselves, each to the other, in the penal sum of two thousand dollars, lawful money of Pennsylvania. In witness whereof, the said parties to these presents have hereunto interchangeably set their hands, and affixed their seals, the day and year first within written.

"JAMES MEHAFFY. (SEAL.)
"JOSEPH HOPKINS. (SEAL.)

"Signed by the president, in behalf of the president and managers of the Manchester turnpike road, and by Joseph Hopkins, on his part, in presence of WILLIAM CHILD."

The defendant pleaded payment, with leave, &c.; but on the trial altered his plea to *non est factum*, by the leave of the court, and against the consent of the plaintiff's counsel.

The errors assigned, on the return of the record to this court, were: —

1. That the court permitted the plea to be altered on the trial, which Hopkins, for the plaintiff in error, denied their right to do.

2. That the court instructed the jury that a suit could not be supported against the defendant on the agreement above stated.

GIBSON, J. I cannot acquiesce in the law as laid down in some of the cases which have been cited. In general, it is true that there is a distinction between contracts that are entered into on the part of government, by its agents, and those which are entered into on the part of individuals or corporations by those who represent them. In respect of the first it may safely be asserted that whether the contract be by parol or by deed, the public faith is exclusively relied on, whenever the agent does not specially render himself liable. In respect of the second, where the contract is by parol, the agent is liable only where he had no authority to bind his principal; but the agent of an individual or corporation, covenanting under his seal, for the act of his principal, although he describe himself as contracting for and on behalf of his principal, is liable on his express covenant, whether he had the authority of the person whom he thus professes to bind or not. The law is thus broadly laid down by Mr. Chitty, in his treatise on pleading, page 24, and the authorities which he cites fully bear him out; to which may be added Tippets *v.* Walker, 4 Mass. Rep. 595. It is somewhat remarkable that the distinction between a parol and a sealed contract was not taken in Randal *v.* Vanvechten, 19 Johns. 60, and that the authorities cited to prove that an agent who personally covenants in behalf of his principal, is liable only in the event of there being no recourse to the principal, directly prove the reverse. There is a class of cases referred to which have nothing to do with the question. I mean those cases where the defendant undertakes to covenant for others, as well as himself; and there it is settled, that if he has no authority to bind the others, he is nevertheless bound himself; not that he incurs an eventual liability in consequence of the others being discharged, but he remains bound as he was originally, the instrument being his several deed. It is unnecessary, therefore, to inquire whether the plaintiff might have an action of assumpsit against the principal, in consequence of the existence of a parol authority to the agent to enter into the contract, because, whether he may or not, the agent is liable on his express covenant. But there is a striking and substantial difference between the covenant of an agent who describes himself as contracting for his principal, and the covenant of a principal, through the means, and by the instrumentality, of an agent. The first is the individual covenant of the agent, the second is the individual covenant of the principal; and in this respect the case at bar differs from Randal *v.* Vanvechten, in which the distinction seems not to have been adverted to. No decision can be found in support of the position that what appears on the face of the deed to be the proper covenant of the principal, but entered into through the agency of an attorney (which, by-the-bye, is the legitimate form of the instrument where the attorney is not to be bound), shall be taken to be the proper covenant of the attorney, wherever he had not authority to execute the deed. How could he be declared against? If in the usual and proper manner of pleading it were alleged that the agent had covenanted, it would appear by the production of the instrument that he had not, but that his principal had covenanted through his means; which, on *non est factum* being pleaded, would be fatal. This is precisely the case before us, except that it is not quite so strong. In the body of the instrument the covenants are stated as if they were made by the corporation directly with the plaintiff, without the agency of any one, the defendant not being named, but merely signing and sealing it with his own seal as the deed of the corporation, which I readily admit it is not. Now to avoid the difficulty which I have just mentioned, the plaintiff, in declaring, does not in the usual way set forth the substance of the covenants, but alleges that, by certain articles of agreement between the parties, it was covenanted "as follows;" and then sets out the articles according to their tenor, assigning for breach that the defendant had not paid, &c. A demurrer would unquestionably have answered the purpose as well as the plea of *non est factum*, for the declaration sets forth no covenant of the defendant, and consequently no cause of action. But the paper is not the defendant's deed. He sealed and delivered it undoubtedly; but there is something more than sealing and delivering necessary to a deed. It ought to contain the proper parts of a contract; and in this instrument there are no obligatory words applicable to the person of the defendant. Even the sealing and delivery were as the president, and in behalf of the corporation. If the defendant had authority to contract for the corporation, although he has done so informally, there cannot be a doubt, that as the work has been done, the plaintiff may have an action of some sort against it. But he never treated on the basis of the defendant being personally answerable; and to permit him to maintain this action would permit him to have, what was not in the contemplation of either party, recourse to the person of the agent. I am therefore of opinion that the judge who tried the cause was right in directing the jury that the paper given in evidence was not the deed of the defendant. In regard of the other error assigned, little need be said. Under the act of assembly, a defendant may change his defence after the jury has been impanelled, as a matter, not of indulgence, but of right, and in this also there is no error. *Judgment affirmed.*[1]

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[1] *Acc.*: Abbey *v.* Chase, 6 Cush. 54 (1850), where, at p. 56, METCALF, J., said: "In deciding whether the defendant has or has not bound himself, we need not decide

BRINLEY AND ANOTHER *v.* MANN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1848.

[2 *Cush.* 337.]

THIS was a writ of entry, for the recovery of certain real estate in Dedham, which was tried, on the general issue, before FORBES, J., to whose rulings and instruction — a verdict being rendered for the demandants — the tenant excepted.

The demandants gave in evidence a judgment rendered in their favor, in the Court of Common Pleas for this county, against the New England Silk Company, a corporation legally established; an execution issued in pursuance thereof dated September 2, 1845; and a levy, appraisement, and other proceedings returned thereon; from which it appeared, that the officer, by whom the execution was served, on the 11th of September, 1845, seized thereon seven thirty-second parts of the demanded premises; that further proceedings in the levy were suspended until the 10th of October, 1845, when the levy was completed, and seven thirty-second undivided parts of the demanded premises were assigned to the demandants, in part satisfaction of their judgment.

The tenant objected, that it did not appear, that the levy of the execution was completed in due season, after it was commenced; whereupon the demandants gave evidence showing that the same premises were attached on the 17th of June, 1845, on a writ in favor of other creditors, on which judgment was subsequently obtained, and an execution issued, which was levied on an undivided part of the premises, on the 1st of October, 1845.

The demandants also gave in evidence a judgment recovered by them against the New England Silk Company, in the Court of Common Pleas for the county of Suffolk, and an execution issued thereon, upon which seven one hundred and fiftieth parts of the demanded premises were seized and assigned to the demandants, December 17, 1845, in part satisfaction of such execution.

In both these levies, the appraisers certified (their certificates were made part of the return) that, finding the premises incapable of division, they had appraised the undivided parts set off by them, in each case, at the several sums at which they were so assigned, but they did not otherwise report the entire value of the whole estate. The tenant

whether he has or has not bound the company. For it does not necessarily follow that a contract, made by an authorized agent, which does not bind the principal, becomes the agent's contract, and makes him answerable if it is not performed. This depends upon the legal effect of the terms of the contract. If the agent employs such terms as legally import an undertaking by the principal only, the contract is the principal's, and he alone is bound by it. But if the terms of the contract legally import a personal undertaking of the agent, and not of the principal, then it is the contract of the agent, and he alone is answerable for a breach of it." — ED.

objected to the levies, because the appraisers did not report the entire value; but the objection was overruled.

The tenant thereupon produced the evidence, upon which he relied to show his title in the demanded premises, from which it appeared that Christopher Colt, Jr., treasurer of the New England Silk Company, acting under the supposed authority of certain votes of the company, conveyed the demanded premises, before the seizure thereof on execution as above mentioned, by deeds of mortgage and quitclaim, to James B. Colt, from whom, by intermediate conveyances, the estate came to the tenant.

The demandants, among other objections to the evidence on the part of the tenant, not necessary to be stated, objected to the validity of the deeds to James B. Colt.

The formal parts of one of the deeds, to which the objection referred, are as follows: —

"Know all men by these presents, that the New England Silk Company, a corporation legally established, by Christopher Colt, Jr., their treasurer, of Dedham, &c., in consideration, &c., do hereby give, grant, sell, and convey," &c.

"In witness whereof, I, the said Christopher Colt, Jr., in behalf of said company, and as their treasurer, have hereunto set my hand and seal, this," &c. [Signed and sealed] "Christopher Colt, Jr., Treasurer of New England Silk Company."

The certificate of acknowledgment stated that "Christopher Colt, Jr., treasurer, &c., acknowledged the above instrument to be his free act and deed."

In the other deed Christopher Colt, Jr., describes himself, in the concluding recital, as "treasurer of the New England Silk Company, and duly authorized for that purpose;" and, in the certificate of acknowledgment it is stated that, "in his said capacity," he acknowledged the instrument to be his free act and deed.

D. A. Simmons, for the tenant.

J. J. Clarke, for the demandants.

METCALF, J. The demanded premises were formerly the property of the New England Silk Company, a body corporate, and the demandants claim title thereto under levies of two executions against that company. We see no valid objection to either of those levies. The delay in completing the levy of the first execution was warranted by the Rev. Sts. c. 97. The appraisement of the undivided fractional part of the estate, which was set off on the second execution, was all that the law required of the appraisers. The objections to these levies were therefore rightly overruled by the judge at the trial, and he rightly instructed the jury that the demandants had a *prima facie* title to the premises demanded in this suit.

The tenant also claims title under the Silk Company, through two deeds made to James B. Colt before the demandants levied upon or attached the demanded premises, and a deed from Colt to Humphrey, who was the tenant's immediate grantor. On examining the deeds to Colt, we are of opinion that they conveyed no title to him. It is a rule of conveyancing, long established, that deeds which are executed by an attorney or agent, must be executed in the name of the constituent or principal. In Combes' Case, 9 Co. 76 *b.*, it was resolved "that when any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority." And in Fowler *v.* Shearer, 7 Mass. 19, Parsons, C. J., says, "It is not enough for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name." This doctrine, which was applied in Elwell *v.* Shaw, 16 Mass. 42, and in other cases cited by the demandants' counsel, and also in Berkeley *v.* Hardy, 8 Dowl. & Ryl. 102, must be applied to the deeds now before us. Both of these deeds were executed by C. Colt, Jr., in his own name, were sealed with his seal, and were acknowledged by him as his acts and deeds. In one of them, it is true, he declared that he acted in behalf of the company, and as their treasurer; and in the other he declared himself to be their treasurer and to be duly authorized for the purpose of executing it. But this, as we have seen, was "not enough." He should have executed the deeds in the name of the company. He should also have affixed to them the seal of the company, and have acknowledged them to be the deeds of the company. 1 Crabb on Real Property, §§ 703, 705; 4 Kent Com. (3d ed.) 451; Stinchfield *v.* Little, 1 Greenl. 231; Savings Bank *v.* Davis, 8 Connect. 191; 3 Stewart on Conveyancing, 189. If the deeds had been rightly executed in other respects, the seal which C. Colt, Jr., affixed to each of them (namely, a wafer and a paper, without any stamp or impression) might have been regarded as the seal of the company, according to the decisions in Mill Dam Foundery *v.* Hovey, 21 Pick. 417, and Reynolds *v.* Glasgow Academy, 6 Dana, 37.

The case of Warner *v.* Mower, 11 Vt. 385, cited by the tenant's counsel, was decided upon a statute of Vermont, which authorizes certain corporations to convey real estate by a deed of their president, sealed with his seal. The court, in that case, admitted that "the form of the deed, at common law, would not, probably, be considered good."

As nothing passed to James B. Colt by the deeds of October, 1844, and June, 1845, he could not convey any title to Humphrey, nor Humphrey to the tenant. We therefore need not examine the other objections to the tenant's title, which were raised and argued by the counsel for the demandants.

Judgment on the verdict.

THE NORTHWESTERN DISTILLING COMPANY *v.* BRANT.

SUPREME COURT OF ILLINOIS. 1873.

[69 *Ill.* 658.]

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. *Upton*, *Boutell & Waterman*, for the appellant.

Messrs. *Brandt & Hoffman*, for the appellee.

Mr. Justice SHELDON delivered the opinion of the Court: —

This was an action of covenant brought by Brant against The Northwestern Distilling Company, to recover for not restoring certain premises in as good order as when it received them; the action being founded upon a lease commencing as follows: "This indenture, made this 17th day of April, A. D. 1869, between Daniel R. Brant, of the city of Chicago, party of the first part, and Edward F. Lawrence, president of the Northwestern Distilling Company, of the same place, party of the second part." Throughout, the parties are mentioned as of the first or second part, and the pronouns he, his, or him are everywhere used in referring to the party of the second part.

The covenant to restore the premises in good condition, for the alleged breach of which the action is brought, is: "And the said party of the second part further covenants with the said party of the first part, that, at the expiration of the term, he will yield up the demised premises to the said party of the first part in as good condition as when the same were entered upon by the said party of the second part," &c. It concludes, "In testimony whereof the said parties have hereunto set their hands and seals the day and year first above written," and is signed and sealed:

"D. R. BRANT, [SEAL.]
"NORTHWESTERN DISTILLING CO., [SEAL.]
"By Edward Lawrence, President."

The plaintiff recovered in the court below, and the defendant appealed.

The sole question presented by the record is, whether an action of covenant lies against the company on this lease. The whole argument for the appellant turns upon an assumption of fact, that the covenant was made by Lawrence, which we do not consider was well founded. And on that assumption, it is insisted, that it cannot be shown, as has been done by the declaration and proof, that the company intended to make the covenant; that that can only be done upon an application to a court of equity to reform the contract. The only circumstance which raises any difficulty is, that in the commencement of the lease, Lawrence, president of the company, is described as the party of the second part, and the covenant is by "the said party of the second part." The contract, as claimed, is one made by a corporation, which can act only by its agents; and it is apparent upon the face of the instrument, that Lawrence does not act individually, but as president of the company for the company.

Had he executed the instrument in his own name for the company, it would have been a good execution by the company. Wilks *et al. v.* Back, 2 East, 142; Mussey *v.* Scott, 7 Cush. 216. The conclusion of a lease, as well as its commencement, may be looked to for the description of the parties; the conclusion describes them to be those persons who have set their hands and seals to the instrument, and it is the signature and seal of the Northwestern Distilling Company which are set thereto, not those of Lawrence. In action on a sealed instrument which, in its commencement described Sebre Howard and Hiram Howard as party of the first part, but which was signed by Sebre Howard alone, and suit was brought thereon by him alone, and objection made that Hiram should have joined in the action, the Supreme Court of the United States say: "The descriptive words in the premises of the deed declare Sebre and Hiram Howard to be the party of the first part; but inasmuch as Hiram did not seal the deed, he never in truth became a party to the instrument. He entered into no covenant contained in it. The truth is, the descriptive words are controlled by the decisive fact that Hiram did not seal the deed." Phil., Wilm. and Balt. R. R. *v.* Howard, 13 How. 337.

The last observation applies with force to the present case. Where a deed is made to a corporation by a name varying from the true name, the plaintiffs may sue in their true name, and aver in the declaration that the defendant made the deed to them by the name mentioned in the deed. The New York African Society, etc. *v.* Varick *et al.*, 13 Johns. 39. This court has frequently held, that where a person executing an instrument under seal is described therein by a different name, an action may be maintained against him upon the instrument, upon averring in the declaration and making proof that he executed the instrument, but was described therein by the name there appearing. O'Brien *v.* The People, 41 Ill. 456; Garrison *v.* The People, 21 id. 535; Graves *v.* The People, 11 id. 542. The averments and proof here sufficiently meet the requirements in those respects, and fully show that the lease was actually made to the distilling company.

In the case of Douglass *et al. v.* The Branch Bank at Mobile, 19 Ala. 659, a lease in the body of it purported to be made by Henry B. Holcombe, assistant commissioner of the Branch Bank of the State of Alabama, at Mobile, and was signed by the corporation, as in this case; an action on the lease in the name of the corporation was sustained; and see Eastern R. R. Co. *v.* Benedict *et al.*, 5 Gray, 561, as to the rule in respect to unsealed instruments.

We are of opinion that the action in the present case was well brought against the Northwestern Distilling Company, and the judgment is affirmed. *Judgment affirmed.*

BRADSTREET ET AL. *v.* BAKER ET AL.

SUPREME COURT OF RHODE ISLAND. 1884.

[14 *R. I.* 546.]

COVENANT. On demurrer to the pleas.

July 12, 1884. DURFEE, C. J. This is an action of covenant broken. The covenant, if valid, is a covenant by which the defendants bound themselves to receive from the plaintiffs, dealers in ice, and copartners under the firm of the Centennial Ice Company, at Pittston, Maine, between June 1, 1878, and Oct. 1, 1878, five thousand tons of ice, and to pay them for it at the rate of one and one half dollars per ton, and to pay in full in cash at said rate for all the ice remaining unshipped Oct. 1, 1878, the ice so remaining to be the property of the plaintiffs. The defendants made default by not receiving, though the plaintiffs were ready to deliver, the ice according to the contract. The plaintiffs sue for damages, claiming the stipulated price of the five thousand tons as liquidated damages. The defence is: *first*, that the defendants are not bound because the plaintiffs were not bound by the covenant, the obligations thereof being mutual or dependent; and *second*, that the plaintiffs can recover only their actual damages, the stipulated damages being manifestly designed as a penalty.

The first question is: Did the plaintiffs bind themselves by the covenant? The contract was not executed by the plaintiffs in person, but it was negotiated for them and signed by their agent, J. S. Bradstreet, who had a sufficient power of attorney under seal. The contract begins thus: "Agreement made this fifteenth day of February, 1878, between the Centennial Ice Company, of Pittston, Me., party of the first part, by J. S. Bradstreet, agent, and Joseph K. Baker, of Dennisport, Mass., and E. C. Baker, of Providence, R. I., parties of the second part, witnesseth." The stipulations contained in the body of the instrument purport to be stipulations between "the said party of the first part" and "the said parties of the second part," no names being given. It concluded as follows, to wit: —

"In witness whereof the parties have hereunto affixed their hands and seals the year and day first above written.

(Signed) "J. S. BRADSTREET, *Agent*, [L. S.]
"J. K. BAKER, [L. S.]
"E. G. BAKER, [L. S.]"

The defendants contend that the execution was ineffectual because the instrument does not contain the signatures of the party of the first part by their agent, but only the signature of the agent himself. Undoubtedly in the execution of a deed by an agent the most approved form is for the agent to sign the name of his principal, writing his own name below, with the word "agent" following, and the preposition "by" preceding it. See City of Providence *v.* Miller, 11 R. I. 272, 277, and cases there cited. But the form is not material provided it appears on the face of the instrument that the deed was executed by the principal acting through his agent and not by the agent himself. In Wilks *v.* Back, 2 East, 142, an arbitration bond was given by Mathias Wilks for himself, and under a power, for his copartner James Browne. The signatures were affixed as follows, to wit: "Mathias Wilks, [L. S.]." "For James Browne, Mathias Wilks, [L. S.]." The Court of King's Bench decided that the execution was good. "Here the bond was executed," say the Court, "by Wilks for and in the name of his principal; and this is distinctly shown by the manner of making the signatures. Not even this was necessary to be shown, for if Wilks had sealed and delivered it in the name of Browne, that would be enough without stating that he had so done." The case was followed with approval in Mussey *v.* Scott, 7 Cush. 215, where the form of the signature was "B. for A." It was also followed by the Supreme Court of Vermont in McDaniels *v.* Flower Brook Manuf. Co., 22 Vt. 274. There the operative clauses were in the name of the corporation "by William Wallace, their agent;" the covenants were in the name of the corporation. The deed concluded, "In witness whereof we have hereunto set our hand and seal," and the signature was, "William Wallace, Agent for the Flower Brook Manufacturing Company." The court said that the execution, in connection with what preceded it, must be understood to be an execution in the name of the company. And see to the same effect Martin *v.* Almond, 25 Mo. 313. It seems to us that there is no material distinction between these cases and the case at bar. The case at bar would be identical with them if the words, "for the Centennial Ice Company," had been added to the signature. But those words if added would express nothing which is not expressed without them by the signature, taken in connection with the *testimonium* clause and covenant which precede it. The seal is stated in said clause to be the seal of the principals, and the hand to be their hand, evidently because the agent signed for them. In Abbey *v.* Chase, 6 Cush. 54, and in Ellis *v.* Pulsifer *et al.*, 4 Allen, 165, the Supreme Judicial Court of Massachusetts decided that such an execution did not bind the agents, the action being against the agents, but expressly refrained from saying that it did not in their opinion bind the principals. See also Varnum, Fuller, & Co. *v.* Evans, 2 McMullan, 409; Hunter's Admr's *v.* Miller's Exec'rs, 6 B. Mon. 612; Bryan *v.* Stump, 8 Gratt. 241; M'Ardle *v.* The Irish Iodine Company, 15 Ir. C. L. Rep. 146. It is true that some of the text-books say, and some of the cases seem to imply, that the name of the principal must necessarily appear in the signature. But we do not see the necessity. When A., being agent for B., signs the deed, "A. for B.," or "A., agent for B.," his own name is the signature, the other words being used to denote that he makes the signature not for himself but for his principal. And surely if this be so, it is unnecessary to use those words, if the thing which is denoted by them be otherwise apparent.

The defendants cite and rely on Townsend *v.* Corning, 23 Wend. 435; Townsend *v.* Hubbard, 4 Hill (N. Y.), 351; Brinley *v.* Mann, 2 Cush. 337; Lessee of Clarke *v.* Courtney, 5 Pet. 319, 350; but in each of these cases the deed was not only signed in the name of the agent, but the seal was stated in the *testimonium* clause to be his seal. Of course the deed could not be the deed of the principal unless the seal was his seal. Indeed, in Townsend *v.* Hubbard, *supra*, Chancellor Walworth declared that no particular form of words is necessary to make the deed the deed of the principal, "provided it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal, and not the seal of the attorney or agent merely." In Bellas *v.* Hays, 5 Serg. & R. 427, likewise cited for the defendants, it did not appear that the seal was the seal of the principal, there being no *testimonium* clause, and it was assumed to be the seal of the agent. The agent, moreover, signed his own name simply, without the word "agent" appended. The counsel for the defendants quotes the words of Judge Story in Lessee of Clarke *v.* Courtney, *supra,* that "the law looks not to intent alone, but to the fact whether that intent has been executed in such manner as to possess a legal validity." Undoubtedly. But, in his work on Agency, Judge Story, treating of this matter, says: "In all cases where the instrument purports on its face to be intended to be the deed of the principal, and the mode of execution of it by the agent, however irregular and informal, is not repugnant to that purport, it would probably be construed to be the deed of the principal, especially where the *in testimonium* clause is that the principal has thereto affixed his seal." Story on Agency, § 153, cited in Martin *v.* Almond, *supra.* Our conclusion is that the plaintiffs were bound by the contract, and therefore, that the action can be maintained.[1] . . .

Judgment will therefore be given for the plaintiffs for the amount stipulated in the covenant, and the case will stand for chancerization under Pub. Stat. R. I. cap. 216, §§ 2, 3.

Edward D. Bassett and *Frederic Hayes,* for plaintiffs.

James G. Markland, for defendants.

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[1] A passage holding the stipulation a penalty is omitted. — ED.

SECTION III.

Negotiable Instruments.

LONG v. COLBURN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1814.

[11 *Mass.* 97.]

ASSUMPSIT on the following promissory note, viz.: "No. 273, $301. Boston, 17th March, 1812. For value received, I promise to pay Mr. Edward J. Long, or order, on demand, three hundred and one dollars, with interest after four months. *Pro* William Gill, — J. S. Colburn."

The action came on for trial upon the general issue, at the last November term in this county, before PARKER, J.; when, it appearing in evidence that the defendant had a letter of attorney from William Gill, who was in Europe when the note was given, and when the action was commenced; and that the note was for a premium on a policy of insurance effected for Gill and on Gill's property; and the note being, in the opinion of the judge, signed by the defendant for Gill, — a nonsuit was directed, with liberty to move the Court to set it aside; the defendant agreeing, in case the nonsuit should be set aside, to be defaulted.

Sullivan, for the plaintiff.

Crane, for the defendant.

PARKER, J., delivered the opinion of the Court.

In this case, Colburn, the defendant, is declared against upon a promissory note made by him; and when the note was offered in evidence to support the declaration, it appearing to be, as construed by the judge, a promise in behalf of William Gill, a nonsuit was directed, on the ground that the evidence offered did not support the declaration. If the note warranted a verdict against the defendant in the present action, the nonsuit must be set aside, and judgment be rendered for the plaintiff upon the default of the defendant.

But we are all very clear that the nonsuit was properly ordered; it being certain that a verdict could not have passed for the plaintiff upon this evidence, if the cause had gone on to trial. It appears upon the face of the note itself, that the present defendant was not to be considered as the promisor. He signed his own name, *Pro* William Gill; and the plaintiff's remedy is against Gill, if Colburn had authority to make the promise for him; and if he had not, a special action of the case might make Colburn answerable.

This authority may be by parol, by letter, by verbal directions, or may even be implied from certain relations proved to exist between the actual maker of the note and him for whom he undertakes to act; and it may sometimes be inferred from the subsequent assent or ratification of the party who is charged by the writing. But in all cases, the name of the party intended to be charged must appear upon the instrument itself.

But in the case at bar, the evidence exhibited by the defendant, although unnecessary for the purpose of discharging himself, abundantly shows that he had authority to promise for Gill, and that Gill is accountable for the contents of this note.

The counsel for the plaintiff has ingeniously endeavored to construe this note into a promise of Colburn to pay this money for W. Gill. But the obvious and true construction of the instrument is a promise of Gill by Colburn, his agent or attorney. And, indeed, if the construction given by the plaintiff's counsel were correct, he could not recover in the present action; for he should have set forth that, Gill being indebted, Colburn, the defendant, for forbearance, or some other legal consideration, promised to pay. There is, however, no reason to suppose this the nature of the transaction; and there seems to be no difficulty in the plaintiff's pursuing his proper remedy against Gill. The nonsuit must remain. *Costs for the defendant.*[1]

LEADBITTER *v.* FARROW.

KING'S BENCH. 1816.

[5 *M. & S.* 345.]

ASSUMPSIT upon a bill of exchange and the money counts. Plea, *non-assumpsit.* At the trial before Lord ELLENBOROUGH, C. J., at the London Sittings after last Hilary term, there was a verdict for the plaintiff, damages £50, subject to the opinion of the Court upon the following case: —

The plaintiff and defendant, at the time of drawing the bill in question, resided at Hexham. The defendant, who was a tanner, was also agent of the Durham bank, in which capacity he acted from July, 1812, to July, 1815, when the bank failed. On the 8th of June, 1815, the plaintiff sent £50 to the house of the defendant, in order to procure a bill upon London for the amount, and the defendant filled up and signed the bill in question upon one of the printed forms of the Durham bank, and sent it to the plaintiff. The following is a copy of the bill: —

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[1] *Acc.*: Rice *v.* Gove, 22 Pick. 158 (1839); Alexander *v.* Sizer, L. R. 4 Ex. 102 (1869).

In 2 M. & G. 721, n. (a), the reporters, commenting upon the signature "Robert Blundell, by procuration of Thomas S. M. Stanley" (Blundell being the agent and Stanley the principal), say: "This is the ordinary commercial form of signing by procuration. It is incorrect, as, in strictness, the words used would import that Blundell was the drawer &c. of the bills through the procuration, interposition, or agency of Stanley. The proper mode of signing by procuration is, either to use the name of the principal only, or to sign, 'A. B. (the principal) by, or by the procuration of, C. D.' (the agent)." — ED.

"N. G. 205.

"£50. HEXHAM, June 8th, 1815.

"Forty days after date, pay to the order of Mr. Thomas Leadbitter fifty pounds, value received, which place to the account of the Durham bank as advised.

"Messrs. Wetherell, Stokes, Mowbray, Hollingsworth, and Co., *bankers*, London.

(Signed) "CHRISTR. FARROW."

The persons who constitute the firm upon which the bill was drawn are the same who constitute the firm of the Durham bank, that bank having a house in London, upon which they were in the habit of drawing bills, which they wished to make payable there.

The bill in question was drawn in the same form as had been used by the defendant since June, 1813, before which time he had been in the course of issuing bills, drawn in the name of one of the partners of the Durham bank. He did not draw bills on his own account in this form, nor upon the same parties. The plaintiff, when he sent the £50, and obtained the bill, knew that the defendant was agent of the Durham bank at Hexham, and that the Durham bank drew upon a house in London, and he supposed that the bill was given by the defendant, as agent, and on account of the Durham bank, to which the defendant paid over the £50. The bill, when due, was presented to the drawees, and payment refused, and due notice was given to the defendant.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Tindal for the plaintiff.

Scarlett, contra.

Lord ELLENBOROUGH, C. J. Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by procuration of another, which are words of exclusion? Unless he says plainly, "I am the mere scribe," he becomes liable. Now, in the present case, although the plaintiff knew the defendant to be agent to the Durham bank, he might not know but that he meant to offer his own responsibility. Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not so done, and therefore, has made himself liable.

I do not say whether an action would lie against the Durham bank, because, considering it in either way, it would not, as it seems to me, affect the liability of the defendant.

Bayley, J. I am entirely of the same opinion. The drawer, by the act of drawing, pledges his name to the bill's being duly honored; and though the plaintiff in this case knew that the defendant was an agent, he might also know that he had given this pledge.

Abbott, J. I am also of the same opinion. The party does not show that the bill was not taken according to the effect which it bears on the face of it.

Holroyd, J. I apprehend that no action would lie on the bill, except against those who are the parties to it.

Judgment for the plaintiff.

PRICE *v.* TAYLOR AND FISHER.

Exchequer. 1860.

[5 *H. & N.* 540.]

Declaration. That the defendants, together with one W. R. Heath, on the 12th of March, 1858, made their promissory note in writing now overdue, which note is in the words and figures following, that is to say: —

"Midland Counties Building Society, No. 3.
"Birmingham. March 12, 1858.

"Two months after demand in writing we promise to pay to Mr. Thomas Price the sum of one hundred pounds, with interest after the rate of six pounds per centum per annum, for value received.

"W. R. Heath,
"£100. John Taylor, *Trustees.*
"W. D. Fisher, *Secretary.*"

Averments: that the signatures John Taylor and W. D. Fisher attached to the said note are those of the defendants, respectively; that, after the making of the said promissory note, the plaintiff duly demanded in writing of the defendants the payment of the said sum of £100 with interest for the same after the rate aforesaid; that two months after the making of the demand had elapsed before suit; yet that the defendants have not nor hath either of them paid, &c. Second count, for money due in respect of moneys lent, for interest, and on an account stated.

Plea, by the defendant Taylor: That the several contracts in the declaration mentioned, and each and every of them, were made and entered into by a certain building society, whereof the defendants and divers other persons, at the time of the making of the said contracts, were and are members, that is to say, the No. 3, Midland Counties Building Society, duly established under and by virtue of the provisions of an Act (6 & 7 Wm. IV. c. 32), for the regulation of building societies, and all other statutes in that behalf, the rules of which said society were duly certified and allowed, and all other matters and things required by the statutes duly performed in pursuance of the said statutes, to constitute the said society a building society, within and subject in all respects to the provisions of the said Acts; and the said contracts were not, nor was any or either of them, made with the defendants otherwise than as members of the said society, together with the said other members; and that at time of the commencement of this suit divers persons, of whom the defendant W. D. Fisher was not one, were trustees of the society, duly appointed in all respects as required by the Acts by the rules of the society, and liable by virtue of the said Acts to be sued as such upon all the contracts of the society.

To this plea the plaintiff demurred.

Quain, in support of the demurrer.

Gray, in support of the plea.

Pollock, C. B. I am of opinion that the plaintiff is entitled to judgment. The note is nothing more than what it purports to be, viz., the promise of the defendants, not of the society. The plea does not deny that the form of the contract is that set out in the declaration, but says it means something else. I think, however, that it is not competent to a defendant to plead that a written contract means something different from that which it purports. A party cannot say, "I executed that contract, but you know I meant something else."

Martin, B. The meaning of a written document is to be collected from the terms in which it is expressed. In Bayley on Bills, ch. 2, sec. 8, it is said: "Where a bill or note is drawn by an agent, executor, or trustee, he should take care, if he mean to exempt himself from personal responsibility, to use clear and explicit words to show that intention." This is the correct rule of construction. Does the note in the present case show an intention on the part of the defendants to exempt themselves from personal responsibility? I think not. "Midland Counties Building Society, No. 3," may be the name of the place from which the note is dated; the promise is not qualified. If the plea admits that the note was the note of the defendants it shows no answer to the action; if it be meant to contradict the terms of the note, it is bad.

Bramwell, B. I am of the same opinion; though I cannot say I think the matter very clear. First, what is the natural meaning of the language of the note? There is no difficulty about that, for on reading it, it does not appear that the defendants undertake for anybody but themselves. If there was anything to show that the note would be binding on the building society, we might hold that the note was the note of the society, and not of the defendants alone, as in Aggs *v.* Nicholson, 1 H. & N. 165. If the note had been made by the defendants in such a form as not to bind them personally, possibly the plea might have been good. But I concur in saying that the plaintiff must have judgment. I do not think that the defendants contend that this is a note binding upon the society. I doubt if they could have said so. I know of no means by which such a note could be enforced except as against the individual members of the society.

Wilde, B. I am of the same opinion. The note on the face of it merely professes to bind the persons who signed it. They add the word "trustees" to their signature. The defence is, that they signed as agents. But an agent who signs a note in his own name makes himself personally liable upon it. If there are any circumstances to show that the trustees were not to be personally liable, that may be a matter of equitable defence. *Judgment for the plaintiff.*[1]

THE BANK OF THE STATE OF NEW YORK *v.* THE MUSKINGUM BRANCH OF THE BANK OF THE STATE OF OHIO.

Court of Appeals of New York. 1864.

[29 *N. Y.* 619.]

Appeal from a judgment of the Supreme Court.

The action was brought against the defendants as endorsers of a bill of exchange as follows: —

"No. 1,305. Zanesville, O., July 21, 1857.

"Sixty days after date, pay to the order of D. C. Converse, Esq., cashier, twenty-two hundred and forty dollars, as advised, and charge the same to account of

"Your obedient servants,
"Beaumont & Hollingsworth.

"To W. R. Eckart, 118 Broad St., New York. $2,240."

(Written across face.) "W. R. Eckart."

(Endorsement.) "Pay to the order of Edwin Ludlow, cashier."

"D. C. Converse, *Cr.*
"Edwin Ludlow, *Cr.*"

The complaint averred that D. C. Converse was and is the cashier of the defendants, and their officer authorized to deal with their funds and negotiable paper; that the bill was actually drawn to the defendants, and endorsed by the defendants to the Ohio Life Insurance and Trust Company, and by the Ohio Life Insurance and Trust Company endorsed in blank, and that before maturity the bill was delivered to the plaintiff, for value.

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[1] *Acc.*: Casco National Bank *v.* Clark, 139 N. Y. 307 (1893). — Ed.

The defendants, in their answer, denied that D. C. Converse was or is authorized to deal with the negotiable paper in any other manner than as their cashier and special agent. As a further defence it was averred and stated that the defendants were the sole and absolute owners of the bill; that after becoming such owners they transmitted it to the Ohio Life Insurance and Trust Company, to its office in the city of New York, for collection for their account, and for no other purpose, and upon no other account whatsoever. That said company failed, on or about the 24th August, 1857, having been insolvent and embarrassed for four months previous thereto; and that the alleged transfer of said bill to the plaintiff was made fraudulently, corruptly, usuriously, and in bad faith, and without any authority, and in contemplation of the insolvency of the said Ohio Life Insurance and Trust Company; and that the plaintiff did not receive the same in the usual course of business, but with notice of the premises as aforesaid, or under circumstances to put said plaintiff upon inquiry as to the right of said trust company and its cashier to endorse or transfer the same, and as to the right of the defendants thereto. And it is averred that the plaintiff was chargeable with notice that the said acceptance was not the property of the Ohio Life Insurance and Trust Company, but the property of the defendants. The case was referred to WILLIAM KENT, Esq., who gave judgment for the plaintiffs. The referee found as facts that the defendants and the Ohio Life Insurance and Trust Company were corporations incorporated by the State of Ohio. That at the time the bill was endorsed and sent to the Ohio Life Insurance and Trust Company, D. C. Converse was the cashier of the defendants and Edwin Ludlow was the cashier of the trust company. That the bill was discounted by the Muskingum Branch Bank, in the regular course of business, and was afterwards endorsed by said Converse, the cashier thereof, and transmitted to the Ohio Life Insurance and Trust Company, in the city of New York, for collection only. That the defendants did not part with their property in the bill to the Ohio Life Insurance and Trust Company; but that company received it as the agents of the defendants, "for collection, and for no other purpose." That it was transferred by the Ohio Life Insurance and Trust Company to the plaintiff as collateral security; that the plaintiff had not, at the time of such transfer, actual notice of the ownership of said bill by the Muskingum Branch Bank, but received the same *bona fide*, and in the usual course of business.

As conclusions of law, the referee decided that the plaintiff acquired a title to the bill of exchange by virtue of the transfer to it aforesaid; and that the Muskingum Branch Bank had become liable to pay the amount thereof, with interest, to the plaintiff, by reason of the said endorsement thereof by D. C. Converse, cashier of said Branch Bank, and the transfer by the Ohio Life Insurance and Trust Company.

At the close of the evidence the point was taken by the defendants' counsel, and overruled by the referee, that the Muskingum Branch

Bank could not be made liable on the endorsement, "D. C. Converse, cashier," said bank nowhere appearing on the said bills, and the said Converse having no authority to bind the bank.

Judgment being entered for the plaintiffs on the report of the referee, the defendants appealed to the Supreme Court, where the judgment was affirmed. The defendants brought the present appeal.

G. C. Goddard, for the appellant.

A. W. Clason, for the respondent.

Wright, J. The question in the case, on the facts, is a narrow one. The defendants discounted a bill of exchange in the regular course of business, which was endorsed by one Converse, their cashier, and transmitted to the Ohio Life Insurance and Trust Company, in the city of New York, for collection only. Before the bill matured, the trust company transferred it to the plaintiffs as collateral security for borrowed money. The plaintiffs, at the time of such transfer, had no actual notice of the ownership of the bill by the defendants, but received the same *bona fide*, and in the usual course of business. The bill was made payable to the order of D. C. Converse, cashier, and endorsed, "Pay to the order of Edwin Ludlow, cashier, D. C. Converse, Cr." The only question is, whether this was the endorsement of the Muskingum Branch Bank, or of Converse individually. If it was an official and not the private act of Converse, in fact done on behalf of the bank, as the bill was negotiated to the plaintiffs, who are *bona fide* holders, the endorsement would conclude the bank in favor of them, though the Ohio Life Insurance and Trust Company, its agent, acted in bad faith, and disobeyed its instructions, by negotiating the bill for its own benefit instead of collecting it.

It seems to me, on the facts, that but one interpretation can be given to Converse's acts. Converse was the defendant's cashier. A bill drawn to "D. C. Converse, cashier," was discounted by the defendants. The facts are found, and it is not controverted, that the Muskingum Bank owned the draft, and that it was sent to the Ohio Life Insurance and Trust Company for collection. The trust company received it from the bank with the endorsement, "D. C. Converse, Cr." Now, how can it be pretended that this was the individual and not the official act of Converse? Although "D. C. Converse, cashier," was the payee of the draft, the bank claimed it as its property, and to deal with it as such. Indeed, a bill drawn to "D. C. Converse, cashier," is, in judgment of law, payable to the bank of which he is the officer. Being the property of the bank, the endorsement, "D. C. Converse, Cr.," was made by the proper officer, for a proper purpose. It was, therefore, an official endorsement. Had there been nothing in the case to connect the bill with the defendant's bank, Converse would have been regarded as the payee and the endorser individually, and the abbreviation affixed to his name considered as a *descriptio personæ;* but when his official position is shown, connected with the facts that the bill was the property of the bank, and in the regular course of business was transmitted to its agent for collection, it is then shown that the endorsement is an official one.

The case of the *Bank of Genesee* v. *Patchin Bank* (19 N. Y. R. 312) is, on this question, a controlling authority. In that case, S. B. Stokes, the cashier of the Patchin Bank, sent to the Bank of Genesee, to be discounted, a bill of exchange payable to the order of "S. B. Stokes, Cas.," endorsed by him with the same addition to his signature, and enclosed in a letter dated at the banking house, and signed "S. B. Stokes, Cas." It was held that these circumstances imported that the endorsement was that of the Patchin Bank, in the regular course of business, and not that of S. B. Stokes individually. There is this difference only in the cases. In the one cited the bill was sent for discount, in this for collection; but plainly that could not affect the question. The intention in each case to make the bank a party to the paper is equally carried out.

I think, therefore, the endorsement in this case was that of the Muskingum Bank, and bound it as such to a *bona fide* holder of the bill. Its liability as endorser certainly cannot be qualified by the consideration that the bill was sent to its agent not to be negotiated, but for collection only. The object of the endorsement was to create a privity between any holder and the parties to the paper, and it accomplished it. There was nothing on the face of the endorsement to convey to third parties knowledge of the single purpose for which it was made, nor were they even bound to ascertain that extrinsic fact. The bank reposed confidence in the caution of its cashier, and in the honesty of its agent. The cashier neglected to add the restrictive words which would have limited the negotiability of the bill, and the agent abused the trust. I do not think that the plaintiff, who became a holder in good faith, and in the regular course of business, should bear a loss occasioned by the negligence of the one and the bad faith of the other agent.

The judgment of the Supreme Court should be *Affirmed.*[1]

BARLOW *v.* CONGREGATIONAL SOCIETY.

Supreme Judicial Court of Massachusetts. 1864.

[8 *Allen*, 460.]

Contract brought by the administrator of the estate of Reuben Barlow against the Congregational Society in Lee, upon the following promissory note: —

"$23.00. Lee, April 26, 1858. On demand, I, as treasurer of the Congregational Society, or my successors in office, promise to pay

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[1] All the judges concurred. The opinion of Ingraham, J., has been omitted.

See Phelps *v.* Livingston, 2 Root, 495 (1797); Baldwin *v.* Bank of Newbury, 1 Wall. 234 (1863). — Ed.

Erastus Hall or order twenty-three dollars, value received, with interest. Samuel S. Rogers, Treasurer."

The declaration alleged that the defendants, for value received by them, made the note by Samuel S. Rogers, their treasurer and agent, duly authorized; and that it was duly indorsed to the plaintiff's intestate. The defendants filed a general demurrer, which was overruled in the Superior Court, and judgment rendered for the plaintiff; and the defendants appealed to this court.

M. Wilcox, for the defendants.

J. Branning, for the plaintiff.

GRAY, J. It is well settled in this Commonwealth that the question whether a principal or his agent is the party liable upon a negotiable note or bill of exchange must be ascertained from the instrument itself, at least when both are in law capable of contracting, and it is not pretended that either has adopted the name of the other as his own for the purpose of transacting business. This exception to the general rule which governs other parol (or unsealed) agreements is derived from the nature of negotiable paper, which, being made for the very purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the maker as the original payee had, must indicate on its face who the maker is; for any additional liability of the principal, not expressed in the form of such a note or bill, would not be negotiable; and any ambiguity, arising upon the face oi the writing, in determining whether it is the promise of the principal or of the agent, must, on the ordinary principles of the law of evidence, be solved without the aid of extrinsic testimony. Bank of British North America *v.* Hooper, 5 Gray, 570, 571, and cases cited; Williams *v.* Robbins, 16 Gray, 77; Draper *v.* Massachusetts Steam Heating Co., 5 Allen, 339; Slawson *v.* Loring, Id. 342.

The plaintiff has mainly relied upon the case of Mann *v.* Chandler, 9 Mass. 335, in which it was held that promissory notes expressed to be made by "I, the subscriber, treasurer of the Dorchester Turnpike Corporation," and signed "Gardner L. Chandler, Treasurer of Dorchester Turnpike Corporation," were the notes of the corporation, and not of the treasurer. That case, although it has never been in terms overruled, has never been followed in this Commonwealth, can hardly be reconciled with the later decisions, and must be maintained, if at all, upon the ground that the treasurer of a corporation is by virtue of his office the hand by which the corporation conducts all its pecuniary affairs, signs all its commercial paper, and pays all its debts. Eastern Railroad *v.* Benedict, 5 Gray, 565; Fiske *v.* Eldridge, 12 Gray, 474; Draper *v.* Massachusetts Steam Heating Co., 5 Allen, 339.

In that view, the notes of the treasurer of a corporation would be assimilated to those of the cashier of a bank, which the American courts, in accordance with mercantile usage, have often shown the strongest inclination to treat as contracts of the bank. Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 335, 336; Hartford

Bank *v.* Barry, 17 Mass. 94; Folger *v.* Chase, 18 Pick. 63; Bank of Utica *v.* Magher, 18 Johns. 346; Watervliet Bank *v.* White, 1 Denio, 613; Farmers' & Mechanics' Bank of Michigan *v.* Troy City Bank, 1 Doug. (Mich.) 470, 472, 473. It has indeed been adjudged by the Supreme Court of the United States, as well as by this court, that on commercial paper payable to "A. B., cashier," the bank, although not named in the instrument, might maintain an action. Barney *v.* Newcomb, 9 Cush. 53; Baldwin *v.* Bank of Newbury, 1 Wallace, 234. Whether those decisions stand upon the peculiar relation between a bank and its cashier, or (as the opinions imply) upon a general right of any principal to sue upon negotiable paper made to his agent, we need not here inquire. See West Boylston Manuf. Co. *v.* Searle, 15 Pick. 230; Commercial Bank *v.* French, 21 Pick. 486; Fuller *v.* Hooper, 3 Gray, 341; Eastern Railroad *v.* Benedict, 5 Gray, 563, 564, and cases cited; Williams *v.* Robbins, 16 Gray, 77; Bank of United States *v.* Lyman, 20 Vt. 673–677, and cases cited; S. C. 12 How. (U. S.) 243.

But a draft payable to "A. B, Treasurer of the Hampshire Manufacturing Company," has been held to be well indorsed by the signature of "A. B., Treasurer;" Chief Justice Shaw saying, "This mode of naming the payee, for aught that appears on the draft, was a *descriptio personæ*." Shaw *v.* Stone, 1 Cush. 253, 254. Still more directly opposed to the case of Mann *v.* Chandler is that of Seaver *v.* Coburn, 10 Cush. 324, in which it was held that a lease to Nathan P. Coburn, "Treasurer of the Eagle Lodge, No. 114, I. O. O. F.," and signed "N. P. Coburn. Treas.," bound Coburn personally. The files of that case show that the lease was under seal, and it is common learning that a sealed instrument takes effect more according to its form, in proportion to the apparent intention, than a simple contract; but it does not appear by the report or opinion that any stress was laid upon that distinction, or upon its not being shown that an Odd Fellows' Lodge was a corporation capable of contracting.

All the decisions of this court upon unsealed instruments since the case of Mann *v.* Chandler have required something more than a mere description of the general relation between the agent and the principal, in order to make them the contracts of the latter. Thus an agreement which declares the signers to be a committee of a certain town, or trustees of a particular meeting-house, and is signed with their own names, without addition, is their individual contract. Simonds *v.* Heard, 23 Pick. 120; Packard *v.* Nye, 2 Met. 47; and see Crew *v.* Petit, 3 Nev. & Man. 450; S. C. *nom.* Rew *v.* Pettet, 1 Ad. & El. 196. So a promissory note, in the body of which the principal is not named, and which is signed by the agent in his own name, does not, by the mere addition to his signature of the words "trustee" or "president" of a particular railroad corporation, become the note of the corporation. Fiske *v.* Eldridge, 12 Gray, 474; Haverhill Ins. Co. *v.* Newhall, 1 Allen, 130. To the same effect are Fogg *v.* Virgin, 19 Me. 352;

Hills *v.* Bannister, 8 Cow. 31; Barker *v.* Mechanics' Ins. Co., 3 Wend. 98; Moss *v.* Livingston, 4 Comst. 208. We are therefore unwilling to rest our judgment in this case upon the authority of Mann *v.* Chandler.

Nor can our decision be governed by the case, next cited by the plaintiff, of Dawes *v.* Jackson, 9 Mass. 490, in which an indenture made by the defendant, "as superintendent or agent of the Massachusetts State Prison," he having authority by virtue of his office to bind the Commonwealth in the matter of that contract, was held not to bind him personally; for that case may have been decided upon the ground that the defendant was a public agent. Hodgson *v.* Dexter, 1 Cranch, 345; Parks *v.* Ross, 11 How. (U. S.) 374.

Upon the question what words in a simple contract, made by the hand of an agent of an individual or private corporation, will bind the principal, the line of distinction between the cases, even in the same court, is very narrow. Thus it is well settled that a promissory note made by an agent, without naming his principal in the body of it, but signed "For C. D., A. B.," or "A. B., agent for C. D.," or "A. B., for C. D.," is the note of C. D., the principal. Long *v.* Colburn, 11 Mass. 97; Emerson *v.* Providence Hat Manuf. Co., 12 Mass. 237; Ballou *v.* Talbot, 16 Mass 461; Rice *v.* Gove, 22 Pick. 158; Paige *v.* Stone, 10 Met. 160; *Ex parte* Buckley, 14 M. & W. 469. But it seems to be equally well settled in this court, and supported by English authority, that the mere insertion of "for," or "for and in behalf of" the principal, in the body of the note, does not make it the contract of the principal, if signed by the mere name of the agent, without addition. Bradlee *v.* Boston Glass Manufactory, 16 Pick. 347; Morell *v.* Codding, 4 Allen, 403; Penkivil *v.* Connell, 5 Exch. 381; Tanner *v.* Christian, 4 El. & Bl. 591. So a direction in a bill of exchange drawn by an agent to place the amount "to the account" of his principal, has been held not to exempt an agent signing his own name without addition, Mayhew *v.* Prince, 11 Mass. 54, and papers on file in Suffolk, March term, 1814; but to bind the principal, when the word "agent" was added to the signature. Tripp *v.* Swanzey Manuf. Co. 13 Pick. 292, 293; Fuller *v.* Hooper, 3 Gray, 334.

Even the insertion in a promissory note of the word "as" between the name of the signer and the description of his relation to another person, has been held not sufficient to exempt him from personal liability, where the note showed upon its face that no other person was legally bound; as in the case of a promissory note made by a guardian "as guardian," and repeating the word "guardian" after his signature, when he had no authority in law to bind the person or estate of his ward by such a note. Thacher *v.* Dinsmore, 5 Mass. 299; Forster *v.* Fuller, 6 Mass. 58. On like considerations it has been held in England that a promise to pay money made by solicitors "as solicitors," bound them and not their client. Burrell *v.* Jones, 3 B. & Ald. 47. See also Eaton *v.* Bell, 5 B. & Ald. 34.

But wherever it appears upon the face of a simple contract made by the agent of one named therein, and whom he can legally bind thereby, that he acts as agent and intends to bind his principal, the law will give effect to the intention, in whatever form expressed. Thus it seems to be well settled in England that an authorized agent making a written agreement "by procuration of" his principal, binds his principal only. Lord Ellenborough, in Leadbitter *v.* Farrow, 5 M. & S. 345; Wightman and Crompton, JJ., in Mare *v.* Charles, 5 El. & Bl. 980. So this court, in what has long since become a leading case, held that an agreement written upon the back of a negotiable promissory note in these words: "By authority from J. De Wolf, Jr., I hereby guaranty the payment of this note. Isaac Clap," was the contract of De Wolf. New England Marine Ins. Co. *v.* De Wolf, 8 Pick. 56. And an agreement in which "the undersigned, committee for the First School District," promise in behalf of said district to pay a certain sum for building a school-house therein, signed by the individual members of the committee, with the word "committee" opposite all their names, has been held by the Supreme Court of Maine not to make them personally liable. Andrews *v.* Estes, 2 Fairf. 267. See also Abbey *v.* Chase, 6 Cush. 56; Tripp *v.* Swanzey Manuf. Co. and Fuller *v.* Hooper, above cited; Bank of Australasia *v.* Breillat, 6 Moore, P. C. 161, 189; Lewis *v.* Nicholson, 18 Q. B. 503; Green *v.* Kopke, 18 C. B. 549.

The case now before the court is stronger against the principal than any of these. The note is dated at Lee, and calls the person who affixes the signature "treasurer of the Congregational Society," thus distinctly naming the Congregational Society in Lee, and showing who the principal is; the promise contained in the note is expressed to be made by the writer "as treasurer of" that society; it does not promise a payment by the present treasurer at all events, but by him "or his successors in office," which could not be if the note were merely his personal act, and not the act of the corporation whose agent he was; and the designation of his office is repeated after his signature. In short, the note not only names the principal, describes the relation between the principal and the agent, and declares the note to be made in execution of the agency, but it cannot take effect according to its terms, except as the note of the principal.

As the intention to bind the defendants thus appears upon the face of the note, and it is alleged in the declaration and admitted by the demurrer that the agent had authority to bind them, the judgment must be *Demurrer overruled.*[1]

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[1] See Klostermann *v.* Loos, 58 Mo. 290 (1874). — ED.

TUCKER MANUFACTURING COMPANY *v.* FAIRBANKS AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1867.

[98 *Mass.* 101.]

CONTRACT against David Fairbanks & Co. as drawers of the following bill of exchange : —

"$4,469.76. BOSTON, March 23, 1866.

"Two months after date pay to the order of Messrs. Hiram Tucker & Co., four thousand four hundred and sixty-nine $\frac{76}{100}$ dollars, value received, and charge the same to account of

"DAVID FAIRBANKS & Co.,
"*Agts.* Piscataqua F. & M. Ins. Co.
"To Piscataqua F. & M. Insurance Co., So. Berwick, Me."

Across the face of the draft was written, "Accepted for the Treasurer, David Fairbanks, President;" and on the back, "Payable in Boston, Hiram Tucker & Co."

Trial by jury was waived, and the case heard by FOSTER, J., who found the following facts: The signatures of all the parties to the bill were proved or admitted. It was actually made and delivered to the officers of the plaintiff corporation, and accepted by them on the 3d of April, 1866, in payment and satisfaction of the amount of a loss by fire, due on a policy of insurance effected by Hiram Tucker & Co. in the Piscataqua Fire and Marine Insurance Company, which had been ascertained on the 23d of March, and was payable sixty days afterwards, and had been assigned by Hiram Tucker & Co. to the plaintiffs on the 26th of March. The plaintiffs had full knowledge of all the circumstances under which the bill was made. The insurance company, at the time of delivering it, took from the plaintiffs' treasurer this receipt: —

"Piscataqua Fire and Marine Ins. Co., Treasurer's Office,
"$4,469.76. SO. BERWICK, ME., April 3, 1866.

"Received of the Piscataqua Fire and Marine Insurance Company, forty-four hundred and sixty-nine and $\frac{76}{100}$ dollars, in full, for loss and damage to my property by fire on the 19th of March, 1866, insured by policy No. 16,907 in said company.

"Tucker Manufacturing Co. R. S. FAY, *Treas.*"

No evidence was offered of any fraud attending the making of the bill. The defendants offered parol evidence tending to show that it was not expected or intended that they should be liable on the bill, that it was given only to settle the loss, and was supposed and expected by both parties to create a debt against no one but the insurance company.

But the judge excluded such evidence, and held that the question of the defendants' liability must be determined by the instrument itself.[1] . . .

Upon these facts the presiding judge found that due presentment and notice had been waived by the defendants; and reserved the questions, whether the facts warranted this finding, whether the defendants were liable personally as drawers on the face of the bill, and whether the parol evidence offered by them should have been received for the consideration of the full court, according to whose opinion judgment was to be entered for the plaintiff, or for the defendant, or a new trial ordered.

C. Browne, for the plaintiffs.

H. A. Scudder, for the defendants.

GRAY, J.[2] 2. It is equally clear that the liability of the defendants as drawers of a negotiable instrument must be determined from the instrument itself. This is too well settled to admit of discussion. There is no distinction in this respect between the drawer of a bill of exchange and the maker of a promissory note. Bank of British North America *v.* Hooper, 5 Gray, 567; Bass *v.* O'Brien, 12 Gray, 481; Slawson *v.* Loring, 5 Allen, 342; Barlow *v.* Congregational Society in Lee, 8 Allen, 460; Arnold *v.* Sprague, 34 Vt. 402; Met. Con. 108.

3. The question whether the defendants are liable upon the face of the bill requires more consideration. The difficulty is not in ascertaining the general principles which must govern cases of this nature, but in applying them to the different forms and shades of expression in particular instruments. In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability. Amid the great variety of language which may be used by merchants in haste or thoughtlessness, ignorant or unmindful of legal rules, or not anticipating the importance of holding one party rather than the other responsible, it must often happen that cases fall very near the dividing line; and, in order to maintain uniformity of decision, it is necessary for the court to refer to the cases already adjudicated, especially within its own jurisdiction.

The authority which at first sight seems most strongly to support the position of the defendants is that of Ballou *v.* Talbot, 16 Mass. 461, in which a note signed "Joseph Talbot, agent for David Perry," was held not to bind Talbot personally. That case has since been recognized and followed in this Commonwealth. Jefts *v.* York, 4 Cush. 372; Page *v.* Wight, 14 Allen, 182. But the important and effective word in Ballou *v.* Talbot was not the word "agent," nor the name of the principal, but the connecting word "for," which might indeed indicate merely the relation which the agent held to the principal; but which was equally apt to express the fact that the act was done in behalf of the principal, in the same manner as if the words had been transposed thus: "For David Perry, Joseph Talbot, agent." See Deslandes *v.* Gregory, 2 El. & El. 602. This is made manifest by considering that if the word "agent" had been wholly omitted, and the form of the signature had been simply "Joseph Talbot, for David Perry," or "For David Perry, Joseph Talbot," it would have been well executed as the contract of the principal, even if it had been under seal, and of course not less so in the case of a simple contract. Long *v.* Colburn, 11 Mass. 97; Emerson *v.* Providence Hat Manufacturing Co., 12 Mass. 237; Mussey *v.* Scott, 7 Cush. 215; Met. Con. 105, 110.

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[1] Facts indicating waiver of presentment and notice have been omitted. — ED.

[2] After discussing the waiver of presentment and notice. — ED.

On the other hand, in Hills *v.* Bannister, 8 Cowen, 31, a note signed by two persons, with the addition "Trustees of Union Religious Society, Phelps" (who were a legal corporation), was held to bind the signers personally; and in Barker *v.* Mechanic Insurance Co., 3 Wend. 94, a note signed "John Franklin, President of the Mechanic Fire Insurance Company," was held on demurrer not to be the note of the company, although alleged to have been made within the authority of the president and the scope of the legitimate business of the corporation; the court saying: "In this case, there is an averment that the president was lawfully authorized; but it does not appear that he acted under that authority; he does not say that he signs *for the company;* he describes himself as president of the company, but to conclude the company by his acts he should have contracted in their name, or at least on their behalf." The variation between the words "for" and "of" seems at first view slight; but in the connection in which they are used in signatures of this kind the difference is substantial. "Agent of" or "president of" a corporation named simply designates a personal relation of the individual to the corporation. "Agent for" a particular person or corporation may designate either the general relation which the person signing holds to another party, or that the particular act in question is done in behalf of and as the very contract of that other; and the court, if such is manifestly the intention of the parties, may construe the words in the latter sense. But even "agent for" has been held under some circumstances a mere *descriptio personæ* of the agent, as in De Witt *v.* Walton, 5 Selden, 570, in which the name following these words was not the proper name of the principal, but the name of a newspaper which the agent carried on in the principal's behalf, and a note signed "David Hoyt, agent for The Churchman," was held to be the note of Hoyt and not of his principal; and in Shattuck *v.* Eastman, 12 Allen, 369, in which it was held that a paper in the form of a receipt, signed "Robert Eastman, Agent for Ward 6, Lowell, Mass.," if executed under such circumstances as to amount to a contract, might be binding on the agent personally. In Fiske *v.* Eldridge, 12 Gray, 474, in a careful review of the cases by Mr. Justice Dewey, the New York decisions above mentioned were quoted with approval, and a note signed "John T. Eldridge, Trustee of Sullivan Railroad," was held to be the personal note of Eldridge. In Haverhill Insurance Co. *v.* Newhall, 1 Allen, 130, a note signed "Cheever Newhall, President of the Dorchester Avenue Railroad Company," was held to bind Newhall personally, although given by him to an insurance company (as was expressed in the note itself) in consideration of a policy issued to the railroad corporation, which he was in fact authorized to obtain and sign the note for. See also Fullam *v.* West Brookfield, 9 Allen, 1; Morell *v.* Codding, 4 Allen, 403; Tanner *v.* Christian, 4 El. & Bl. 591; Parker *v.* Winslow, 7 El. & Bl. 942; Price *v.* Taylor, 5 H. & N. 540; Bottomley *v.* Fisher, 1 H. & C. 211.

This case is not distinguishable from those just stated. It differs from Ballou *v.* Talbot, in omitting the word "for" (the only evidence, contained in the note there sued on, that it was made in behalf of the principal), leaving the words "Agts. Piscataqua F. & M. Ins. Co." as a mere description of the persons signing this bill. The cases of Mann *v.* Chandler, 9 Mass. 335; Despatch Line of Packets *v.* Bellamy Manufacturing Co., 12 N. H. 205, and Johnson *v.* Smith, 21 Conn. 627, cannot avail the defendants against the later decisions of this court. See 12 Gray, 476; 8 Allen, 461, 462. The name of the principal does not appear in the body of the bill. The address of the bill to the corporation and the request to them to charge the amount to the account of the drawers have certainly no tendency to show that the drawers are the same as the corporation, the drawees. The fact that the bill was delivered to the plaintiffs by the insurance company, as shown by the contemporaneous receipt, does not make it the less the promise of the signers. The defendants must therefore be held personally responsible as the drawers of the bill. *Judgment for the plaintiffs.*[1]

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[1] Compare Chipman *v.* Foster, 119 Mass. 189 (1875). — ED.

CARPENTER *v.* FARNSWORTH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1871.

[106 *Mass.* 561].

CONTRACT on a bank check, of the face of which the following is a copy: —

The Boston National Bank.

ÆTNA MILLS.

$19.20. BOSTON, September 9, 1869.

Pay to L. W. Chamberlin or J. E. Carpenter or order, nineteen dollars $\frac{20}{100}$.

I. D. FARNSWORTH, *Treasurer.*

The case was submitted to the judgment of the Superior Court, and on appeal of this court, on facts agreed substantially as follows: The Ætna Mills owed Chamberlin $19.20 for an order accepted by them payable to him or order, and Chamberlin indorsed the order to the plaintiff, who requested the defendant to pay it, whereupon the defendant, who was the treasurer of the Ætna Mills and authorized to sign checks for them, gave the plaintiff the check declared on. The Boston National Bank refused payment of the check, and due notice thereof was given to the defendant.

J. E. Carpenter, *pro se.*

W. P. Walley, for the defendant.

GRAY, J. The writing sued on, being payable in the alternative to either of the persons named or order, would seem not to be a negotiable instrument. Osgood *v.* Pearsons, 4 Gray, 455. But it is immaterial whether it is or is not. If it is, the question who is liable thereon as drawer must in all cases be determined from the instrument itself. Tucker Manufacturing Co. *v.* Fairbanks, 98 Mass. 101, 104, and authorities there cited. If it is not, there is nothing in the circumstances under which it was made to show an intention to charge the defendant personally, for it is admitted to have been given in payment for a debt of the Ætna Mills. And accordingly the only ground upon which the plaintiff seeks to charge the defendant is that he appears upon the face of the paper to be the drawer thereof.

But we are of opinion that this case does not fall within that class, to which all those cited for the plaintiff belong, in which the name of the principal appears upon the instrument by way of mere designation of the general relation which the signer holds to a corporation; and that this check manifests upon its face that the writing is the act of the principal, though done by the hand of an agent, or in other words, that it is the check of the Ætna Mills, executed by Farnsworth as their treasurer and in their behalf.

The case is not distinguishable from those in which similar instruments have been held by this court to be the contracts of the principal only. The court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intentions of the parties. In Tripp *v.* Swanzey Paper Co., 13 Pick. 291, a draft not naming the principal otherwise than by concluding "and charge the same to the Swanzey Paper Company, yours respectfully, Joseph Hooper, Agent," was held to be the draft of the company. In Fuller *v.* Hooper, 3 Gray, 334, a draft with the words "Pompton Iron Works" printed in the margin, and concluding "which place to account of Pompton Iron Works, W. Burtt, Agent," was held to bind the proprietor of the Pompton Iron Works; and in Bank of British North America *v.* Hooper, 5 Gray, 567, in which a draft concluding "and charge the same to account of Proprietors Pembroke Iron Works, your humble servant, Joseph Barrell," without otherwise naming a principal or disclosing the signer's agency, was held to bind him only, it was said by the court that in Fuller *v.* Hooper, the words "Pompton Iron Works" in the margin of the draft fully disclosed the principal, and that the draft was drawn on his behalf. So in Slawson *v.* Loring, 5 Allen, 340, 343, in which a draft, having the words "Office of Portage Lake Manufacturing Company, Hancock, Michigan," printed at the top, was signed "I. R. Jackson, Agent," Chief Justice Bigelow said, "No one can doubt that on bills thus drawn the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon."

The instrument in question therefore binds the corporation, and not its treasurer personally; the judgment of the Superior Court must be reversed, and there must be *Judgment for the defendant.*[1]

STURDIVANT AND ANOTHER *v.* HULL.

SUPREME COURT OF MAINE. 1871.

[59 *Me.* 172.]

ON exceptions to the ruling of Goddard, J., of the Superior Court for the county of Cumberland, at the November term, 1870.

BARROWS, J. Assumpsit by the payees against the maker of a promissory note of the following tenor: —

$225.00 PORTLAND, Dec. 20, 1869.

U.S.I.R
Stamp.
25 cents.

Four months after date, I promise to pay to the order of Sturdivant & Co., two hundred and twenty-five dollars. Payable at either bank in Portland, with interest. Value received.

JOHN T. HULL, *Treas. St. Paul's Parish.*

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[1] *Acc.*: Hitchcock *v.* Buchanan, 105 U. S. 416 (1881). — ED.

The signature to the note was not denied, but the defendant offered to prove, and if evidence *dehors* the note is admissible for that purpose we must consider it as proved, that at the time the note was made defendant was treasurer of St. Paul's Parish, and made the note in suit, in behalf of said parish and for their sole benefit, in renewal of a former note given by his predecessor, Moody, for lumber used in building their parish church, and that defendant never received any personal consideration or any consideration for the note, other than the foregoing. And that these facts were known to the plaintiffs when the note was given, and that the understanding and intention of both parties, then, was that it was the note of the parish and not of the defendant.

As the suit is between the original parties to the note, it follows that if the proffered evidence showed that there was no valid consideration for the defendant's promise, it should have been admitted. But such is not the case. It is not necessary that the consideration should have enured to the personal benefit of the promisor, and the surrender of the previous note, or the extension of the term of credit originally given to the parish for the lumber, would, either of them, be a sufficient consideration for the defendant's note.

The case presents but two questions: —

1. Whether the defendant's liability must be determined solely by the written instrument which he has subscribed, excluding the evidence above offered to control its construction?

2. If so, does the true construction of it make it his note, or that of the parish?

I. Now, when parties are competent witnesses, and stand ready to testify (if allowed) not only to their own intentions, but to those of the other party to the contract, the wisdom of the long established rule, which requires all parties to written contracts, at their peril, to state what they mean to abide by in the writing itself, and prohibits them from resorting to oral testimony to contradict or vary its terms, grows more apparent every day.

One of the illustrations of this rule, given by Mr. Greenleaf in his Treatise on Evidence, Vol. 1, p. 320, ed. of 1842 (citing Stackpole *v.* Arnold, 11 Mass. 27), runs thus: "Where one signed a promissory note in his own name, parol evidence was held inadmissible to show that he signed it as the agent of another, on whose property he had caused insurance to be effected by the plaintiff, at the owner's request."

When a man has deliberately said, in writing, "I promise to pay," and a valid consideration for the promise is shown, right and justice are not very likely to be the gainers by allowing him to retract and to undertake to prove that he did not actually mean, "I promise," but that he meant, and the other party understood that he meant, that some third party, whose promise the writing does not purport to be, undertook the payment.

It is better that a careless or ignorant agent should sometimes pay for his principal, than to subject the construction of valid written contracts to the manifold perversions, misapprehensions, and uncertainties of oral testimony.

And upon this point the decisions (although, in cases of like type with this, they are somewhat conflicting, or at least, distinguished with scarcely a shade of difference, upon the question of the construction of the instrument itself) will be found concurring. Andrews v. Estes, 11 Maine, 270; Hancock v. Fairfield, 30 Maine, 299; Slawson v. Loring, 5 Allen, 342; Draper v. Mass. Steam Heating Co., 5 Allen, 338; Barlow v. Cong. Soc. in Lee, 8 Allen, 460; Tucker Manuf. Co. v. Fairbanks, 98 Mass. 104, and cases there cited. . . .[1]

The defendant's liability must be ascertained by an examination of the note itself.

II. As has already been suggested, the cases involving the construction of similar instruments are more difficult to reconcile than those in which the point just disposed of has been considered. Apparently slight changes in the phraseology have affected the construction adopted by different courts, and by the same court in different cases. There is a necessity for a careful examination and comparison of the numerous decisions. This we have endeavored to make, and the result is, we are satisfied that the weight of reason and authority demonstrates that this is the personal contract of the defendant and not that of the parish of which he was treasurer.

There are no appropriate words in it to show that it was the contract of the parish, or that it was made by the defendant in its behalf. He does not say that he promises as treasurer, or use any language significative of an intention to bind his successors in office, as in Barlow v. Cong. Soc. in Lee; in which case Mann v. Chandler, a *per curiam* opinion reported 9 Mass. 335, is disavowed as an authority, and it is said that "all the decisions of this court upon unsealed instruments, since the case of Mann v. Chandler, have required something more than a mere description of the general relation between the agent and the principal, in order to make them the contracts of the latter." *Vide* 8 Allen, 461, 462, 463.

In Haverhill M. F. Insurance Co. v. Newhall, 1 Allen, 130, upon a note signed, "Cheever Newhall, president of the Dorchester Avenue Railroad Company," though it was agreed that the defendant, at the time of signing the note, was the president of said company; that it was given in consideration of a policy of insurance issued by the plaintiffs to that company, upon property owned by them, and that the defendant was duly authorized by the company to obtain the insurance and sign the note, it was held that the form of the note only was to be looked at upon the question of charging the defendant; that he had fixed a personal liability upon himself by the use of the words, "I promise to pay," and that this liability was not affected by the descriptive addition to his signature.

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[1] The omitted passages pointed out that the general rule is not abrogated by certain statutory provisions. — ED.

In Fiske *v.* Eldridge, 12 Gray, 474, the note was signed "John S. Eldridge, Trustee of Sullivan Railroad," and the defendant was held personally liable, though he proved that he was trustee of the railroad company, and as such had entire charge of its property and business, and gave the note in suit to take up a promissory note of the corporation, and delivered with it bonds of the corporation as collateral security for its payment.

The defendant's counsel relies upon certain *dicta* intimating that the case of Mann *v.* Chandler may be sustained, because the defendant there, as here, was treasurer of the corporation, and that the signature of that officer may be thought, of itself, to import a promise of the party whose treasurer he is.

But we should be unwilling to say that the treasurer of a religious corporation has any authority by virtue of his office to bind such corporation by the issue of negotiable promissory notes, or that the official signature of such treasurer could be considered as indicating the assertion of such authority, any more than the signature of a person describing himself as president or trustee of a business corporation asserts the requisite authority on the part of such president or trustee.

In Mann *v.* Chandler, relied on by the defendant, the special authority conferred by the directors upon the treasurer to give the note in suit was shown, and in the more recent cases above cited, from 12 Gray and 1 Allen, such authority was either admitted or proved without objection. But the tendency of the later decisions, manifestly, is to hold the man who says, "I promise to pay" (without stating in the writing itself that he promises for or in behalf of any other party), responsible personally. Why should it not be so? That is the plain and direct import of the language he uses. "I" is not the language of a corporation or an association. It is that of an individual signer. If such signer appends to his signature a description of himself as agent, president, trustee, or treasurer of a corporation, it may import a declaration on his part, that, having funds of such corporation in his possession, he is willing to be responsible, and accordingly makes himself responsible for a debt of theirs.

And this *descriptio personæ* may aid him in the keeping and adjustment of his accounts with his different principals.

But without some words in the contract importing that he promises for or in behalf of his principal, he cannot avoid the personal liability he has thus assumed.

In Seaver *v.* Coburn, 10 Cush. 324, the contract signed by defendant as "Treasurer of the Eagle Lodge," etc., was held binding upon him personally. And the distinction which the defendant seeks to set up, between treasurers and other officers and agents of corporations, was ignored.

The fact that it has been suggested as a possible ground upon which the case of Mann *v.* Chandler (so often doubted, and so recently denied to be an authority in the court which pronounced it) might be sustained, can hardly be expected to avail the defendant here.

This subject has been elaborately discussed in Tucker Manuf. Co. *v.* Fairbanks, 98 Mass. 101, and in Barlow *v.* Cong. Soc. in Lee, 8 Allen, 460, and what we have already said may seem superfluous.

It is a satisfaction, however, to know that the view of the law which we take comports well with justice also. In the agreed statement of facts which the parties have appended to the case, it appears that in May, 1870, the parish mortgaged their church edifice and other property to Henry A. Neely and the defendant and other members of the parish associated with them, to secure them for liabilities assumed by them for the parish, and that in the following month, before the commencement of this suit, the equity of redemption from this mortgage was sold on execution against the parish, and purchased in by the mortgagees, so that the appropriation of the materials furnished by the plaintiffs for the building of the church, without compensation, would seem to be a sort of pious fraud which we should be slow to sanction so long as a legal reason for avoiding it could be found.

In the agreed statement it further appears, that there never was any vote of the parish authorizing defendant, as treasurer or otherwise, to sign any negotiable or other paper for the parish, but, that at a meeting of the parish in September, 1869, on defendant's motion, it was voted that the parish assume the payment of all liabilities thus contracted by said Neely, the defendant and others, by thus signing or indorsing any notes for the parish, and that they would "save and hold harmless, from any loss or injury, all persons whatsoever, who may have or shall hereafter assume or become responsible for the payment of any debts of the parish." And on the 12th day of May, 1870, they voted to assume the payment of all notes signed by defendant as treasurer. This tardy assumption might not have availed the plaintiffs in a suit against the parish on this note; for it seems to have been held, that, when one signs as agent in such a case, his authority at the time must be shown, and that subsequent ratification will not make it good as the act of the principal.

Tabor *v.* Cannon, 8 Met. 461; Rossiter *v.* Rossiter, 8 Wendell, 499

But the defendant, who is mortgagee of all the church property, and co-owner of the equity of redemption, fortified by such a vote may haply find means to make it available for his protection.

Exceptions overruled. Judgment for plaintiffs.

APPLETON, C. J.; KENT, WALTON, and DICKERSON, JJ., concurred.

T. T. Snow, for the plaintiffs.

A. A. Strout, for the defendant.[1]

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[1] *Acc.*: Rendell *v.* Harriman, 75 Me. 497 (1883).
Compare Kean *v.* Davis, 21 N. J. L. 683 (1847). — ED.

LIEBSCHER, APPELLANT, *v.* KRAUS, IMPLEADED, RESPONDENT.

SUPREME COURT OF WISCONSIN. 1889.

[74 *Wis.* 387.]

APPEAL from the Circuit Court for Milwaukee County.

The case is stated in the opinion.

For the appellant the cause was submitted on the brief of ***Frank J. Lenicheck***, attorney, and ***J. C. McKenney***, of counsel.

For the respondent there was a brief by ***Winkler***, ***Flanders***, ***Smith***, ***Bottum & Vilas***, and oral argument by ***F. C. Winkler***.

ORTON, J. This action was brought on the following promissory note: —

"$637.40. MILWAUKEE, January 1st, 1887.

"Ninety days after date we promise to pay to Leo Liebscher, or order, the sum of six hundred and thirty-seven dollars and forty cents, value received.

"SAN PEDRO MINING AND MILLING COMPANY.
"F. KRAUS, *President*."

The plaintiff demands judgment on this note against both the corporation and Frederick Kraus, as joint makers. The defendant Kraus answered that he signed the note for the said San Pedro Mining & Milling Company, as its president, and not otherwise, and that his signature was placed upon said note for the purpose of showing who executed the same on behalf of said company, and as a part of the corporation signature to the note, and for no other purpose. The plaintiff offered to prove on the trial, substantially, that Kraus did not sign the name of the company, but signed his own name as a joint maker, intending to bind himself, and that this was according to the understanding of the parties at the time. This offer was rejected, and a verdict in favor of Kraus was directed by the court. This evidence is admissible only on the ground that there is an ambiguity in the signatures to the note. If, in the law, this signing imports that both the company and Kraus are jointly bound, or that only the company is bound, there is no ambiguity, and parol evidence to alter or vary this effect is inadmissible. But if, in the law, such signing imports only that both are bound, or that the company only is bound according to the facts and circumstances in explanation of it and the intention or understanding of the parties, then there is an ambiguity and the evidence was proper.

The contention of the learned counsel of the appellant that this signing imports that both are bound is inconsistent with the offer of such evidence. The learned counsel of the appellant has expressed, in his brief, the true principle as follows: "As to the question of parol evidence, the rule of law is that such evidence cannot be admitted to vary the terms of a contract, or to show contrary intention than that disclosed by the instrument, unless there is an ambiguity." This has been often decided to be the law by this court. Foster *v.* Clifford, 44 Wis. 569; Cooper *v.* Cleghorn, 50 Wis. 113; Hubbard *v.* Marshall, 50 Wis. 322; Gillman *v.* Henry, 53 Wis. 470.

There appears to be an inconsistency in cases where it is first held that such a note *ipso facto* binds the person who signed it with his official name, and yet that parol evidence might be given to make it certain. Heffner *v.* Brownell, 70 Iowa, 591. This case is mentioned as the only one in which it has been decided that such signing binds the person as well as the corporation; but there would seem to be somewhat of an ambiguity in the opinion. In Bean *v.* Pioneer Mining Co., 66 Cal. 451, it seems to have been decided that a similar note bound the company alone, but that parol evidence was proper to explain it. No case is cited, and I can find none, where it has been decided squarely that such a note bound both the company and the person whose name appears below with the name of his office or agency, or bound the company alone, except the case of Chase *v.* Pattberg, 12 Daly, 171, where the note was: "We promise to pay," etc. "[Signed] ENGLISH S. M. CO. H. PATTBERG, Manager;" and it was decided that the company was not bound, but that Pattberg was. The authorities are generally the other way. In Draper *v.* Massachusetts Steam-Heating Co., 5 Allen, 338, the note was: "We promise to pay," etc. "[Signed] MASSACHUSETTS STEAM-HEATING COMPANY. L. S. FULLER, Treasurer." In Castle *v.* Belfast Foundry Co., 72 Me. 167, it was: "We promise to pay," etc., "at office Belfast Foundry Company. [Signed] BELFAST FOUNDRY COMPANY. W. W. CASTLE, President." In Falk *v.* Moebs, 127 U. S. 597, it was: "We promise to pay," etc., "to the order of Geo. Moebs, Sec. & Treas., at," etc. "[Signed] PENINSULAR CIGAR CO. GEO. MOEBS, Sec. & Treas.," and indorsed "GEO. MOEBS, Sec. & Treas." These notes were held to be unambiguous, and not explainable by parol evidence, and the notes of the companies alone.

Many other cases of similar signing are found in the above cases and in the text-books. See, also, Mechem, Ag. § 439; 1 Rand. Com. Paper, 188; 1 Daniel, Neg. Inst. §§ 299-305; Gillet *v.* New Market Savings Bank, 7 Bradw. 499; Scanlan *v.* Keith, 102 Ill. 634; Latham *v.* Houston Flour-Mills, 68 Tex. 137; Story, Ag. § 154; Pars. Notes & B. 312. The question comes very near, if not quite, having been decided by this court in Houghton *v.* First Nat. Bank, 26 Wis. 663, where it is held that an indorsement on a note not belonging to the bank, by "GEO. BUCKLEY, Cas.," he being cashier of the bank, bound the bank and not himself. In Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120, it is held that a note signed by "J. H. SIDMORE, Cash.," bound the bank alone. In Rockwell *v.* Elkhorn Bank, 13 Wis. 653, where the bank promises to pay in the body of the note, and it is signed only by "D. D. SPENCER, Cashier," it was held that the bank only was bound.

The principle of these authorities seems to be "that if the agent sign the note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable: but if his agency appears with his signature, then his principal only is bound." Here the corporation could not sign its own name, and it is not otherwise shown on the face of the note than that Kraus signed the corporate name, and by adding the word "President," to his own name he shows conclusively that as president of the corporation he signed the note, and not otherwise. Such is the natural and reasonable construction of these signatures, and so it would be generally understood. The affix, cashier, secretary, president, or agent, to the name of the person sufficiently indicates and shows that such person signed the bank or corporate name, and in that character and capacity alone. The use of the word "by" or "per" or "pro" would not add to the certainty of what is thus expressed. It is not common to use these words in commercial business. It is sufficiently understood that the paper is signed by the officer or agent named, and for the corporation. But it is useless to prolong this discussion. It is almost too plain for argument. The note was that of the corporation alone, signed by Kraus as its president. The Circuit Court properly rejected the offer of parol proof, and correctly instructed the jury to find a verdict in favor of Kraus.

BY THE COURT. — *The judgment of the Circuit Court is affirmed.*[1]

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[1] *Acc.*: Reeve *v.* First National Bank, 54 N. J. L. 208 (1891).

See Miller *v.* Roach, 150 Mass. 140 (1889).

For additional cases on the topic dealt with in this section, see 1 Ames' Cases on Bills and Notes, 204, 2 id. 216, 221, 224, 550 *et seq.* — ED.

CHAPTER V.

UNDISCLOSED PRINCIPAL.

SECTION I.

Whether the Principal can hold the Third Party.

SCRIMSHIRE *v.* ALDERTON.

NISI PRIUS, LEE, C. J. 1742–43.

[2 *Str.* 1182.]

THE plaintiff, who was a farmer in the Isle of Ely, sent up oats to Bear-Key, consigned to one Hunt as his factor. The custom of the trade appeared to be, that formerly the factor had 4*d.* per quarter for selling them, and they gave immediate notice to the farmer of the name of the buyer, and the price: but this being inconvenient to farmers at a distance, it had for many years past been customary for the farmer to allow 2*d.* per quarter more, upon the factor's taking the risk of the debts: since which they had ceased to inform the farmers of the buyers. The goods in the present case were sold; but the factor failing, the plaintiff (before actual payment) gave notice to the defendant (the buyer) not to pay the factor, which he did, notwithstanding: and thereupon this action was brought.

The CHIEF JUSTICE was of opinion, that this new method had not deprived the farmer of his remedy against the buyer, provided there was no payment to the factor. And the only reason of advancing 2*d.* per quarter was, to have both at stake: and here being notice before actual payment, there could be no harm done. And therefore he directed the jury in favor of the plaintiff. They went out and found for the defendant; were sent out a second and a third time to reconsider it, and still adhered to their verdict; and being asked man by man, they separately declared they found for the defendant. Upon this a new trial was moved for, and no cause being shown was accordingly granted. And at the sittings after this term it came on again before a special jury; when the CHIEF JUSTICE declared, that a factor's sale does by the general rule of law create a contract between the owner and buyer. But notwithstanding this, the jury found for the defendant; and being asked their reason, declared, that they thought from the circumstances no credit was given as between the owner and buyer, and that the latter was answerable to the factor only, and he only to the owner.[1]

COTHAY AND OTHERS *v.* FENNELL AND OTHERS.

KING'S BENCH. 1830.

[10 *B. & C.* 671.]

ASSUMPSIT on a contract for the sale by defendants of a quantity of Barbary gum to the plaintiffs. Plea, the general issue. On the trial before Lord TENTERDEN, C. J., at the London sittings after last Hilary term, it appeared that Cothay carried on business in London, others of the plaintiffs at Glasgow, and the rest at Manchester. These three firms had agreed to be interested in the purchase, but that Cothay should be the actual purchaser; and he gave the order, and the broker knew him only. Upon this it was contended, that Cothay alone could sue upon the contract so made. Lord TENTERDEN overruled the objection, and the plaintiffs had a verdict, the defendants having leave to move to enter a nonsuit.

Gurney now moved accordingly, and contended, that the private agreement between the three houses did not give them a joint right of action against the vendors. They were not all parties to the contract, and if the vendors had been obliged to bring an action on the contract, it must have been against Cothay alone. [LITTLEDALE, J. Cannot a dormant partner sue on a contract made by the ostensible partners?] Yes; but there he is a party to the contract.

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[1] In Scott *v.* Surman, Willes, 400, 405-406 (1742-43), WILLES, C. J., stated thus the case of Gurratt *v.* Cullum, (K. B., 1710): —

"The plaintiff being in Ireland employed Bartwell and Mason as his factors in London to sell goods for him, which he had sent to them. They sell a parcel to J. S. for £20, the plaintiff not knowing to whom they were sold, nor J. S. whose goods they were; but they were delivered to him as the goods of B. and M. by a bill of parcels and charged to their account in their books mutually. B. and M. before payment became bankrupts, and their debts are assigned by the commissioners to the defendant, who afterwards receives the £20 of J. S. The plaintiff brought an action for money had and received to his use; and this matter being referred by Holt for the opinion of the King's Bench, judgment was given on argument for the plaintiff. Afterwards at Guildhall before Lord Chief Justice Parker, this case was cited and allowed to be law, because though it was agreed that payment by J. S. to Bartwell and Mason with whom the contract was made would be a discharge to J. S. against the principal, yet the debt was not in law due to them, but to the person whose goods they were, and therefore it was not assigned to the defendant by a general assignment of their debts, but remained due to the plaintiff as before; and being paid to the defendant who had no right to have it, it must be considered in law as paid for the use of him to whom it was due, and so an action will lie for money had and received to his use." — ED.

Per Curiam. If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made. In Young *v.* Hunter, 4 Taunt. 582, Gibbs, C. J., puts one special instance to the contrary; but that does not govern the present case. Here, Cothay may be considered as agent for the Glasgow and Manchester houses, or they may be treated as dormant partners in this transaction; and a dormant partner in one instance may sue as well as a dormant partner in the general business of a mercantile house.

Rule refused

GRACE HUMBLE *v.* HUNTER.

Queen's Bench. 1848.

[12 *Q. B.* 310.]

Assumpsit, on a charter-party, for freight, demurrage, &c. The declaration stated the instrument as "a certain charter-party of affreightment, then made between the plaintiff, then and still being the owner of the good ship or vessel called *Ann*," and the defendant. Pleas: *Non assumpsit;* and others which it is unnecessary to state.

On the trial, before Wightman, J., at the Durham Summer assizes, 1847, the charter-party was put in, signed, not by the plaintiff, but by her son: and the words of agreement were: "It is" "mutually agreed between C. J. Humble, Esq." (the son), "owner of the good ship or vessel called *The Ann*," "and Jameson Hunter," the defendant. Humble the son was called as a witness on behalf of the plaintiff, to prove that she was the real owner of the vessel, and that he had signed the charter-party as her agent, and not as principal. This line of examination was objected to on the ground that a person who has signed a contract expressly as principal cannot be admitted to prove, in contradiction to the written instrument, that he was merely an agent. The evidence was received, and a verdict found for the plaintiff. *Watson*, in Michaelmas term, 1847, moved for a new trial on account of the reception of this evidence, and on other grounds. The court granted a rule nisi, on this point only.

Knowles and *F. Robinson* showed cause.

Watson and *Pashley, contra.*

Lord Denman, C. J. We were rather inclined at first to think that this case came within the doctrine that a principal may come in and take the benefit of a contract made by his agent. But that doctrine cannot be applied where the agent contracts as principal; and he has done so here by describing himself as "owner" of the ship. The language of Lord Ellenborough in Lucas *v.* De la Cour, 1 M. & S. 249, "If one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made," is very apposite to the present case.

Patteson, J. The question in this case turns on the form of the contract. If the contract had been made in the son's name merely, without more, it might have been shown that he was agent only, and that the plaintiff was the principal. But, as the document itself represents that the son contracted as "owner," Lucas *v.* De La Cour applies. There the partner who made the contract represented that the property which was the subject of it belonged to him alone. The plaintiff here must be taken to have allowed her son to contract in this form, and must be bound by his act. In Robson *v.* Drummond, 2 B. & Ad. 303, where Sharpe, a coachmaker, with whom Robson was a dormant partner, had agreed to furnish the defendant with a carriage for five years, at a certain yearly sum, and had retired from the business, and assigned all his interest in it to C. before the end of the first three years, it was held that an action could not be maintained by the two partners against the defendant, who returned the carriage, and refused to make the last two yearly payments. In this case I was at first in the plaintiff's favor on account of the general principle referred to by my Lord; but the form of the contract takes the case out of that principle.

Wightman, J.[1] I thought at the trial that this case was governed by Skinner *v.* Stocks, 4 B. & Ald. 437. But neither in that nor in any case of the kind did the contracting party give himself any special description, or make any assertion of title to the subject-matter of the contract. Here the plaintiff describes himself expressly as "owner" of the subject-matter. This brings the case within the principle of Lucas *v.* De La Cour and the American authorities cited.

Lord Denman, C.J. Robson *v.* Drummond, which my Brother Patteson has cited, seems the same, in principle, with the present case. You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract.

Rule absolute.

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[1] Coleridge, J., having heard the argument for the defendant only, gave no judgment. — Rep.

SCHMALTZ *v.* AVERY

QUEEN'S BENCH. 1851.

[16 *Q. B.* 655.]

ASSUMPSIT on a memorandum of charter between the defendant as shipowner and the plaintiff as freighter. Breach: that defendant would not receive cargo. Plea: *Non assumpsit.* Issue thereon. Other issues of fact, which it is unnecessary to state.

On the trial, before WIGHTMAN, J., at the Newcastle summer assizes, 1850, it appeared that the plaintiff carried on business under the firm of Schmaltz & Co. The execution of a charter-party by the defendant was proved. It was expressed to be made between the defendant as owner of the ship of the one part "and G. Schmaltz & Co. (agents of the freighter) of the other part." At the end of the charter-party there was a memorandum in these terms: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." In the declaration no notice was taken of this memorandum: in other respects the agreement set out corresponded with that proved. Oral evidence was given that the plaintiff was in truth principal. The learned judge directed a verdict for the defendant on the issue upon *Non assumpsit*, leave being reserved to move to enter a verdict for the plaintiff on that issue. The other issues were left to the jury, who found a verdict for the plaintiff for £5 10*s.*, subject to leave to enter a verdict for the defendant on another issue.

Knowles obtained a rule *nisi* to enter a verdict for the plaintiffs on the issue joined on the plea of *non assumpsit.*

Watson and *Unthank* showed cause.

Knowles and *Udall*, *contra.*

PATTESON, J.[1] It is conceded that, if there had been a third party who was the real freighter, such party might have sued, although his name was not disclosed in the charter-party. But the question is, whether the plaintiff can fill both characters of agent and principal; or, rather, whether he can repudiate that of agent and adopt that of principal; both characters being referred to in the charter-party, but the name of the principal not being therein mentioned. The cases principally relied on for the defendant were Bickerton *v.* Burrell, 5 M. & S. 383, and Rayner *v.* Grote, 15 M. & W. 359, in both which cases the supposed principal was named in the instrument of contract: also the case of Humble *v.* Hunter, 12 Q. B. 310. In the case of Bickerton *v.* Burrell, the plaintiff, on the face of the contract, professed to enter into it as agent for C. Richardson. At the trial, C. Richardson was called to prove that her name was used without her knowledge, and that she had nothing to do with the contract. Lord Ellenborough refused to receive the evidence, and nonsuited the plaintiff. A rule *nisi* to set aside the nonsuit was obtained, but on argument was discharged, on the ground that a person who has exhibited himself as agent for another whom he names, cannot at once throw off that character and put himself forward as principal without any communication or notice to the other party. All the judges relied on the want of such notice, which seems to have been the chief ground of their decision; for they considered that the defendant was thereby placed in great difficulty, as he had contracted in point of law with Richardson and not with the plaintiff, and might have no means of ascertaining or even conjecturing that she was not the real party The soundness of that ground of decision was somewhat doubted in the late case of Rayner *v.* Grote, 15 M. & W. 359. There the plaintiff contracted as agent for Johnson, but was in truth himself the principal. He sued the defendant for not accepting and paying for goods. The defendant had accepted and paid for a great part of the goods sold, and knew, before he refused the residue, that the plaintiff was the real principal: and so the case was distinguishable from that of Bickerton *v.* Burrell, 5 M. & S. 383, upon the very ground on which that decision proceeded; and the plaintiff was held to be entitled to sue.[1] . . . The case of Jenkins *v.* Hutchinson, 13 Q. B. 744, was also cited for the defendant: but it proceeded on a different ground, and is not applicable to the present question. There the defendant was sought to be charged as principal on a charter-party executed by him, on the face of it, as agent for Barnes. He had in truth no authority from Barnes; nor was he himself interested at all; and the Court held that he could not be sued as principal without showing that he really was so. A distinction was taken, on the argument in the present case, by the defendant's counsel, between an executed and an executory contract: and it was said that, whatever might be the rule in the former class of cases, where the defendant has received the benefit of the contract, and it is probably immaterial to him whom he pays, yet that in the latter class the defendant cannot properly be held answerable to B., having expressly contracted with A. And a passage in the judgment of the court in Rayner *v.* Grote, 15 M. & W. 359, 365, was much relied on. "If, indeed, the contract had been wholly unperformed, and one which the plaintiff, by merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt. In many such cases, such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule." With this passage we entirely agree; but it is plain that it is applicable only to cases where the supposed principal is named in the contract: if he be not named, it is impossible that the other party can have been in any way induced to enter into the contract by any of the reasons suggested.

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[1] After stating the case. — ED.

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[1] Here was stated Humble *v.* Hunter, *ante*, p. 629. — ED.

In the present case, the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters can be surmised. Any one who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have sued on this charter-party. The defendant cannot have been in any way prejudiced in respect to any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him, and he did not think it necessary to inquire who he was. It is indeed possible that he may have been contented to take any freighter and principal provided it was not the present plaintiff, and may have relied on the terms of the charter-party indicating that the plaintiff was an agent only, being willing to accept of any one else, be he who he might, as principal. After all, therefore, the question is reduced to this: Whether we are to assume that the defendant did so rely on the character of the plaintiff as agent only, and would not have contracted with him as principal if he had known him so to be, and are to lay it down as a broad rule that a person contracting as agent for an unknown and unnamed principal is precluded from saying, I am myself that principal. Doubtless his saying so does in some measure contradict the written contract, especially the concluding clause which says: "This charter being concluded on behalf of another party," &c.; for there was no such other party. It may be that the plaintiff entered into the charter-party for some other party, who had not absolutely authorized him to do so, and afterwards declined taking it; or it may be that he intended originally to be the principal: in either case the charter-party would be, strictly speaking, contradicted: yet the defendant does not appear to be prejudiced: for, as he was regardless who the real freighter was, it should seem that he trusted for his freight to his lien on the cargo. But there is no contradiction of the charter-party if the plaintiff can be considered as filling two characters, namely those of agent and principal. A man cannot in strict propriety of speech be said to be agent to himself. Yet, in a contract of this description, we see no absurdity in saying that he might fill both characters; that he might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt that character of freighter himself if he chose.

There is nothing in the argument that the plantiff's responsibility is expressly made to cease "as soon as the cargo is shipped;" for that limitation plainly applies only to his character as agent; and, being real principal, his responsibility would unquestionably continue after the cargo was shipped.

Upon the whole, we are of opinion that this rule must be made absolute. *Rule absolute.*[1]

MEHITABEL HUNTINGTON *v.* KNOX.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1851.

[7 *Cush.* 371.[2]]

SHAW, C. J. This action is brought to recover the value of a quantity of hemlock bark, alleged to have been sold by the plaintiff to the defendant, at certain prices charged. The declaration was for goods sold and delivered, with the usual money counts. The case was submitted to a referee by a common rule of court, who made an award in favor of the plaintiff, subject to the opinion of the court on questions reserved, stating the facts in his report, on which the decision of those questions depends.

The facts tended to show that the bark was the property of the plaintiff; that the contract for the sale of it was made by her agent, George H. Huntington, by her authority; that it was made in writing by the agent, in his own name, not stating his agency, or naming or referring to the plaintiff, or otherwise intimating, in the written contract, that any other person than the agent was interested in the bark.

Objection was made, before the referee, to the admission of parol evidence, and to the right of the plaintiff to maintain the action in her own name. The referee decided both points in favor of the plaintiff, holding that the action could be maintained by the principal and owner of the property, subject to any set-off or other equitable defence, which the buyer might have, if the action were brought by the agent.

The court are of opinion, that this decision was correct upon both points. Indeed they resolve themselves substantially into one; for *prima facie*, and looking only at the paper itself, the property is sold by the agent, on credit; and in the absence of all other proof, a promise of payment to the seller would be implied by law; and if that presumption of fact can be controverted, so as to raise a promise to the principal by implication, it must be by evidence *aliunde*, proving the agency and property in the principal.

It is now well settled by authorities, that when the property of one is sold by another, as agent, if the principal give notice to the purchaser, before payment, to pay to himself, and not to the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent.

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[1] See Hunter *v.* Giddings, 97 Mass. 41 (1867). — ED.

[2] Only the opinion is reprinted. — ED.

When a contract is made by deed under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it; and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it.

But a different rule, and a far more liberal doctrine, prevails in regard to a written contract not under seal. In the case of Higgins *v.* Senior, 8 Mees. & Welsb. 834, it is laid down as a general proposition, that it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract of sale, so as to give the benefit of the contract, on the one hand, to, and charge with liability on the other, the unnamed principals; and this whether the agreement be or be not required to be in writing, by the Statute of Frauds. But the court mark the distinction broadly between such a case and a case where an agent, who has contracted in his own name, for the benefit, and by the authority of a principal, seeks to discharge himself from liability, on the ground that he contracted in the capacity of an agent. The doctrine proceeds on the ground that the principal and agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a contract made by his authority for his account. Paterson *v.* Gandasequi, 15 East, 62; Magee *v.* Atkinson, 2 Mees. & Welsb. 440; Trueman *v.* Loder, 11 Ad. & El. 589; Taintor *v.* Prendergast, 3 Hill, 72; Edwards *v.* Golding, 20 Vt. 30. It is analogous to the ordinary case of a dormant partner. He is not named or alluded to in the contract; yet as the contract is shown in fact to be made for his benefit, and by his authority, he is liable.

So, on the other hand, where the contract is made for the benefit of one not named, though in writing, the latter may sue on the contract, jointly with others, or alone, according to the interest. Garrett *v.* Handley, 4 B. & C. 664; Sadler *v.* Leigh, 4 Campb. 195; Coppin *v.* Walker, 7 Taunt. 237; Story on Agency, § 410. The rights and liabilities of a principal, upon a written instrument executed by his agent, do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts; 1, that the act is done in the exercise, and 2, within the limits, of the powers delegated; and these are necessarily inquirable into by evidence. Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326.

And we think this doctrine is not controverted by the authority of any of the cases cited in the defendant's argument. Hastings *v.* Lovering, 2 Pick. 214, was a case where the suit was brought against an agent, on a contract of warranty upon a sale made in his own name. The case of the United States *v.* Parmele, Paine, 252, was decided on the ground that, in an action on a written executory promise, none but the promisee can sue. The court admit that, on a sale of goods made by a factor, the principal may sue.

This action is not brought on any written promise made by the defendant; the receipt is a written acknowledgment, given by the plaintiff to the defendant, of part payment for the bark, and it expresses the terms upon which the sale had been made. The defendant, by accepting it, admits the sale and its terms; but the law raises the promise of payment. And this is by implication, *prima facie*, a promise to the agent; yet it is only *prima facie*, and may be controlled by parol evidence that the contract of sale was for the sale of property belonging to the plaintiff, and sold by her authority to the defendant, by the agency of the person with whom the defendant contracted.

We are all of opinion that the provisions of Rev. Sts. c. 28, § 201, do not apply to the sale of bark, as made in this case.

Judgment on the award for the plaintiff.[1]

SECTION II.

Whether the Third Party can hold the Principal.

RAILTON *v.* HODGSON.
PEELE *v.* HODGSON.

NISI PRIUS. 1804.

[4 *Taunton*, 576, n. (*a*).]

THE facts were, that the defendant, Hodgson, had formerly been a clerk with Smith, Lindsay, & Co., which the vendors knew; that he purchased goods himself, and directed the vendors to draw bills upon Smith, Lindsay & Co., and make out invoices to that house, which was then a house of good credit, and without whose security Hodgson could not have obtained credit and made the purchases. Smith, Lindsay, and Co. received from the defendant a commission of from 2 and half to 5 per cent upon the goods. The vendors entered the goods in their own books, in the names of Smith, Lindsay, and Co., made out the invoices in the names of, and sent them to Smith, Lindsay, and Co., and drew bills upon them for the amount, which Smith, Lindsay, and Co. accepted. The defendant insisted that he purchased as the agent of Smith, Lindsay, and Co., and in their names, and on their account, as he used to do when in their employ. There was proof, however, of his being the principal, and having bought the goods on his own account. The plaintiffs obtained a verdict, and MANSFIELD, C. J., in summing up the evidence, observed to the jury, "that it was admitted these goods were never delivered to Smith, Lindsay, & Co.; the defendant had the goods, and the profits and loss. Smith, Lindsay, and Co. were only to have a commission, for which they lent their credit. Suppose a principal authorizes a factor to sell goods, and he sells in his own name, the principal may call upon the vendee for payment. It appeared that Hodgson had been a trader from 1798. Suppose Hodgson had not been known to be the buyer, he would have been liable; Smith, Lindsay, and Co. would only have been nominal buyers. If Hodgson had really paid Smith, Lindsay, & Co., it would have depended upon circumstances whether he would be liable to pay for the goods over again; if it would have been unfair to have made him liable he would not have been so. What pretence was there that the plaintiffs should be thrown upon the insolvent estate of Smith, Lindsay, & Co., who never had the goods? This was a stronger case than that of a dormant partner. The buyer must be liable, though a third person may also, unless there is an express agreement that the buyer shall not be liable." The jury found a verdict for the plaintiffs. A motion was made in the following term to set aside the verdict, and have a new trial; but the Court refused it.

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[1] In Edwards *v.* Golding, 20 Vt. 30 (1847), Mills, agent of Edwards, but supposed to be acting for himself alone, sold Edwards' goods to Golding & Peabody. Afterwards, in Mills' absence and as his representative, Edwards executed a bill of sale in this form: "Golding & Peabody bought of J. W. Mills, 15 tons . . . old iron . . . $271.99. Rec'd note at four months. . . . Burlington, 6th June. J. W. Mills, *per* J. H. Edwards." The note having been paid, an action for the remainder of the purchase price was brought in the name of Edwards. It was held that Edwards could recover. BENNETT, J., delivering the opinion of the court, said: "We do not think that it impugns any rule of law to allow it to be shown by parol that Mills in the sale was but the agent of the plaintiff. It is consistent with the bill of sale that the defendants bought the iron of Mills either as agent or principal. It does not profess to state in what capacity he was acting; and, without any violence to language, an agent might adopt the phraseology in this bill of sale." — ED.

THOMSON *v.* DAVENPORT AND OTHERS.

KING'S BENCH. 1829.

[9 *B. & C.* 78.]

THIS was a writ of error, brought upon a judgment obtained in the borough court of Liverpool against the plaintiff in error. The plaintiff below declared for goods sold and delivered. Plea, general issue. Upon the trial before the mayor, and bailiffs, assisted by the recorder, a bill of exceptions was tendered to the direction given by the mayor, bailiffs, etc., by the said recorder to the jury. The bill of exceptions stated that one Thomas M'Kune was produced and examined upon oath as a witness by the counsel for the plaintiffs, to maintain the issue on their parts. And M'Kune stated in evidence that he, M'Kune, was established in Liverpool as a general Scotch agent, and amongst others, acted as agent for the defendant, who resided in Dumfries; that, in March, 1823, he received from the defendant a letter, containing an order to purchase various goods, and, amongst others, a quantity of glass and earthenware; which letter, with the order, was produced by the plaintiffs' attorney, and was read in evidence as follows: "Dumfries, 29th March, 1823. Annexed is a list of goods which you will procure and ship per *Nancy*. Memorandum of goods to be shipped: twelve crates of Staffordshire ware, crown window glass, ten square boxes," &c., &c. That he, M'Kune, provided himself with the goods mentioned in this letter, and that he got the glass and earthenware from the plaintiffs, who were glass and earthenware dealers in Liverpool: that at the time he ordered the glass and earthenware he saw the plaintiff, Mountford Fynney, himself, and, to the best of his recollection, told him, that he, M'Kune, had an order to purchase some goods, and that they were the same house for whom he had purchased goods from the plaintiffs the preceding year; and he also stated, to the best of his recollection, that as he was a stranger to the nature of the goods, he hoped that the plaintiffs would let him have the same as before, to save him from blame by his employer; but he, M'Kune, did not show the plaintiffs the letter containing the order, nor did he mention the name of any principal; that he then either gave the plaintiff, Mountford Fynney, a copy of the order, or produced to him the original order, that Fynney might himself take a copy, but he rather thought the former was the fact, and that the plaintiff Fynney did not see the original, though he could not say positively; that the plaintiff accordingly furnished the glass and earthenware, the amount of which, deducting the discount, was £193 7*s.* 8*d.*, but adding the discount, £219 10*s.*, and rendered invoices thereof to M'Kune, headed thus: "Mr. Thomas M'Kune bought of John and James Davenport" (which was the plaintiffs' firm); that M'Kune entered the net amount (£193 7*s.* 8*d.*), to the credit of the plaintiffs in an account with them in his books, and charged the same sum, with the addition of 2 per cent for the commission, to the debit of the defendant in an account with him, which was according to his invariable course of dealing; and that he sent to the defendant a general invoice of all the goods purchased, comprising the glass and earthenware, but not mentioning the plaintiffs' names; that afterwards, in April, 1823, and before the credit for the goods had expired, M'Kune became insolvent, though up to the day of his stopping payment he was in good credit, and could have bought goods on trust to the amount of £20,000; whereupon the said mayor and bailiffs, by the said recorder, after stating the evidence, told the jury that, from the distance of time since the sale took place, there was some uncertainty in the evidence of M'Kune as to the precise words used by him to the plaintiffs at the time he gave them the order for the goods; but it appeared to them (the said recorder) upon the evidence, that the name of the defendant as principal was not then communicated or known to the plaintiffs; and directed the jury that if they were of opinion that the defendant's name as principal was mentioned by M'Kune to the plaintiffs at the time the order was given, or that the plaintiffs then knew that the defendant was the principal, their verdict ought to be for the defendant; but if they were of opinion that the defendant's name as the principal was not mentioned by M'Kune to the plaintiffs at the time of the order being given, and that the plaintiffs did not then know that the defendant was the principal, and they did not think, upon all the said facts of the case, that the plaintiffs at the time of the order being given knew who the principal was, so that they then had a power of electing whether they would debit the defendant or M'Kune, they ought to find a verdict for the plaintiffs; and that, although the plaintiffs at the time of the sale might think that M'Kune was not buying the goods upon his own account, yet if his principal was not communicated or made known to them, that circumstance ought to make no difference in the case. The jury, after finding as a fact that the letter containing the order was not shown and made known to the plaintiffs, gave their verdict for the plaintiffs below for £219 10*s*. It was contended that the mayor and bailiffs, by the recorder, ought to have directed the jury that if they were satisfied that Davenport, &c. at the time of the order being given knew that M'Kune was buying the goods as an agent, even though his principal was not communicated or made known to them, they, by afterwards debiting M'Kune, and so rendering the said invoices, had elected to take him for their debtor, and had precluded themselves from calling on Thomson.

Joy for the plaintiff in error.

Patteson, *contra*.

Lord TENTERDEN, C. J. I am of opinion that the direction given by the learned recorder in this case was right, and that the verdict was also right. I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of Addison *v.* Gandasequi, 4 Taunt. 574, and Paterson *v.* Gandasequi, 15 East, 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but they were not informed *who* the principal was. They had not, therefore, at that time the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner. In this case, the buyers lived at Dumfries; and a question might have been raised for the consideration of the jury, Whether, in consequence of their living at Dumfries, it may not have been understood by all persons at Liverpool, where there are great dealings with Scotch houses, that the plaintiffs had given credit to M'Kune only, and not to a person living, though not in a foreign country, yet, in that part of the king's dominions which rendered him not amenable to any process of our courts? But, instead of directing the attention of the recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs, at the time of the order being given, knew that M'Kune was buying goods for another, even though his principal might not be made known to them, they, by afterwards debiting M'Kune, had elected him for their debtor. The point made by the defendant's counsel, therefore, was, that if the plaintiffs knew that M'Kune was dealing with them as agent, though they did not know the name of the principal, they could not turn round on him. The recorder thought otherwise: he thought that though they did know that M'Kune was buying as agent, yet, if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment of the court below must therefore be affirmed.

Bayley, J. There may be a course of trade by which the seller will be confined to the agent who is buying, and not be at liberty at all to look to the principal. Generally speaking, that is the case where an agent here buys for a house abroad. There may also have been evidence of a course of trade, applicable to an agent living here acting for a firm resident in Scotland. But that does not appear to have been made a point in this case, and it is not included in the objection which is now made to the charge of the recorder. In my opinion, the direction of the recorder was right; and it was, with the limits I have mentioned, perfectly consistent with the justice of the case. Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent. But the seller, who knows who the principal is, and instead of debiting that principal debits the agent, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal, destroys the right of the seller to look to that principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said, that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment. But in a case circumstanced as this case is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller or to the solvent agent, or to the estate of the insolvent agent, who has made no payment in respect of these goods. The justice of the case is, as it seems to me, all on one side, namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid any body else. Now, upon the evidence, it appears that the defendant had the goods, and has not paid for them either to M'Kune or to the present plaintiffs, or to any body else. He will be liable to pay for them either to the plaintiffs or to M'Kune's estate. The justice of the case, as it seems to me, is, that he should pay the plaintiffs who were the sellers, and not any other person. I am, therefore, of opinion that the direction of the recorder was right.

Littledale, J. The general principle of law is, that the seller shall have his remedy against the principal, rather than against any other person. Where goods are bought by an agent, who does not at the time disclose that he is acting as agent, the vendor, although he has debited the agent, may upon discovering the principal, resort to him for payment. But if the principal be known to the seller at the time when he makes the contract, and he, with a full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal. Or if in such case he debits the principal, he cannot afterwards charge the agent. There is a third case: the seller may, in his invoice and bill of parcels, mention both principal and agent; he may debit A. as a purchaser for goods bought through B., his agent. In that case, he thereby makes his election to charge the principal, and cannot afterwards resort to the agent. The general principle is, that the seller shall have his remedy against the principal, although he may, by electing to take the agent as his debtor, abandon his right against the principal. The present case differs from any of those which I have mentioned. Here the agent purchased the goods in his own name. The name of the principal was not then known to the seller, but it afterwards came to his knowledge. It seems to me to be more consistent with the general principle of law that the seller shall have his remedy against the principal, rather than against any other person, to hold in this case that the seller, who knew that there was a principal, but did not know who that principal was, may resort to him as soon as he is discovered. Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. The seller was in the same situation, as if at the time of the contract he had not known that there was any principal besides the person with whom he was dealing, and had afterwards discovered that the goods had been purchased on account of another; and in that case it is clear that he might have charged the principal. It is said that he ought to have ascertained by inquiry of the agent who the principal was, but I think that he was not bound to make such inquiry, and that by debiting the agent with the price of the goods, he has not precluded himself from resorting to the principal, whose name was not disclosed to him. It might have been made a question, whether it was not a defence to this action that the principal resided in Scotland. But that was not a point made at the trial, nor noticed in the bill of exceptions; we cannot, therefore, take it into our consideration. For the reasons already given, I think the plaintiff is entitled to recover.

Judgment affirmed.[1]

Parke, J., having been concerned as counsel in the cause, gave no opinion.

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[1] See Paterson v. Gandasequi, *ante*, p. 527; Hutton v. Bulloch, L. R. 9 Q. B. 572 (Ex. Ch. 1874). — Ed.

PENTZ *v.* STANTON.

SUPREME COURT OF NEW YORK. 1833.

[10 *Wend.* 271.]

THIS was an action of assumpsit, tried at the Madison Circuit in September, 1830, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The first count in the declaration was on a bill of exchange for $158.36, bearing date 25th May, 1826, charged to have been drawn by one Henry F. West, by the name and description of H. F. West, agent, he, the said West, then and there being the agent and servant of the defendant in that behalf, according to the custom of merchants. The bill was drawn on one James Carey, payable four months after date, was accepted by Carey, and when due was protested for non-payment, and notice of non-payment was alleged to have been given to the defendant. There was also the common counts for goods sold and delivered to the defendant, and for money lent, &c. The defendant pleaded the general issue, and specially that the bill of exchange counted upon was received and accepted by the plaintiff in satisfaction of the goods sold; as to which the plaintiff took issue. On the trial the bill was produced, and purported to be signed H. F. West, agent. A regular protest was shown, and notice of the same addressed to and received by West at Manchester, in Oneida County, where West at the date of the bill, and before and since as the agent of the defendant, superintended a woollen manufactory belonging to the defendant, who resided at Pompey in Onondaga County, and spent only a portion of his time at the factory. West testified that he was authorized by the defendant to make notes and draw bills of exchange in the name of the defendant and as agent in his behalf; that the bill in question was given on the purchase by him of a quantity of dye-stuffs of the plaintiff for the defendant, taken to and used in the factory and in the business of the defendant; that when he called for the goods, he proposed to the plaintiff to give him the bill in question, who agreed to accept and did accept the same, giving him, the witness, a bill of the goods, headed, "Mr. H. F. West, Agent, bought of W. A. F. Pentz," and receipting the draft at the bottom. He further testified, that he informed the defendant of the drawing of the bill of exchange, and delivered the notice of protest to him, but did not do so until several weeks after he had received it; that the letters relating to the factory business were generally sent to Manchester, sometimes addressed to the defendant and sometimes to the witness as agent; and that he always opened them, whether addressed to his principal or himself. It further appeared that the acceptor failed before the bill fell due, and that on the day after the bill was protested, the plaintiff addressed a letter to West, complaining that he had suffered the protest, as he had been apprised by the acceptor of his inability to meet it. On this evidence, the defendant's counsel insisted that the plaintiff was not entitled to recover; but the judge ruled that he was entitled to recover, and so instructed the jury, who accordingly found the amount of the bill, with interest. The defendant moves for a new trial.

P. Gridley, for the defendant.

J. A. Spencer, for the plaintiff.

By the Court, SUTHERLAND, J. The plaintiff cannot recover upon the bill of exchange against the present defendant. His name nowhere appears upon it. It was drawn and subscribed by West in his own name, with the simple addition of "agent," but without any specification whatever of the name of the principal. Mr. Chitty, in his valuable Treatise on Bills, says, page 22, "It is a general rule that no person can be considered a party to a bill, unless his name or the name of the firm of which he is a partner, appear on some part of it;" and Mr. Justice Buller, in Fenn *v.* Harrison, 3 T. R. 761, observes, that in the case of bills of exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself; the acceptor, the drawers, and the indorsers are all liable in their turns, but they are only liable because they have written their names on the bill; but this is an attempt to make some other persons liable, whose names do not appear on the bill.[1] . . .

The next inquiry is whether the defendant is liable upon the counts for goods sold and delivered. West was examined as a witness, and testified that he was the agent of the defendant in carrying on a woollen manufactory in Oneida County; that the goods for which he gave the bill were purchased for the defendant, and were used in his business of manufacturing; that he had authority to draw bills of exchange and notes in the name of the defendant; that when he called for the goods in this case, he proposed to let the plaintiff have the draft in question; that the plaintiff said he would inquire about the drawee, and did so, and afterwards received the draft from the witness, and gave the receipt at the bottom of the bill. It does not appear that West disclosed to the plaintiff the fact that the goods were purchased for the defendant. The bill of goods delivered to him was headed Mr. H. F. West, agent, and the draft which he gave was also signed by him as agent. These are the only circumstances showing the mutual understanding of the parties that West was acting as agent and not as principal in the transaction. It was shown that payment of the bill had been regularly demanded of the drawee, and notice of its dishonor regularly given to West, the drawer. This would entitle the plaintiff to resort to the common count as against West, if he were the defendant, and it had been a transaction unquestionably on his own account. Jones & Mann *v.* Savage, 6 Wend. 659, 662. The question then upon this branch of the case is, whether the goods were sold to West exclusively upon his own individual credit, and the credit of the bill which he drew, so as to prevent the plaintiff from all remedy against the defendant, for whom they were in fact purchased, and who has had the exclusive benefit of them. The only additional evidence upon this point, not already adverted to, is the letter written by the plaintiff to West on the 29th September, 1826, advising him of the dishonor of the bill by the drawee, and requesting him to make provision for its payment. I do not think that this is a circumstance of much importance in the case. The communication would of course be made to West, and he would be called on for payment, admitting that he was known and considered by the plaintiff as a mere agent, as a matter of necessity; and it does not appear that the plaintiff knew who the principal was. It was a question for the jury to decide whether the goods were sold exclusively upon the credit of West and of the bill, or not, Bentley *v.* Griffin, 5 Taunt. 356; 1 Com. L. R. 131; Legget *v.* Reed, 1 Car. & Payne, 16; 11 Com. L. R. 301, and cases stated in note; and it is to be regretted that it was not distinctly left to them by the judge. Upon the evidence, I think the jury would have been justified in finding for the plaintiff on this point. The plaintiff certainly knew that West was acting as agent for some third person. The bill of goods was made out to him as agent, and the draft which he received was signed by West as agent. It would not be an unreasonable conclusion from these facts, that the plaintiff did not repose entirely upon the security and responsibility of West, but had regard to the eventual liability of the principal, whoever he might be, if it should become necessary to resort to him. If the plaintiff should fail in this action on the ground that the credit was given exclusively to West, then no doubt he could recover in an action against West; and it is equally clear that whatever money West may be compelled to pay on this account, would be money paid to the use of the defendant, and which he might recover from him. The defendant must eventually pay for these goods, and I see no legal objection to a recovery against him in this action upon the common counts.

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[1] The omitted passages deal with the topics treated in Chapter IV. sec. III. — ED.

Motion for new trial denied.

LERNED AND ANOTHER *v.* JOHNS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1864.

[9 *Allen*, 419.]

CONTRACT brought to recover damages for the failure to deliver a quantity of coal, sold by the defendant to the plaintiffs. One ground of defence was, that the contract was not binding because not executed in conformity to the Statute of Frauds.

At the trial in the superior court, before MORTON, J., the plaintiffs introduced evidence tending to show that on the 4th of April, 1863, J.

W. Gregg, as agent of Wannemacher & Maxfield, and for and in behalf of the defendant, made a parol contract to sell to the plaintiffs from two hundred and fifty to three hundred tons of lump "Johns coal" at five dollars per ton, according to the terms of the written memorandum hereinafter referred to; and also the same quantity of broken "Johns coal," on the same terms; and that papers were accordingly executed for the sale . . . signed, on the one part, by the plaintiffs, and, on the other, by "Wannemacher & Maxfield, by J. W. Gregg." All of the above papers were put in evidence by the plaintiffs, those signed by them being produced by the defendant on notice. Wannemacher & Maxfield and the defendant subsequently refused to deliver the coal to the plaintiffs.

Upon the introduction of this evidence, the judge ruled that the action could not be maintained; and a verdict was accordingly taken for the defendant. The plaintiffs alleged exceptions.

G. A. Somerby, for the plaintiffs.

C. A. Welch, for the defendant.

HOAR, J.[1] Another point is taken by the defendant: that the signature "Wannemacher & Maxfield, per J. W. Gregg," is not a sufficient signature to the memorandum to bind him, although it were proved by parol that Wannemacher and Maxfield were his agents, duly authorized to make the contract on his behalf, and that they actually made it for him through Gregg. There can of course be no controversy that the name of Wannemacher & Maxfield is sufficiently signed; but it is contended that it is not competent to show by parol that a party whose name is signed as a principal is only the agent of a third person, when there is no intimation in the memorandum that he acted as agent. The doctrine is well settled in England that, when a written contract not under seal is made by or with an agent, the principal, although undisclosed, may sue or be sued upon it, except in the case of commercial paper. Kenworthy *v.* Schofield, 2 B. & C. 945. It is fully and strongly stated in Higgins *v.* Senior, 8 M. & W. 834, and is affirmed in many other cases cited by Mr. Justice Dewey in Eastern Railroad *v.* Benedict, 5 Gray, 561; and it is adopted by the most approved writers on the law of agency. To what extent it is the law of this Commonwealth it was not necessary fully to determine in the case last cited; though it is there said to be well settled that the rule applies to cases of sales by written bills, or other memoranda made by the agent, using his own name, and disclosing no principal.

There are certainly *dicta* to the contrary in Stackpole *v.* Arnold, 11 Mass. 27. And in Shaw *v.* Finney, 13 Met. 453, where the question was on the sufficiency of the signature to a memorandum to bind the defendant under the Statute of Frauds, and the sale was stated in the memorandum as made by one Hathaway, who was proved to have been the plaintiff's agent, Mr. Justice Wilde observed that "if the defendant had himself signed the first memorandum, he would not have been liable in this action by the plaintiffs; for the contract was in terms a contract with Hathaway."

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[1] From the statement and the opinion are omitted passages not pertaining to Agency. — ED.

But in most of our own recent cases the English rule has been fully sustained; and we find no adjudged case to the contrary. In Huntington v. Knox, 7 Cush. 371, the case of Higgins v. Senior is cited with entire approbation by Chief Justice Shaw; and the doctrine held to be equally applicable to agreements which are, or are not, required to be in writing by the Statute of Frauds. And in Williams v. Bacon, 2 Gray, 387, the precise question now under consideration seems to have been decided, and the case is a direct authority in point. See also the statement of Mr. Justice Metcalf, in Fuller v. Hooper, 3 Gray, 341; and Dykers v. Townsend, 24 N. Y. 57.

Exceptions sustained.[1]

BORCHERLING v. BERNARD KATZ AND PHILIP KATZ.

COURT OF CHANCERY OF NEW JERSEY. 1883.

[37 *N. J. Eq.* 150.]

ON final hearing on bill and answer and proofs taken in open court.

Mr. Thomas N. McCarter, for complainant.

Mr. Charles F. Hill and *Mr. Socrates Tuttle*, for defendants.

VAN FLEET, V. C. This is a novel case. The complainant seeks to hold the defendants for the rent reserved by a lease made by him to other persons than the defendants. The special ground on which he seeks to do this is, that the defendants were the real lessees, that, though the demise was made to other persons, they acted simply as the agents of the defendants, who were the principals in the affair and entitled to the benefit of the demise. The legal principle on which he rests his right to relief, is that which entitles a vendor who, having made a sale to a person whom he believed at the time to be the principal in the transaction, is afterwards discovered to have been the agent of a third person, to recover the price of the goods of the principal, though he has in the mean time debited the agent.

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[1] In Beckham v. Drake, 9 M. & W. 79, 95-96 (1841), where it was held that an action was maintainable against three partners, one of them dormant, upon a written contract executed in the names of two, in the course of the partnership business, PARKE, B., commenting on Beckham v. Knight, 5 Scott, 619 (1838), s. c. 4 Bing. N. C. 243, said: "There has been a mistake in applying to contracts which are, in point of law, parol, although reduced to writing, the doctrine which is applicable exclusively to deeds, — regularly framed instruments between certain parties. Those parties only can sue or be sued upon an indenture, who are named or described in it as parties; but this doctrine is applicable to deeds only, and I was not aware of any opinion being entertained, before this case occurred, that the same rule extended to all written contracts. With regard to the practice on this subject, it must be familiar to every one that there are innumerable mercantile contracts in writing, where the real principal, when disclosed, is made liable, though the contract is entered into by another. . . . The doctrine rests upon this principle, that the act of the agent was the act of the principal, and the subscription of the agent was the subscription of the principal; and I am not aware of the existence of any cases in which a distinction has been suggested between a contract which has been entered into by one individual for another, or by two individuals for themselves and another, as to the liability of the principal to be sued. The case of bills of exchange is an exception, which stands upon the law merchant; and promissory notes another, for they are placed on the same footing by the statute of Anne. In neither of these can any but the parties named in the instrument, by their name or firm, be made liable to an action upon it." — ED.

The following summary presents all the important facts: On the 22d of October, 1877, the complainant made a lease, under seal, to Rudolph Heller and William Katz, partners, doing business under the name of Heller & Katz, demising certain premises, situate on Mulberry Street, in the city of Newark, for a term of two years and five months from the 1st day of November, 1877, at an annual rent of $840, payable monthly in advance. The lease was executed by both parties. It gave the lessor the right to re-enter for the breach of any covenant on the part of the lessees. The lessees covenanted not to underlet, nor to assign the lease, or any part of their term, without the written consent of the lessor. On the 31st day of October, 1877, the defendants, Bernard Katz and Philip Katz, constituted and appointed Heller & Katz their attorneys, empowering them to carry on and conduct the business then owned by the defendants in the city of Newark, and to do and perform all and every act and thing whatsoever requisite and necessary to be done in carrying on the business. Heller & Katz took possession of the demised premises soon after the commencement of the term, and continued to occupy them, jointly, until December, 1878, when Heller left. Afterwards Katz continued to occupy them alone until April 1st, 1879, when he left. At the time the premises were abandoned there was $220 rent in arrear, which the complainant attempted to collect by distress, but the defendants claimed the property seized, and the complainant surrendered it. This claim by the defendants was, in part at least, false. They now admit that most of the chattels seized belonged to Heller & Katz. The complainant subsequently brought an action at law against the lessees for the rent in arrear, but, on discovering the power of attorney, proceeded no further. He did not know of the existence of the power of attorney until May, 1879, some time after he had commenced his action at law. For the purpose of putting the case in the most favorable form for the complainant, I shall assume that the business carried on on the demised premises was the business of the defendants, and that Heller & Katz were the agents of the defendants when the lease was executed, although the weight of the evidence shows both facts to have been otherwise.

Some of the complainant's legal propositions are so firmly established as to be beyond dispute. There can be no doubt that a principal is bound by the acts of his agent within the authority expressly given to the agent, and also for such acts as are necessary and requisite to be done in order that the agent may accomplish the object of his appointment. It is also true, as a general rule, that where a contract is made by an agent, without disclosing his principal, and the other contracting party afterwards discovers that the person with whom he dealt was not the principal, but that a third person stood behind him as the real party in interest, he may abandon his right to look to the agent personally, and resort to the principal. And this he may do even when the contract is in writing, and is such as is required by the Statute of Frauds to be in writing, for, in such case, parol evidence, showing that an additional party is liable, in no way contradicts the written instrument. "It does not deny that it is binding on those whom, on its face, it purports to bind, but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is, in law, the act of his principal." Higgins *v.* Senior, 8 M. & W. 834, 844. Parol evidence is admissible in such cases to charge the principal, but not to discharge the agent. 2 Smith's Lead. Cas. 226. But where an agent makes a lease in his own name, and executes it in his own name, though the rent is reserved to his principal, and all the covenants purport to be made with his principal, the principal cannot maintain an action on it, for the reason that on a deed *inter partes* no person can maintain an action except a party to it. Berkeley *v.* Hardy, 5 B. & C. 355; Sheldon *v.* Dunlap, 1 Harr. 245.

The complainant puts his right to relief against the defendants, on these legal rules. He justifies his resort to this court in this wise: He insists that by force of the legal rules just stated, his right to hold the defendants for the rent is clear, but that he cannot maintain an action at law against them because they are not parties to the lease. He says he cannot maintain an action for use and occupation, for the statute declares that such action can only be maintained where the agreement for the occupation of the land is not by deed (Rev. p. 570, § 3); he claims, therefore, that his case falls within the principle of equity jurisprudence which declares that where there is a right there ought to be a remedy, and, if the law gives none, it ought to be administered in equity. This conclusion, I think, may be admitted to be sound, provided it is found that the defendants are subject to the legal principle on which the complainant mainly rests his right to relief. This, in my judgment, is the test question of the case.

Neither the researches of counsel, nor my own, have resulted in the discovery of a precedent for this action. I think it may safely be said that no instance exists in which some other person than the lessee named in a lease, under seal, has been held liable in equity for the rent reserved by the lease, on the ground that he was the undisclosed principal in the transaction, and liable, as such, by force of the rule which renders an unnamed and unknown vendee liable for the price of goods purchased by him through his agent. The only case to which my attention has been directed, which can be regarded as authority for the complainant's position, is Clavering *v.* Westley, 3 P. Wms. 402. There the plaintiff made a lease of a coal mine to A. for twenty-one years. A. then declared a trust of the lease for five persons. These five persons entered into possession, worked the mine, and took its products, but some time after, the lessee becoming insolvent, and the mine unprofitable, they abandoned it. The lessor then brought his bill against the lessee and *cestuis que trust* to compel them to pay the rent in arrear, and also the accruing rent, insisting that though the lease was made to A., yet it being declared by him to be in trust for the five persons, as tenants in common, it was the same thing as if it had been made to them originally. The Master of the Rolls (Sir Joseph Jekyll) held that the *cestuis que trust* were not liable, and dismissed the bill. His reason was this: That inasmuch as the plaintiff had chosen to let the mine to A. alone, and to accept his covenant for the rent, he should be restricted to the security he had voluntarily accepted. Having accepted the covenant of the lessee, his remedies were limited to that. Lord Talbot, on appeal, reversed this decree, and decreed that the lessee was primarily liable, but in case the rent could not be collected of him, then that each of the five *cestuis que trust* should pay one-fifth of the rent in arrear, and also that which should afterwards accrue. The report of this case, on appeal, is extremely meagre and unsatisfactory. The conclusion of the Lord Chancellor is simply given, without more. No reasons are given, and we have not even a hint of the legal rule which it was supposed the judgment of the Master of the Rolls had overlooked or disregarded.

But this case has since been overruled. It is no longer an authority in the court which decided it; on the contrary, its doctrine has been repudiated. Lord Cranworth, in Walters *v.* Northern Coal Mining Co., 5 De G. M. & G. 629, after expressing regret that the grounds of Lord Talbot's decision are not given, says: "If he is to be taken as laying down a general proposition that whenever a legal lessee is trustee for another, the rent becomes an equitable debt from the *cestui que trust*, to be recovered by bill in this court, I must, with all respect, say that is a proposition to which I cannot assent. I rest my judgment on the ground that no such general principle exists." Lord Cranworth's discussion of the question on which the decision here must turn, is so exhaustive and unanswerable that this case may be decided by a single quotation from his opinion. He says: "The rights of a landlord against those who occupy his land are legal rights, well defined and understood. Where a tenant is holding under a demise at a stipulated rent, the landlord has his remedy by distress or action of debt. If the lessee assigns to another, the landlord has against the assignee, so long as he remains in possession, the same rights which he had against the original tenant. If instead of assigning his interest, the lessee creates a tenancy under himself, then the original landlord may either distrain on the under-tenant, or may bring his action of debt or covenant, as the case may be, against the original lessees. . . . The object of the present bill is to give to the landlord an additional remedy in case the legal lessee is a mere trustee for others, who have in fact occupied the lands, to enable the landlord, in such a case, to treat the *cestuis que trust* as equitable debtors for the amount of the rent. But I can discover no principle to warrant such a proposition. The relation between the owner of the land and those who occupy it is of a purely legal character. The circumstance that there is a relation of an equitable character subsisting between the lessee and the actual occupier cannot give any equitable rights to one who claims by a title paramount both to the trustee and the *cestui que trust.* Whatever be the relation between the lessee and the occupier, the landlord's rights are unaffected. He has his legal remedy by distress, or he may bring his action against the lessee." The same doctrine, substantially, was enforced by Lord Justices Knight Bruce and Turner in Cox *v.* Bishop, 8 De G. M. & G. 815. An attempt was made there to hold the equitable assignee of a lease for the rent which accrued during the time he was in the actual possession and enjoyment of the demised premises. Lord Justice Knight Bruce said: "They [possession and enjoyment] do not, in my judgment, create a contract between the lessor and the equitable assignee which can give the former a title to the relief prayed against the latter. The possession by itself would not, nor would the equitable assignment by itself, have given the lessor the equitable right which he is here asserting against the assignee; neither, I think, can the union of the two."

It is quite impossible to distinguish these cases from the one under consideration. They are, in all material and essential points, identical, and must all be governed by the same general rules of justice. The fact that the complainant has chosen to describe the relation existing between the defendants and the lessees in this case, as principal and agent, and that in the cases just referred to the relation which existed between the lessees and the persons sought to be charged with the rent was spoken of as trustee and *cestuis que trust,* is without the least significance in legal estimation. The difference is in terms or names, and not in the legal character of the relation. The relation, in principle and substance, is the same, whether it is described by one set of terms or the other, and its rights and obligations are the same, whether called by one name or the other. In every instance in which an agent takes title in his own name to property purchased for his principal, he makes himself, in equity, the trustee of his principal. And if, in the transaction under consideration, Heller & Katz were the agents of the defendants, then in taking the lease in their own names they made themselves the trustees of the defendants, and the more accurate description of the relation of the parties, in that case, would be trustee and *cestui que trust*, rather than principal and agent.

The precedents are against the complainant. I think reason is also against him. No reason of justice or policy can be suggested why landlords should have the additional remedy sought in this case. A creditor of that kind is already highly favored by the law. He may distrain either against the tenant or the under-tenant; if the person in possession fails or refuses to pay the rent in arrear, the landlord may dispossess him, and thus recover the possession of the premises, and in addition, he may use the only means within the reach of ordinary creditors, — bring his action at law. If with these ample remedies at his command he fails to secure the payment of his rent, it may be safely concluded it is not for the want of adequate remedies.

The complainant's bill must be dismissed, with costs.

KAYTON ET AL., APPELLANTS, *v.* BARNETT ET AL., RESPONDENTS.

COURT OF APPEALS OF NEW YORK. 1889.

[116 *N. Y.* 625.]

APPEAL from judgment of the General Term of the Superior Court of the City of New York, entered upon an order made December 2, 1886, which denied a motion for a new trial, and directed judgment in favor of defendants, entered upon an order nonsuiting plaintiffs on trial.[1]

This action was brought to recover a balance of the purchase-price alleged to be due for certain property sold by plaintiffs to defendants.

On the 17th day of March, 1881, the plaintiffs sold and delivered to William B. Bishop several machines, and assigned to him certain letters-patent for the agreed price of $4,500. Bishop paid $3,000 on delivery, and gave three notes, dated March 24, 1881, for $500 each, one due nine months, one fifteen months, and one eighteen months after date, without interest. June 29, 1883, Bishop died insolvent without having paid the notes, or any part of them. The plaintiffs tendered the notes to the defendants, and on August 22, 1883, brought this action to recover the part of the purchase-price represented by the notes, on the theory that Bishop, as agent for the defendants, bought the property for them, without disclosing his principals until after the execution and delivery of the notes. The defendants, in their answer, denied that they purchased the property, and alleged that it was bought by William B. Bishop for the price and on the terms stated in the complaint.

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[1] The opinion of the General Term is thus reported in 22 Jones & Spencer, 78: —

"TRUAX, J. The action was brought to recover from the defendants as undisclosed principals. The evidence shows that the plaintiffs asked Bishop, the person who, as a matter of fact, bought the goods, if he was buying for the defendants, and stated to him that if he was buying for the defendants plaintiffs would not sell the goods to them. Bishop said that he was not buying for the defendants, but that he was buying for himself.

"It was testified on the trial, and for the purposes of this appeal it must be taken as the fact, that Bishop was buying the goods for the defendants.

"Where an agent acts for an undisclosed principal, the third party on discovering the principal may sue him and recover (Meeker *v.* Claghorn, 44 N. Y. 351), provided that in the mean time the principal has not in good faith paid the agent (Armstrong *v.* Stokes, L. R. 7 Q. B. 253; Rowan *v.* Buttman, 1 Daly, 412), and provided that the credit has not been given to the agent as agent. Meeker *v.* Claghorn, *supra;* Coleman *v.* First Nat. Bank of Elmira, 53 N. Y. 388.

"In each of these cases there must be an agency which was unknown to the plaintiff. But in the case before the court the plaintiffs refused to contract with the defendants. There was no reciprocity of action between the plaintiffs and the defendants; if the plaintiffs had refused to complete the contract the defendants could not have sued them for damages. Humble *v.* Hunter, 12 Q. B. 311; Winchester *v.* Howard, 97 Mass. 303; Robson *v.* Drummond, 2 B. & Ad. 303.

"In this case the plaintiffs did not give credit to the agent as agent, because they did not know that Bishop was acting as agent for the defendants." — ED.

Further facts appear in the opinion.

W. J. Curtis, for appellants.

A. R. Dyett, for respondents.

FOLLETT, C. J. When goods are sold on credit to a person whom the vendor believes to be the purchaser, and he afterwards discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchase-price. The defendants concede the existence of this general rule, but assert that it is not applicable to this case, because, while Bishop and the plaintiffs were negotiating, they stated they would not sell the property to the defendants, and Bishop assured them he was buying for himself and not for them. It appears by evidence, which is wholly uncontradicted, that the defendants directed every step taken by Bishop in his negotiations with plaintiffs; that the property was purchased for and delivered to the defendants, who have ever since retained it; that they paid the $3,000 towards the purchase-price, and agreed with Bishop, after the notes had been delivered, to hold him harmless from them. Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who have had the benefit of it, and have never paid the remainder of the purchase-price pursuant to their agreement. Bishop was the defendants' agent. Bishop's mind was, in this transaction, the defendants' mind, and so the minds of the parties met, and the defendants having, through their own and their agent's deception, acquired the plaintiff's property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase-price because they, through their agent, succeeded in inducing the plaintiffs to do that which they did not intend to do, and, perhaps, would not have done had the defendants not dealt disingenuously.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur, except HAIGHT, J., not sitting.

Judgment reversed.

WATTEAU *v.* FENWICK.

QUEEN'S BENCH DIVISION. 1892.

[[1893] 1 *Q. B.* 346.]

APPEAL from the decision of the county court judge of Middlesborough.

From the evidence it appeared that one Humble had carried on business at a beerhouse called the Victoria Hotel, at Stockton-on-Tees, which business he had transferred to the defendants, a firm of brewers, some years before the present action. After the transfer of the business, Humble remained as defendants' manager; but the license was always taken out in Humble's name, and his name was painted over the door. Under the terms of the agreement made between Humble and the defendants, the former had no authority to buy any goods for the business except bottled ales and mineral waters; all other goods required were to be supplied by the defendants themselves. The action was brought to recover the price of goods delivered at the Victoria Hotel over some years, for which it was admitted that the plaintiff gave credit to Humble only: they consisted of cigars, bovril, and other articles. The learned judge allowed the claim for the cigars and bovril only, and gave judgment for the plaintiff for £22 12*s.* 6*d.* The defendants appealed.

1892. *Finlay*, Q. C. (*Scott Fox* with him), for the defendants. The decision of the county court judge was wrong. The liability of a principal for the acts of his agent, done contrary to his secret instructions, depends upon his holding him out as his agent, — that is, upon the agent being clothed with an apparent authority to act for his principal. Where, therefore, a man carries on business in his own name through a manager, he holds out his own credit, and would be liable for goods supplied even where the manager exceeded his authority. But where, as in the present case, there is no holding out by the principal, but the business is carried on in the agent's name, and the goods are supplied on his credit, a person wishing to go behind the agent and make the principal liable must show an agency in fact.

[Lord COLERIDGE, C. J. Cannot you, in such a case, sue the undisclosed principal on discovering him?]

Only where the act done by the agent is within the scope of his agency; not where there has been an excess of authority. Where any one has been held out by the principal as his agent, there is a contract with the principal by estoppel, however much the agent may have exceeded his authority; where there has been no holding out, proof must be given of an agency in fact in order to make the principal liable.

Boydell Houghton, for the plaintiff. The defendants are liable in the present action. They are in fact undisclosed principals, who instead of carrying on the business in their own names employed a manager to carry it on for them, and clothed him with authority to do what was necessary to carry on the business. The case depends upon the same principles as Edmunds *v.* Bushell, L. R. 1 Q. B. 97, where the manager of a business which was carried on in his own name with the addition "and Co.," accepted a bill of exchange, notwithstanding a stipulation in the agreement with his principal that he should not accept bills; and the Court held that the principal was liable to an indorsee who took the bill without any knowledge of the relations between the principal and agent. In that case there was no holding out of the manager as an agent; it was the simple case of an agent being allowed to act as the ostensible principal without any disclosure to the world of there being any one behind him. Here the defendants have so conducted themselves as to enable their agent to hold himself out to the world as the proprietor of their business, and they are clearly undisclosed principals. Ramazotti *v.* Bowring, 7 C. B. (N. S.) 851. All that the plaintiff has to do, therefore, in order to charge the principals, is to show that the goods supplied were such as were ordinarily used in the business, — that is to say, that they were within the reasonable scope of the agent's authority.

[He also cited Yorkshire Banking Co. *v.* Beatson, 4 C. P. D. 204; 5 C. P. D. 109.]

Finlay, Q. C., in reply, cited Summers *v.* Solomon, 7 E. & B. 879.

Cur. adv. vult.

Dec. 12. Lord COLERIDGE, C. J. The judgment which I am about to read has been written by my brother Wills, and I entirely concur in it.

WILLS, J. The plaintiff sues the defendants for the price of cigars supplied to the Victoria Hotel, Stockton-upon-Tees. The house was kept, not by the defendants, but by a person named Humble, whose name was over the door. The plaintiff gave credit to Humble, and to him alone, and had never heard of the defendants. The business, however, was really the defendants', and they had put Humble into it to manage it for them, and had forbidden him to buy cigars on credit. The cigars, however, were such as would usually be supplied to and dealt in at such an establishment. The learned county court judge held that the defendants were liable. I am of opinion that he was right.

There seems to be less of direct authority on the subject than one would expect. But I think that the LORD CHIEF JUSTICE, during the argument laid down the correct principle, viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies, — that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority, — which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent, and then discovering that he was an agent and had a principal.

But in the case of a dormant partner it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.

The principle laid down by the Lord Chief Justice, and acted upon by the learned county court judge, appears to be identical with that enunciated in the judgments of Cockburn, C. J., and Mellor, J., in Edmunds *v.* Bushell, L. R. 1 Q. B. 97, the circumstances of which case, though not identical with those of the present, come very near to them. There was no holding out, as the plaintiff knew nothing of the defendant. I appreciate the distinction drawn by Mr. Finlay in his argument, but the principle laid down in the judgments referred to, if correct, abundantly covers the present case. I cannot find that any doubt has ever been expressed that it is correct, and I think it is right, and that very mischievous consequences would often result if that principle were not upheld.

In my opinion this appeal ought to be dismissed with costs.

Appeal dismissed.[1]

ISHAM AND ANOTHER *v.* BURGETT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893.

[157 *Mass.* 546.]

Holmes, J. This is an action for the price of poles sold for the use of an electric light company. The defendant contended that the company alone was liable, and asked a ruling to that effect. The judge before whom the case was tried found as a fact that the contract was made by the defendant, and the only question is whether there was any evidence warranting the finding. The testimony was, that the defendant gave a written order, and orally instructed the plaintiffs to charge

[1] *Acc.*: Hubbard *v.* Tenbrook, 124 Pa. 291 (1889).
See Hatch *v.* Taylor, *ante*, p. 291. — Ed.

the goods to the company. The order, when produced, appeared to be signed by the defendant in such a way as to charge him on its face. Brown *v.* Bradlee, 156 Mass. 28; Huntington *v.* Knox, 7 Cush. 371, 374. It appeared that the company was incorporated when the order was given, but that no capital had been paid in. The defendant and one Turner built the whole electric line with their own funds, keeping the account in which the plaintiffs' debt appeared among others in their own books, and afterwards received substantially all the stock of the company in payment for it. Whether or not the form of the order was enough, without more, to warrant the finding, supposing the company to have been the principal, in view of the charge to the company upon the plaintiffs' books (Raymond *v.* Crown & Eagle Mills, 2 Met. 319, 324; James *v.* Spaulding, 4 Gray, 451; Lee *v.* Wheeler, 11 Gray, 236, and Banfield *v.* Whipple, 10 Allen, 27, 31), the judge was warranted in finding that the real principal, as well as the mouthpiece of the transaction, was the defendant, so that, although he used the name of his creature, the corporation, in such a way as to bind it to the plaintiffs at their election, still, when they discovered the facts, they had the right also to go against him. The judge may have found that the plaintiffs did not discover the facts until the trial; that until then they supposed that the corporation was the true purchaser, and sought to charge the defendant with the contract on a different ground. If the defendant saw fit to use the name of the corporation on his own behalf, as representing himself when engaged in a particular business, he cannot complain of being held if the fact happens to be discovered. Sloan *v.* Merrill, 135 Mass. 17, 19. *Exceptions overruled.*[1]

C. R. Darling, for the defendant.

D. A. Dorr, for the plaintiffs.

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[1] The order above referred to was as follows: —

"BOSTON, Aug. 23, 1888.

"D. B. Isham & Son, Boston, Mass.:

"Gentlemen, — Please furnish poles as follows: F. O. B., Dover, N. H.

100 poles, 30 feet long, 6 inches at top.
115 " 35 " " 7 " "
10 " 40 " " 7 " "

These must be straight and well trimmed, and first-class in every respect.

"H. W. BURGETT.

"Mark. The Dover Electric Light Company.

"Prices as follows: —

30 — 6 inches.	$2.50.
35 — 7 "	3.50.
40 — 7 "	4.50.

"F. O. B., Dover, N. H." — REP.

Compare Heffron *v.* Pollard, 73 Tex. 96 (1889).
And see Spurr *v.* Cass, L. R. 5 Q. B. 656 (1870). — ED.

SECTION III.

Whether the Third Party can hold the Agent.

SIMON *v.* MOTIVOS.

KING'S BENCH. 1766.

[3 *Burr.* 1921.]

THIS action was brought against the defendant, who had bought goods at an auction, which were not taken away according to the conditions of sale, but put up again and resold.

There was a verdict for the plaintiff; and the defendant moved for a new trial.

The defendant was a broker; and bid for one Durant; but did not name his principal, till some days after.

The auctioneer, when he knocked down the lots to the highest bidder, put down his name, in the usual manner, as the purchaser of those goods. The defendant came, the next day, and saw the goods weighed.

The objection now made was, "That this contract, not being in writing, was void by the Statute of Frauds."

But the Court were all clearly of opinion, that the auctioneer must be considered as agent for the buyer (after knocking down the hammer) as well as for the seller; and that his setting down in writing the name of the buyer, the price, etc., was sufficient to take it out of the statute; and that the buyer's coming the next day, and seeing the goods weighed, was an additional circumstance that deserved attention. And they inclined to think "That buying and selling at auctions was not within the Statute of Frauds."

Upon the whole (though no earnest was actually paid), they discharged the rule which had been made upon the plaintiff, for him to show cause why the verdict which he had obtained against the buyer should not be set aside, and why there should not be a new trial.[1]

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[1] *Acc.*: McComb *v.* Wright, 4 Johns. Ch. 659 (1820); Royce *v.* Allen, 28 Vt. 234 (1856); McClellan *v.* Parker, 27 Mo. 162 (1858); Pierce *v.* Johnson, 34 Conn. 274 (1867).

It is settled that sales at auction are within the Statute of Frauds. Kenworthy *v.* Schofield, 2 B. & C. 945 (1824). — ED.

S. DAVENPORT & CO. *v.* RILEY AND O'HEAR.

CONSTITUTIONAL COURT OF SOUTH CAROLINA. 1822.

[2 *McCord*, 198.]

In the City Court, April Term, 1822. Process to recover $57, the difference between the value of sound and damaged cotton.

The report of the Recorder: —

"The fact of the damage and the quantum of the injury were clearly proved. It was further shown by a witness for the plaintiffs, that the cotton was purchased from the defendants, who were well known to be factors in Charleston; that when the defendants were informed by the witness that the cotton was damaged, they said that it belonged to a planter, and not to them, they having sold it as factors. The sales were made out in the manner which is customary with factors, and the bags were stated in the bill to be marked L; previously to bringing the suit, the attorney of the plaintiffs wrote a letter to the defendants, who, in their answer to it, replied that the cotton was the property of a Mr. Lapeine, in King Street, and that they had disposed of it as factors. The plaintiffs' counsel insisted that, as the defendants had sold without disclosing the name of their principal, they were personally responsible. The defendants contended that, the sale having been made by them in their character of factors, the principal was exclusively liable. I decreed for the defendants, upon the ground that it was manifest that the sale had been made by them as factors, consequently that they could not be rendered individually liable unless they had entered into some special assumpsit or undertaking. Notice was served upon me that a new trial would be moved for upon the grounds which are enclosed.

"WM. DRAYTON, *Recorder*."

RICHARDSON, J., delivered the opinion of the Court: —

In the case of Rabone *v.* Williams, 7 T. R. 356, Lord Mansfield says: "Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may bring an action, yet the purchaser may set off any claim he may have against the factor." This has been long settled. In the case of Mauri *v.* Hefferman, 13 Johns. 58, it is decided that to excuse an agent he should have communicated his agency. See also 2 Str. 1182 and 2 Camp. 24 and 341, where the same rule is fully recognized. Without such a rule, the opportunity of committing frauds would be infinite, and the greatest caution in contracts utterly vain. For instance, a country trader, who had purchased goods of a respectable and responsible merchant, upon discovering that they were unsound, might be turned over for his remedy to an unknown foreigner. A citizen who purchased a horse in the same situation might be sent to Kentucky for the restoration of his money, though he had contracted with a livery stable keeper resident here. A foreign trader who has purchased our produce, upon the character of an established factor or other vendor of known responsibility, might be referred to an insolvent debtor.

It cannot be doubted that strangers coming to purchase of us will not only deal more readily, but even give higher prices to known factors, because of their responsibility. And such a reliance is a part of the contract not to be trifled with. The rule, then, that every man is liable upon his own contracts unless he lets the opposite party know that he is a mere agent for another, must be preserved. Men depend upon those with whom the contract is made; and are not to be supposed as confiding in mere strangers. To say that the authority of a factor's employment is of itself notice to a purchaser, would be too unsafe. Factors of every description often sell for themselves. With our factors, selling rice or cotton, it is often that they are the planters, and may be speculators in the produce too.

The motion therefore is granted.

Dunkin & Campbell, for the motion.

Hamilton & Petigru, *contra.*

HENRY J. CHASE, APPELLANT, *v.* DEBOLT, APPELLEE.

SUPREME COURT OF ILLINOIS. 1845.

[7 *Ill.* 371.]

THIS was a suit originally brought before a justice of the peace of Peoria County, by the appellee against the appellant, when judgment was rendered for the plaintiff below, for \$75.93¾.

The case was appealed to the Circuit Court, and heard before the Hon. John D. Caton and a jury, at the October term 1845. Verdict and judgment for the plaintiff, for the amount recovered before the justice.

A summary of the evidence will be found in the opinion of the Court.

E. N. Powell and *W. F. Bryan*, for the appellant.

A. Lincoln and *H. O. Merriman*, for the appellee.

SCATES, J.[1] Debolt sued Chase before a justice of the peace for \$75.93¾ on an account for work and labor done upon Jubilee College.[2] . . .

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[1] WILSON, C. J., and LOCKWOOD, J., did not sit in this case. — REP.

[2] The omitted passages hold that there was no error in admitting certain evidence to which objection had been made as hearsay. — ED.

The refusal of the Court to grant a new trial is also assigned for error. All the evidence is set out in the bill of exceptions. The plaintiff's whole bill of items amounted to \$75.93¾, which was all allowed by the jury. From the evidence, it appears that Chase was the agent of Bishop Chase in hiring labor and superintending the work on Jubilee College. Debolt asked Bennett, a clerk in the store at Jubilee, if he could get work on the college. Bennett answered that he supposed he could, but that Henry J. Chase was the agent who employed all hands. He went to Chase, who employed him, but he did not tell him that he was agent for the bishop. Debolt frequently received pay from the bishop. The account of labor was always returned to Bennett to the store, and he gave orders upon the bishop for the pay; when he had not the change, he would send to the store, and Bennett would pay. One order for eight dollars given Debolt on the bishop for work, had been returned receipted by Debolt; and also another receipt had been given by Debolt for one dollar received of Bishop Chase. Witness supposed that when Debolt was receiving pay for his labor, he knew he was receiving it of Bishop Chase. He further testified that Henry J. Chase had had no work done for him by Debolt.

Daniel Blucher, another witness, testified that he had worked on Jubilee College; that Debolt commenced in the fall and worked until spring, during the time witness worked; that witness had been employed by H. J. Chase; that he knew he was working for the bishop, and Debolt also knew that he was working for Bishop Chase; that witness had always received his pay from the bishop, and never from H. J. Chase, although he had worked some days on the College farm.

The admissions of the plaintiff, Chase, proven by the justice, were, that he had employed the defendant, Debolt, to work on the college, as the agent of Bishop Chase, but did not inform defendant at the time that he was only an agent, but the work was done for the bishop; that defendant never worked for him, and he owed him nothing, and that defendant had received from the bishop the greater portion of his pay. The Court never interferes with verdicts upon facts, for any slight preponderance of testimony. But where there is a strong preponderance of testimony it will set verdicts aside, especially where apparent injustice has been done.

Agents may become liable for contracts made for their principals, where they conceal or do not disclose their character of agent, and it is unknown to the party with whom they contract, and they may also by the nature and character of the contract entered into. But it is quite immaterial whether the agent disclose his character or his principal, himself, if it be actually known at the time to the other party. In such case the agent will not be bound, unless he enter into such a contract as will bind him at all events.

In this case, we cannot doubt that Debolt knew at the time he was employed, that plaintiff was merely an agent, for he had before been so informed by Bennett, and he afterwards took orders to, and received payment of the bishop. The fact of plaintiff's agency was known to a co-laborer, and from these circumstances, the preponderance of testimony to establish these facts is clear, strong, and irresistible upon the record. And establishing this fact discharges the plaintiff from all liability, as there is nothing in the nature of this simple hiring to charge him. In another particular the verdict is manifestly against the weight of evidence. The jury have allowed the plaintiff's whole account, although two receipts were in evidence, showing that he had been paid nine dollars.

Upon the facts in the record, we feel compelled to reverse the judgment and award a new trial. Judgment reversed with costs, and cause remanded with directions to award a *venire de novo*.

Judgment reversed.[1]

PIKE, SONS, & CO. *v.* ONGLEY AND THORNTON.

QUEEN'S BENCH DIVISION AND COURT OF APPEAL. 1887.

[18 *Q. B. D.* 708.]

MOTION for a new trial or to enter judgment for the defendants on the ground of misdirection and misreception of evidence.

The action was brought against the defendants, who were hop brokers, to recover damages for the non-delivery of hops equal to sample sold under a written contract in the following terms: "Sold by Ongley & Thornton to Messrs. Pike, Sons, & Co., for and on account of owner, 100 bales, Hallertau Bavarian hops, at 52*s.* per cwt. Delivery in October. (Signed) for Ongley & Thornton, S. T." At the trial before MANISTY, J. and a special jury, the plaintiffs contended that the defendants were personally liable on the contract, and evidence was tendered to show that, by the custom of the hop trade in such a contract, if the principal be not disclosed at the time of making the contract, the broker is in fact regarded as the principal and is held liable. The evidence was admitted by the learned judge. It was admitted by the parties that the plaintiffs had not asked the defendants for the name of their principal, but there was evidence to show that the plaintiffs in fact knew that he was a foreigner. The jury found a verdict for the plaintiffs, and judgment was entered in accordance with the finding.

Winch, for the defendants.

Murphy, Q. C., and *Pyke* for the plaintiffs.

DAY, J. The document upon which this action was brought is a sale note of the defendants, who purported to sell thereby certain hops to the plaintiffs "for and on account of the owner." The question is whether that contract on the face of it makes the brokers liable as principals, or whether, if that is not so, evidence can be given to vary the contract by showing a trade custom to treat as principals brokers who have not disclosed the names of their principals at the time of the making of the contract. "It is clear from a series of decisions that where the contract sued upon has been made by a broker 'for' or 'for and on account of' an undisclosed or foreign principal, the broker is not primarily liable." That is the result of the decision in Gadd v. Houghton, 1 Ex. D. 357, where the Court of Appeal held that where the words "on account of" were inserted in the body of a contract, the broker was not personally liable. That case is binding and conclusive, and we must hold that in the present case, where goods have been sold "for and on account of" an owner (the owner not having been named), the brokers are not primarily liable. That is a convenient expression to use. But evidence was in this case tendered to prove a trade custom, and such evidence is often admissible where it is not inconsistent with the contract. "The custom here set up was that, if the broker did not disclose the name of his principal, he was himself personally liable." I asked whether the custom was that "the principal should be disclosed at the time of the making of the contract," and I gather from the judge's notes and from the answers of counsel that "a primary liability would attach to the broker as part of the contract," if that was not done. If that is so, the new term contradicts the written document, which says that the defendants do not contract for themselves, but for the owner of the hops, thus excluding all idea of primary liability; until it was shown that they were the owners, they could not be taken to be so. Therefore I am of opinion that the evidence of custom which was tendered was inadmissible, and that the learned judge at the trial ought to have construed the contract and directed a verdict for the defendants.[1]

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[1] *Acc.*: Boston & Maine Railroad *v.* Whitcher, 1 Allen, 497 (1861); Warren *v.* Dickson, 27 Ill. 115 (1862). — ED.

Judgment reversed.

The plaintiffs appealed.

Murphy, Q. C., and *Pyke*, for the plaintiffs.

Finlay, Q. C. and *Winch*, for the defendants.

Lord ESHER, M. R. In this case the defendants are clearly not liable upon the contract itself; they were selling as agents for an owner, and in the absence of trade usage no liability would attach to them. The evidence of the witnesses who were called to prove the custom came to this, that if the name of the owner was not given in, or at the time of the making of, the contract, the buyer had the right to treat the broker as principal; and on such a custom I should say that even if the owner's name were disclosed after the making of the contract, the buyer might sue either the principal or the broker. Is it the fair meaning of such evidence to say that where a broker says in the contract that he is acting for a principal, though an undisclosed one, the buyer is to look only to him and not to the real principal? Such a custom would be in direct contradiction of the terms of the written contract, but I can see no reason for supposing that a man having a remedy against two persons would deliberately debar himself of his remedy against one of them. The custom is not wanted in such a case: it is only wanted where there is a principal who could be charged and the contract is made without disclosing his name. The meaning of this custom is that where the principal's name is not disclosed in or at the time the contract is made, the buyers reserve to themselves the right of suing the broker or factor. I can well conceive that in this trade, and in many others, such a custom is for the broker's benefit, and I am clearly of opinion that the evidence was properly admitted by the learned judge at the trial. If any remarks of mine in the judgment in Hutchinson *v.* Tatham, L. R. 8 C. P. 482, are in conflict with our present decision they must be considered as withdrawn. The appeal must be allowed.

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[1] A concurring opinion by WILLS, J., is not reprinted. — ED.

Fry, L. J. I am of the same opinion. If the objection were now being taken for the first time to the admissibility of evidence of a custom to charge the brokers as principals in the event of non-disclosure by them of their principals at the time of the contract, I should have paused before deciding in favor of its admissibility. But that proposition is now clearly established; and we have only to consider whether by the custom of the trade the defendants were liable from the beginning as principals, and whether such a custom contradicts the written contract. I can entertain no doubt on either point. By the terms of the document itself the owner is liable; the custom says the broker shall be liable also; there is nothing in that which is inconsistent with the contract, though it would be inconsistent if the custom were to exclude the liability of the owner.

Appeal allowed.[1]

SECTION IV.

Whether the Agent can hold the Third Party.

JOSEPH AND OTHERS *v.* KNOX.

NISI PRIUS. 1813.

[3 *Camp.* 320.]

This was an action against the owner of a ship on a bill of lading signed by the master, for not carrying goods from London to Surinam.

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[1] See Lyon *v.* Williams, 5 Gray, 557 (1856); Williamson *v.* Barton, *ante,* p. 535; Fleet *v.* Murton, L. R. 7 Q. B. 126 (1871). — Ed.

The bill of lading stated that the goods were shipped by the plaintiffs; that they were to be delivered in Surinam to Levy Davids or his assigns; and that the freight was paid in London.

The goods consisted chiefly of butter, which the plaintiffs had received from Sussman & Polack of Amsterdam, to be forwarded to Levy Davids in Surinam, and which in an answer to a bill in equity they swore they believed to be his property.

Topping, for the defendant, insisted, that this action could not be maintained by Joseph & Co., who had no interest in the goods. They were merely the conduit through which the goods were to be transmitted from Sussman & Polack at Amsterdam to Levy Davids at Surinam. The property being in Levy Davids, he alone was injured by the non-delivery of the goods, and he alone could sue to recover their value. It has often been decided that an action against a common carrier for the loss of goods must be brought by the purchaser who ought to receive them, and not by the vendor who has delivered them to the carrier. There, the vendor delivers them merely as the agent of the purchaser, and on that ground can maintain no action respecting them. What difference can it make that here the goods were to be conveyed on board a ship? The plaintiffs were still merely the agents of the real owner of the goods.

Lord ELLENBOROUGH. I am of opinion that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his agent, he cannot say to the shippers they have no interest in the goods and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner.

It appeared that the ship in question was in the same fleet mentioned in the case of Van Omeron *v.* Dowick, 2 Campb. 42, and that the goods were sold at Grenada, exactly under the same circumstances. Lord ELLENBOROUGH again laid down the same doctrine with regard to the authority of the master over the cargo, which was acquiesced in on the part of the defendant, and the plaintiffs had a verdict.[1]

Garrow, S. G. *Park*, and *Taddy*, for the plaintiffs.

Topping and *Campbell* for the defendant.

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[1] *Acc*: Blanchard *v.* Page, 8 Gray, 281 (1857).

Compare Dawes *v.* Peck, 8 T. R. 330 (1799).

See Dunlop *v.* Lambert, 6 Cl. & F. 600 (1839); Colburn *v.* Phillips, 13 Gray, 64 (1859); Hooper *v.* Western Railroad Co., 27 Wis. 81 (1870); Finn *v.* Western Railroad Co., 112 Mass. 524 (1873); Snider *v.* Adams Express Co., 77 Mo. 523 (1883). — ED.

GARDNER *v.* DAVIS.

NISI PRIUS. 1825.

[2 *C. & P.* 49.]

ASSUMPSIT for goods sold. The plaintiff was a cow-keeper, the defendant a milkman. The sale and delivery by the plaintiff to the defendant being proved, evidence was adduced on the part of the defendant, to show, that though the plaintiff ostensibly carried on the business of a cow-keeper, and had his name painted on the carts, his initials branded on the pails, &c, yet that the business really belonged to a Mrs. Evans.

ABBOTT, C. J. The question here is, more properly, With whom was this present contract made? than, To whom did the business belong? for if a person allow another to trade in his own name, and to hold himself out to the world as carrying on the business, a payment to that other would be a good bar to an action brought by the person for whom the trade was really carried on. And the person ostensibly carrying on the trade is by law entitled to recover for goods sold in the course of that trade unless the person so suffering him to carry on the trade interfere, by asserting his or her right to the sum due. In this case, it appears that the defendant owes the money either to the plaintiff or to Mrs. Evans, and that the business was carried on by the plaintiff in his own name, and that Mrs. Evans has taken no step whatever to assert any right that she may have to this money; and, therefore, taking it that the plaintiff was carrying on the trade in his own name with her privity and consent, but was really a sort of agent to her, as she has not interfered to assert any claim to this money, he would still be entitled to recover in this action.[1]

Verdict for the plaintiff. Damages £15 6*s.*

Brougham and *Abraham*, for the plaintiff.

Comyn, for the defendant.

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[1] In Sims *v.* Bond, 5 B. & Ad. 389, 393 (1833), DENMAN, C. J., said: "It is a well established rule of law, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party." — ED.

SHORT AND OTHERS *v.* SPACKMAN.

KING'S BENCH. 1831.

[2 *B. & Ad.* 962.]

ASSUMPSIT for not delivering goods. At the trial before Lord TENTERDEN, C. J., at the sittings in London after Trinity term, 1831, a verdict was found for the plaintiffs for £600 subject to a reference. The arbitrator made his award, and annexed to it, at the request of the defendant's counsel, a statement to the following effect: The plaintiffs being brokers, and authorized by one Hudson to buy for him twenty tons of Greenland whale oil, employed Bentley, an oil broker, to make such purchase for them. Bentley applied to the defendant to sell that quantity to the plaintiffs. The defendant at first refused to sell to the plaintiffs; but, upon being informed by Bentley that they were purchasing not for themselves, but as brokers for unnamed principals, he agreed to sell to them; and bought and sold notes, signed by Bentley, were sent by him to the plaintiffs and defendant, in which the goods were stated to be "Bought for Messrs. Short, Brown, and Bowyer," (the plaintiffs) "of Mr. W. F. Spackman," (the defendant) on the terms therein specified, to be paid for by the buyers in ready money. The plaintiffs sent a corresponding bought note to Hudson, their principal; and they afterwards, under a general authority from him, sold the goods for his account, through another broker, to Messrs. Buck and Co. The bought and sold notes in this transaction mentioned the plaintiffs and Buck and Co., as the buying and selling parties. On this sale being communicated to Hudson, he returned the sold note, which had been sent to him, declaring that he would have nothing to do with the oil as purchaser or seller; and to this the plaintiffs assented. The defendant afterwards refused to deliver the oil in pursuance of his agreement, and the plaintiffs, being unable to fulfil their engagement with Buck and Co., were obliged to pay them a sum of money in satisfaction, the market having risen since the last-mentioned contract. It was contended, on behalf of the defendant, that Hudson's repudiation of the contract, and the acquiescence of the plaintiffs therein, put an end to the engagement between the plaintiffs and defendant. The arbitrator, however, was of opinion that these facts did not affect either the rights of the defendant as against Hudson, or the rights and liabilities of the plaintiffs and defendant. He therefore awarded that the defendant should pay the plaintiffs the amount of the loss sustained by them in their settlement with Buck and Co. A rule *nisi* was obtained this term for setting aside the award, on the ground that the action was not maintainable upon the facts above stated.

F. Pollock and *F. Kelly* now showed cause.

Sir *James Scarlett* and *Tomlinson*, *contra.*

Lord TENTERDEN, C. J. I had at first some difficulty in coming to the conclusion that the plaintiffs, situated as they were in this case, could sue upon the contract for their own benefit. But on looking to the contract itself, there appears nothing to prevent it. The form of the bought note is, "Bought for Messrs. Short, Brown, and Boyer," twenty tons of Greenland oil, at so much per ton, to be paid for by the buyers in ready money. The sold note is in the like form. In both the plaintiffs appear as the principals. The rest of the facts are *dehors* the present question. The rule will therefore be discharged.

PARKE, J. There was no fraud upon the defendant in this case. He was informed that there was an unknown principal, and such was the fact. It is found that the plaintiffs were authorized by Hudson to buy the oil of the defendant, and the contract was binding both on them, and, if the defendant chose to enforce it, on Hudson. Then it is said the contract was put an end to by what is called the repudiation on Hudson's part: that is, by his informing the plaintiffs that he would have nothing more to do with the purchase or sale, and by their acquiescing in such determination. But this is no more, in effect, than if Hudson had thought proper to sell the benefit of his contract to any other person, which he might have done without the consent of the plaintiffs: and his doing so would have been nothing to the defendant. It clearly would not have determined the contract. I think, therefore, that the arbitrator came to a right conclusion.

TAUNTON, J. I am of the same opinion. The alleged repudiation of the contract by Hudson was not a circumstance of which the defendant can take advantage.

PATTESON, J. Upon the bought and sold notes the plaintiffs appear to purchase as principals. To show that they acted as brokers, other facts must be imported into the case; and upon those facts it appears that they were duly authorized as brokers. What happened afterwards cannot affect their right to recover.

Rule discharged.

THE UNITED STATES TELEGRAPH COMPANY *v.* GILDERSLEVE.

COURT OF APPEALS OF MARYLAND. 1868.

[29 *Md.* 232.]

APPEAL from the Superior Court of Baltimore City.[1] . . .

The defendant also prayed the Court to instruct the jury as follows: . . .

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[1] The reporter's statement and the opinion have been abbreviated by omitting passages not bearing on Agency. — ED.

3. That the plaintiff cannot recover in this case anything but nominal damages, if they shall find that he has sustained no loss by reason of the non-delivery of said dispatch, even although they may find that A. B. Patterson, acting by authority of the plaintiff, sent said message, and sustained loss by reason of such failure.

4. That there is no evidence that the plaintiff has sustained any damage in this cause, and the plaintiff is therefore not entitled to recover anything beyond nominal damages. . . .

The Court thereupon granted the plaintiff's prayer, and the defendant's sixth prayer, but rejected the defendant's first five prayers. To this ruling of the court the defendant excepted. . . . The verdict and judgment being against him, he appealed.

Levin Gale, for the appellant.

John H. Thomas and *McHenry Howard*, for the appellee.

ALVEY, J., delivered the opinion of the Court.

This was an action, *ex contractu*, instituted by the appellee against the appellant to recover of the latter damages resulting from its failure to transmit and deliver a telegraphic dispatch to certain stock-brokers in New York.

The dispatch directed to be transmitted was as follows: —

"No. 15. BROKER'S TELEGRAM LINE, 4.
"PEOPLE'S TELEGRAPH LINES,
"No. 23 South Street, and Barnum's City Hotel, Balt.

"Send the following message, without repeating it, subject to the conditions indorsed on the back: —

"Dated BALTIMORE, March 9, 1865.
"To DIBBLE AND CAMBLOSS, N. Y.
"Sell fifty (50) gold. Words 3, cal. 70.
"GEO. GILDERSLEVE."

It is alleged that this dispatch was an order to the brokers in New York to sell for the appellee fifty thousand dollars of gold, which order the brokers would have obeyed, but the appellant neglected to telegraph such dispatch, whereby the appellee was greatly damaged by reason of the decline in the market price of gold. The appellant pleaded, not indebted as alleged; with an agreement that such plea should be received, and that all errors in pleading should be mutually waived, and that either party might rely on any claim or defence to which he or it would be entitled, if specially declared on or pleaded.

At the trial below, the appellee offered one prayer to the court, which was granted; and the appellant offered six prayers, of which the first five were rejected, and the sixth was granted. And it was to the granting of the appellee's prayer, and the refusal of those on the part of the appellant, that the first exception was taken.

On this exception, four questions arise: —

1. Whether the appellee can maintain this action, and recover more than nominal damages for the default of the appellant.

2. Whether the contract for transmission of the message was subject to the terms and conditions printed on the back of the dispatch, or to other similar terms and conditions prescribed by the rules and regulations of the appellant's office.

3. To what extent, if the contract be subject to such terms and conditions, can the appellant claim to be exonerated from liability thereunder.

4. To what measure of damage is the appellant subject, if the contract be broken.

1. It appears that the appellee was a broker in Baltimore, and that Dibble and Cambloss were his correspondents and agents in New York, through whom he was in the habit of buying and selling stocks and gold in the latter city; that A. B. Patterson, also a broker in Baltimore, was appellee's customer, for whom the appellee was in the habit as broker of buying and selling gold and stock in New York, through the agency of Dibble and Cambloss; that by arrangement previously made between appellee and Patterson, for the purpose of saving trouble to them both, instead of Patterson being required to give orders to the appellee for such purchases and sales, and the appellee being required to send them to his correspondents, Patterson was authorized to send orders in the appellee's name, and on his responsibility and account, to Dibble and Cambloss, for the purchase or sale of stock or gold; and that by this arrangement the appellee was entitled to his commissions on purchases and sales made in compliance with such orders, and the rights and liabilities of the appellee and Patterson respectively in reference to the orders so sent were in all respects the same as if Patterson had given the orders to the appellee, and the latter had transmitted or undertaken to transmit them to Dibble and Cambloss, in his own name, Patterson not being known to and having no connection with Dibble and Cambloss, except through the appellee; that under said arrangement, on the 9th of March, 1865, at about 3.40 P. M., the message in question, addressed to Dibble and Cambloss, was left by Patterson's direction at appellant's office, in Baltimore, and that the appellant, by its agents, undertook to send and deliver it to the parties to whom it was addressed; that the message was sent to the office without the knowledge or special direction of the appellee, but that he was soon after informed of it, and fully sanctioned it. The appellee also testified that he was not interested in this transaction, and had not paid any loss to Patterson, and did not consider himself liable to Patterson unless he recovered in this suit, in which event anything that was recovered was to be paid over to Patterson. It was also proved that appellee had on the day of the date of the message two hundred thousand dollars of gold to his credit with Dibble and Cambloss, and of that sum, as between appellee and Patterson, ninety-five thousand dollars belonged to the latter.

Upon such state of facts, the appellee was clearly the agent of Patterson, and as such agent, held and controlled the gold of his principal.

It was embraced in the appellee's account, and he had credit for it in the books of his correspondent, and no other person than himself could have withdrawn it or disposed of it. And apart from the fact that he had a special property or interest in the gold of his principal thus at his disposal, he was beneficially interested, at the time of the order given, to the extent of commissions on the sale. And where an agent is thus interested, as for commissions, or by reason of special property in the subject-matter, and the contract, in reference thereto, is made in his name, it is perfectly competent for him to sue and maintain an action in his own name, as if he were the principal. This is so in the case of a factor, or a broker, or a warehouseman, or carrier or auctioneer, a policy broker whose name is on the policy, or the captain of a ship for freight. So where a contract is in terms, as in this case, made with an agent personally, he may sue thereon; and if an agent, in his own name, carry on a business for his principal, and appear to be the proprietor, and sell goods in the trade as such apparent owner, he can sustain an action in his own name for the price. 1 Chit. Pl. 8; Joseph *v.* Knox, 3 Camp. 320; Gardiner *v.* Davis, 2 Car. & P. 49; Dancer *v.* Hastings, 4 Bing. 2. And where A., for his own account and risk, carried on trade in the name of B., it was held that an action for goods sold in the course of such trade was properly brought in the name of B. Alsop *v.* Caines, 10 Johns. 396. And so again, where goods are consigned by A. to B., the former, in contemplation of law, is the agent of the latter, for the purpose of contracting for the carriage; and where a bill of lading stated that the goods were shipped, and their freight paid by the consignor, it was held to establish a privity of contract between the consignor and shipowner, which would entitle the former to recover against the latter for non-delivery of the goods, the damages so recovered being held by the plaintiff in trust for the consignee. Joseph *v.* Knox, 3 Camp. 320; Broom on Parties, 49. And if, in the instances mentioned, the agent can sue and recover the full measure of damages, we can see no reason why the appellee, looking to his relation to this transaction, may not recover the full amount of damages resulting from a breach of the contract with the appellant. He, of course, sues and recovers as trustee for his principal. The court below was therefore right in rejecting the appellant's third and fourth prayers, which raised the question of the right of the appellee to recover more than nominal damages. . . .

Differing with the court below in regard to the appellee's prayer and the first and second prayers of the appellant, we must reverse its judgment. *Judgment reversed and procedendo awarded.*

LUDWIG, RESPONDENT, *v.* GILLESPIE, APPELLANT.

COURT OF APPEALS OF NEW YORK. 1887.

[105 *N. Y.* 653.[1]]

THE following is the *mem.* of opinion herein: —

"The action was to recover $22,251.60, as the price of certain bitumen theretofore sold and delivered by the plaintiff to the defendant. Besides a general denial, the answer set up that the bitumen was sold and delivered by the plaintiff, not on his own account, "but as known agent for the firm of Arles, Dufour, & Co., his disclosed principals under a special contract in writing, and without authority to receive the proceeds of such sales," and upon this defence the defendant, upon trial of the issues before a referee, asked a dismissal of the complaint. His request was denied and judgment went against him, both upon the report of the referee and at the General Term.

"The principal point made in his behalf upon this appeal is that the action was improperly brought by the plaintiff in his own name. It appeared that the contract was negotiated by one Clarke, a broker, who in that character made and signed a writing which, so far as is material, was in these words: 'New York, April 25, 1882. — Sold for account of Mr. E. Ludwig, Agt., to Mr. L. C. Gillespie, four thousand (4,000) cases Syrian bitumen,' etc. A time for delivery was specified and the price declared 'payable thirty days from each delivery.' This contract was assented to by both parties, and the referee finds that 'there was no proof that the name of Arles, Dufour, & Co. was disclosed or mentioned as the principal of the plaintiff in the negotiations for the sale, nor at any time before this contract had been executed and delivered; but he also finds that at the time of making it the 'plaintiff was in fact the agent of Arles, Dufour, & Co., of Marseilles, France, for the sale of imported goods,' and that the bitumen was sold and delivered by him, not on his own account, but for and on account of Arles, Dufour, & Co., and as their agent.

"The evidence sustains these findings, and the case is thus brought within the well established rule of law that when a contract not under seal is made with an agent in his own name for an undisclosed principal, whether he describes himself to be an agent or not, either the agent or principal may sue upon it. Considerant *v.* Brisbane, 22 N. Y. 389; Schaefer *v.* Henkel, 75 id. 378.

"The defendant has received the thing bargained for, and a recovery by the plaintiff and payment of the judgment will be a complete protection to the defendant against any claim of the principal arising upon the contract.

"The other questions presented by the appellant relate to rulings by the referee upon offers of evidence, and were properly held by the General Term to be without merit.

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[1] Among "Memoranda of causes not reported in full." — ED.

"The judgment should be affirmed."

William Hildreth Field for appellant.

M. W. Divine for respondent.

Danforth, J., reads for affirmance. All concur.

Judgment affirmed.

SECTION V.

Defences.

(*A*) In an Action brought by the Principal against the Third Party.

RABONE, Jun., *v.* WILLIAMS.

Nisi Prius. 1785.

[7 *T. R.* 360, *n.* (*a*).]

Action for the value of goods sold to the defendant by means of the house of Rabone, Sen., and Co. at Exeter, factors to the plaintiff. The defendant, the vendee of the goods, set off a debt due to him from Rabone and Co., the factors, upon another account, alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by Rabone and Co., the factors, and not by the plaintiff.

Lord **Mansfield**, C. J. Where a factor, dealing for a principal but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled.[1]

Upon this opinion the rest, being a mere matter of account, was referred.

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[1] In Bayley *v.* Morley, London Sittings after Mich. 1788, Lord Kenyon recognized the law of this case. — Rep.

GEORGE *v.* CLAGETT AND ANOTHER.

KING'S BENCH. 1797.

[7 *T. R.* 359.]

ON the trial of this action, which was assumpsit for goods sold and delivered to the amount of £142 1*s*. 9*d*., before Lord KENYON at the Guildhall Sittings, the case appeared to be this: The plaintiff a clothier at Frome employed Messrs. Rich and Heapy in London, Blackwell-Hall factors, as his factors under a commission *del credere,* who besides acting as factors bought and sold great quantities of woollen cloths on their own account, all their business being carried on at one warehouse. The factors sold at twelve months' credit, and were allowed two and a half per cent. On the 30th of September, 1795, Delvalle, a tobacco broker, and who had been in habits of dealing with the defendants, bought several parcels of tobacco of them, and gave them in payment a bill of exchange for £1,198 16*s*. drawn by one Fisher on Rich and Heapy, on the 24th of September, 1795, payable two months after date to J. Stafford who indorsed to Delvalle, who indorsed it over to the defendants, it having been previously accepted by Rich and Heapy. On the 12th of October, 1795, the defendants bought a quantity of woollen cloths for exportation of Rich and Heapy, amounting to £1,237 18*s*. 3*d*. at twelve months' credit; the goods were taken out of one general mass in Rich and Heapy's warehouse; Rich and Heapy made out a bill of parcels for the whole in their own names, and the defendants did not know that any part of the goods belonged to the plaintiff. Early in November, 1795, Rich and Heapy became bankrupts; and afterwards, on the 20th of the same month, the plaintiff gave the defendants notice not to pay Rich and Heapy for certain cloths specified, part of the above, amounting to £142 1*s*. 9*d*., they having been his property, and having been sold on his account by Rich and Heapy on commission. The question was whether the defendants were or were not entitled to set off their demand against Rich and Heapy on the bill of exchange, on the ground that the defendants dealt with them as principals; Lord KENYON was of opinion that they were, as well on principle as on the authority of Rabone *v.* Williams; and a verdict was accordingly found for the defendants.

A rule having been obtained, calling on the defendants to show cause why the verdict should not be set aside, and a new trial had, on the authority of the case of Estcott *v.* Milward, Co. Bank Laws, 236.

Gibbs and *Giles* were now to have shown cause against that rule.

Erskine and *Walton* were called upon to support it.

The Court were clearly of opinion that the directions given by the learned judge on the trial of this cause were right; and that this case was not distinguishable from that of Rabone *v.* Williams. Therefore they *Discharged the rule.*[1]

HORNBY AND OTHERS *v.* LACY.

KING'S BENCH. 1817.

[6 *M. & S.* 166.]

ASSUMPSIT for goods sold and delivered, money lent, money paid, money had and received, and on an account stated. Plea, general issue. On the trial at the London sittings after Trinity term, 1814, a verdict was found for the plaintiffs for £132 14*s.* 6*d.*, subject to the opinion of the Court on the following case: which it was agreed should be turned into a special verdict if the Court should think proper so to direct.

The action is brought to recover the price of two parcels of linens sold to the defendant, who resides and carries on business in London, under the firm of Hamley & Lacy, by Messrs. Duckham & Lankester of London. The goods belonged to the plaintiffs, who are linen manufacturers at Bentham, Yorkshire, and were, with others, consigned by them to Duckham & Lankester, as their factors, for sale.

The first parcel was sold on the 25th of April, 1810, for £26 18*s.*, at four months' credit from the 1st of June, 1810, and the last on the 25th of May, 1810, for £105 16*s.* 6*d.*, at four months' credit from the 1st of July, 1810. The plaintiffs were in the habit of sending goods to Duckham & Lankester, to dispose of as their factors and paid them a *del credere* commission. Duckham & Lankester transmitted to the plaintiffs monthly accounts of the sales, made up from the 24th of one month to the 24th of the following month, but in these accounts the names of the purchasers were not stated. The general course of dealing between Duckham & Lankester and the defendant was for them to draw on him, for the goods purchased by him, at the end of two months from the time the credit began to run, bills at two months; that between Duckham & Lankester and the plaintiffs was for the latter to draw upon Duckham & Lankester for the amount of such sales, at the expiration of two months from the first day of the month succeeding that for which the account was rendered, bills at two months; so that it was in regular course for the plaintiffs to draw, and they did draw on Duckham & Lankester on the 1st of August for the goods sold to the defendant on the 25th of April, and on the 1st of September for those sold on the 25th of May. Duckham & Lankester dealt as factors for many other persons besides the plaintiffs, and had been for some time accustomed to sell goods to the defendant; and they did not communicate to him the names of the persons to whom the goods belonged, but the defendant knew they were only factors. The invoices were entitled, "Messrs. Hamley, Lacey, and Co. bought of Duckham, Lankester & Co., cotton and linen factors;" and in them it was stated that no short measure or damages should be allowed unless agreed to within three days after the sale. The invoices of the two parcels in question were so entitled, and Duckham & Lankester also on one occasion acted as factors to the defendant. On the 11th of September, 1810, before the credit at which either of the two parcels of goods was sold had expired, and before the bills which had been drawn by the plaintiffs according to the usual course became payable, Duckham & Lankester stopped payment, and in January following became bankrupt. The plaintiffs not having been paid by Duckham & Lankester for these goods, on the 23d of November, 1810, gave notice to the defendant that the goods sold in May were theirs, and required him to pay them and not Duckham & Lankester for them. Duckham & Lankester, besides selling goods to the defendant as above stated, had a bill-account with him for their mutual accommodation, and kept two separate accounts, the one of the goods, the other of the bill transactions. The defendant kept only one account of the goods and bills. At the time of Duckham & Lankester's stopping payment, there was a balance due to them from the defendant, as appeared upon Duckham & Lankester's books, of £1,945 11*s.* 5*d.* on the goods account, and at that time there also appeared a balance in their favor on the bill-account; but in consequence of the defendant having afterwards taken up some returned bills, Duckham & Lankester were debtors upon the two accounts together at the time of the action brought in the sum of £8 5*s.* The plaintiffs have not been paid for the goods, nor has the defendant paid Duckham & Lankester formally for them.

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[1] *Acc.*: Montagu *v.* Forwood, [1893] 2 Q. B. 350 (C. A.).
See Lime Rock Bank *v.* Plimpton, 17 Pick. 159 (1835). — ED.

The question for the opinion of the Court is, Whether the plaintiffs are entitled to recover? If they are, the verdict to stand; if not, a nonsuit to be entered.

Gaselee, for the plaintiffs.

Littledale, contra.

Lord ELLENBOROUGH, C. J. I own I cannot think that a commission *del credere* is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports, that if the vendee does not pay, the factor will: it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency. But it varies not an iota the rights subsisting between vendor and vendee. A somewhat different doctrine seems to have originated with Grove *v.* Dubois. A kind of magic effect was there given to a commission *del credere*, changing the relative position of the owner and buyer; and what is reported to have fallen from

Chambre, J., in a later case, is referable to the same authority; but this was set right, as I think, in the judgment in Morris *v.* Cleasby, M. & S. 574, which was given after much consideration, and, I may add, with the concurrence of two of our learned brethren on this bench, now, unhappily, no more. The ulterior effect given to this commission in the above cases has created the confusion. As to the argument founded on the drawing of bills, if it had amounted to payment, or to a case of mutual credit, George *v.* Clagget, 7 T. R. 359, the argument would have been good. This was very recently considered by us in Graham *v.* Dyster, 6 M. & S. 1.

BAYLEY, J. It is important that the relative position of principal and factor should be understood and kept distinct. The factor is agent, the parties to be considered as principals are the owner and buyer. The owner has a right to look for payment to the buyer, unless by some act in which he has concurred he has deprived himself of that right. When he gives a *del credere* commission, he means to obtain an additional security; that is, the security of the factor; and it would be extremely hard if, instead of having an additional security, he should find that he had only substituted one for another, that he had shifted the responsibility from the buyer to the factor. In Morris *v.* Cleasby the effect of such a commission was much considered, and it was held that it could not have any such effect. If the vendee pay the factor for the purchase in due course, and according to the contract, he will be protected; but if otherwise, he pays on the credit of the factor.

ABBOTT, J. A *del credere* commission is in the nature of a private agreement between factor and principal, and, therefore, cannot vary the rights of third parties. The present is the case of a sale by a factor, the purchaser knowing him to have been such. Acceptances given, or payment made at the time, according to the usual course of trade, would have discharged the purchaser. No such payment having been made, the principal had a right to step in and require payment to himself. The circumstance of there being a bill-account between the parties does not vary these rights, these being founded on the *del credere* commission.

HOLROYD, J. I am of the same opinion with respect to the effect of a *del credere* commission and the sale transaction. Where the party selling is known to be a factor, if the vendee pay the price to him, according to the usual course of his authority to receive, this will discharge him; but it is not by a course of drawing bills between the principal and factor, as stated in the case, that he can be discharged.

Judgment for the plaintiff.[1]

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[1] See Blackburn *v.* Scholes, 2 Camp. 341 (1809). — ED.

BORRIES AND ANOTHER *v.* THE IMPERIAL OTTOMAN BANK.

COMMON PLEAS. 1873.

[*L. R.* 9 *C. P.* 38.]

THE second count was for goods sold and delivered, money received by the defendants for the use of the plaintiffs, and interest.

Fifth plea, as to so much of the second count as related to money payable for goods sold and delivered by the plaintiffs to the defendants, that the goods were sold and delivered to the defendants by certain persons known and carrying on business as Scheitlin & Co., then being the agents of the plaintiffs in that behalf and intrusted by the plaintiffs with the possession of the goods as apparent owners thereof; that Scheitlin & Co. sold and delivered the goods in their own name and as their own goods, with the consent of the plaintiffs; that, at the time of the sale and delivery of the goods, the defendants believed Scheitlin & Co. to be the owners of the goods, and did not know that the plaintiffs were the owners of the goods or of any of them, or were interested therein or in the said sale thereof, or that Scheitlin & Co. were agents in that behalf; that, before the defendants knew that the plaintiffs were the owners of the goods or any of them, or interested therein, or that Scheitlin & Co. were agents in the sale thereof, Scheitlin & Co. became, and at the commencement of the suit were and still remained indebted to the defendants in an amount equal to the plaintiffs' claim, as the drawers of certain dishonored bills of exchange which had been refused acceptance by the drawees, and for goods bargained and sold by the defendants to Scheitlin & Co., and for work done, &c., &c., — which amount the defendants were willing to set off against the plaintiffs' claim.

Second replication to the fifth plea, — that, before and at the time when the goods were so sold and delivered to the defendants as in the plea mentioned by the persons known as Scheitlin & Co. to the defendants, they the defendants had the means of knowing that Scheitlin & Co. were merely apparent owners of the goods, and that the same were intrusted to Scheitlin & Co. as agents of and for the plaintiffs, and that Scheitlin & Co. were agents of and for the plaintiffs, and as agents of and for the plaintiffs sold and delivered the goods to the defendants.

Third replication to the fifth plea, — that, before and at the time when the goods were so sold and delivered to the defendants as in the plea mentioned by Scheitlin & Co., they the defendants had the means of knowing that Scheitlin & Co. were merely apparent owners of the goods, and that the same were intrusted to Scheitlin & Co. as agents, and that Scheitlin & Co. were agents and as agents sold and delivered the goods to the defendants.

Demurrer to the fifth plea, on the ground that it did not allege that the defendants had not the means of knowledge that Scheitlin & Co. were acting in the sale as agents. Joinder.

Demurrers to the second and third replications to the fifth plea, on the ground that, inasmuch as the defendants acted in the *bona fide* belief that Scheitlin & Co. were the owners of the goods, and did not know that Scheitlin & Co. were acting in the sale as agents, it was immaterial whether they had such means of knowledge as alleged. Joinder.

Udall, for the plaintiffs.

Holl, *contra*.

COLERIDGE, C. J. I am of opinion that our judgment should be for the defendants.[1] . . . It was in the first place contended by Mr. Udall that the plea should have averred, not only that the defendants did not know that the plaintiffs were the owners of the goods, and believed Scheitlin & Co. to be the owners, but also that the defendants had not the means of knowledge that Scheitlin & Co. were not owners, but were acting in the sale as agents. It appears to me, however, that the plea states all that is material to raise the defence. It states that the plaintiffs intrusted Scheitlin & Co. with the goods for sale, that they sold them, and that the defendants bought them believing Scheitlin & Co. to be the owners of them. The essence of the defence is, the real state of the defendants' minds when they bought the goods of Scheitlin & Co. They assert that it was this, that they believed the goods to be the goods of Scheitlin & Co., and did not know or believe that the plaintiffs were the owners of or interested in them. That brings the case distinctly within the rule in George *v.* Clagett, 7 T. R. 359, and that is the form of plea which has been commonly in use to raise a defence of this kind. I observe that in two cases, — Purchell *v.* Salter, 1 Q. B. 197, and Semenza *v.* Brinsley, 18 C. B. N. S. 467, — where the plea contained an averment that the defendant had no means of knowledge, no notice is taken of that allegation in the judgment. If it be necessary to aver that the defendants had not notice that the plaintiffs were the owners of the goods, I think that is substantially averred in this plea by the statement that Scheitlin & Co., with the consent of the plaintiffs, sold the goods as their own, and that the defendants believed them to be the owners of them, and did not know that the plaintiffs were the owners. The plea being good, it follows that the replication, which merely states that at the time of the sale the defendants had the means of knowing that Scheitlin & Co. were only apparent owners and were intrusted with the goods as agents of the plaintiffs, is no answer to the plea, — being a mere statement of a fact which was immaterial.

KEATING, J. I am of the same opinion. . . . I think it was quite unnecessary to go on and aver that the defendants had not notice or means of knowledge; for, if they had means of knowledge, that might be given in evidence under a traverse of the allegation of want of knowledge. For these reasons, I entirely agree with my Lord that the plea is good, and that the replications afford no answer to it.

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[1] The passages omitted from the several opinions contained restatements of the case. — ED.

BRETT, J. . . . Assuming the other averments in the plea to be true, such an averment as it is contended ought to appear in it would, as it seems to me, throw upon the purchasers of goods a burthen which the mercantile law never intended should be cast upon them. "Means of knowledge" is so large and comprehensive a term that the defendants might be bound to prove that they could not by inquiry have ascertained that the plaintiffs were the owners of the goods, and that Scheitlin & Co. were acting only as agents in the sale of them. That would be manifestly unjust, seeing that the plaintiffs, by intrusting Scheitlin & Co. with the possession of the goods for sale, gave them the opportunity of representing themselves to be the real owners of them. It was further said that the plea is bad for not averring that the defendants had not notice. It is unnecessary to decide that. If it were, I should be prepared to hold that the negation of notice is involved in the affirmative allegation that Scheitlin & Co. sold the goods in their own names and as their own goods, and that the defendants bought them believing Scheitlin & Co. to be the owners and not knowing the plaintiffs to be the owners. But, though it is not necessary, I should incline to go further and to say, that, if the replication had expressly averred that the defendants had notice at the time of the sale that Scheitlin & Co. were acting merely as agents, if the allegations in the plea were true that averment would be immaterial. I take the rule of law to have been properly laid down by Willes, J., in Semenza *v.* Brinsley, where, treating of the facts necessary to be alleged in a plea of this sort, he says, referring to the rule in George *v.* Clagett: "In order to make a valid defence within the rule above stated, it is obvious that the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal, with the authority of the plaintiff, that the defendant dealt with him as and believed him to be the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued." In that statement of the law by that very learned judge, neither of the allegations the absence of which is relied on here is alluded to. Mr. Udall's reference to the precedent in Chitty, jun. 3rd ed. p. 514, shows that the extreme caution of the learned editors induced them to put in something which was not absolutely necessary to the validity of the plea. I am of opinion that the plea is good, and the replications bad.

DENMAN, J. I am of the same opinion. I think the plea contains all that is essential to constitute a defence. Means of knowledge may be material evidence on the trial. So, the allegation of notice would be merely stating matter of evidence.

Judgment for the defendants.

ROOSEVELT *v.* DOHERTY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1880.

[129 *Mass.* 301.]

CONTRACT to recover the price of plate glass sold and delivered to the defendant. Trial in the Superior Court, before PITMAN, J., who directed a verdict for the defendant, and reported the case for the determination of this court. If the plaintiff could maintain the action, a new trial was to be ordered; otherwise, judgment on the verdict. The facts appear in the opinion.

R. Gray & H. W. Swift, for the plaintiff.

F. S. Hesseltine, for the defendant.

ENDICOTT, J. It appears from the report that the firm of Hills, Turner, & Harmon were importers of and dealers in window and plate glass, and they made a contract in writing with the defendant to furnish the glass for a building which he was about to erect in Boston, according to the specifications furnished by the architect, for the gross sum of $688 in cash. The contract describes the quality and dimensions of the glass to be furnished, and the number of lights of each quality. Hills, Turner, & Harmon were the selling agents for the plaintiff, in Boston, for plate glass, and the first four items of glass to be furnished, as specified in the contract, were plate glass, and belonged to the plaintiff, having been consigned to the firm for sale. The remainder of the glass was furnished by the firm. The defendant had no knowledge that any of the glass belonged to the plaintiff.

We can have no doubt that, as between the firm and the defendant, this was an entire contract; it was to furnish the glass for the building for a specified sum of money. There was no price named in the contract for the several kinds and qualities of glass to be furnished; and it is immaterial that the quality of the several kinds of glass to be furnished was specified. The consideration being entire, there could be no distinct apportionment of the consideration between the different qualities of glass furnished. There were not two contracts, one for plate glass, and the other for glass of different qualities, but one contract for all the glass thus furnished to the building. Clark *v.* Baker, 5 Met. 452. The firm could not recover for any portion of the glass, but only on the entire contract, by which all the glass passed to the defendant. And the question to be considered here is, whether the plaintiff, as an undisclosed principal, can maintain an action against the defendant to recover the value of the plate glass belonging to him, included in the entire contract. We are of opinion that he cannot.

It is too well settled to require the citation of many authorities, that an undisclosed principal, whose goods are sold by a factor, may sue the purchaser for the price; and where the contract of sale is in writing, and made in the name of the factor, he may bring an action upon it. A sale by his agent is a sale by him. Lerned *v.* Johns, 9 Allen, 419, and cases cited.

In the case at bar, it does not appear that any instructions were given by the plaintiff in regard to the price, manner, or terms of sale of his goods. The factors therefore had the right to sell in such manner as would best promote the interests of their principal; and it is to be presumed that the plaintiff understood that they would sell according to the usual course of dealing in Boston, when goods are consigned to a factor for sale. Dwight *v.* Whitney, 15 Pick. 179. That a factor may sell on credit, and take a note in his own name from the purchaser, and if he uses due diligence he is not responsible, in case of loss by reason of the purchaser's failure, was settled in an early case. A factor also may, and often does, sell the goods of different principals in one sale, and has authority to take a note for the whole sum from the purchaser, and may hold the note for the benefit of his principals. Goodenow *v.* Tyler, 7 Mass. 36; Chesterfield Manuf. Co. *v.* Dehon, 5 Pick. 7; West Boylston Manuf. Co. *v.* Searle, 15 Pick. 225; Hapgood *v.* Batcheller, 4 Met. 573; Hamilton *v.* Cunningham, 2 Brock. 350; Corlies *v.* Cumming, 6 Cowen, 181; Beawes Lex Merc. (5th ed.) 45.

In West Boylston Manuf. Co. *v.* Searle, *ubi supra*, a factor sold the goods of two consignors in one sale, and took the note of the purchaser; and it was held that it operated as payment; that the factor had power to release it; and, although he afterwards indorsed it to one of the consignors, that no action could be maintained on the note by the indorsee; and the Court said, "The factors having an unquestioned authority to take a negotiable note in their own name, and thereupon to cancel and discharge the simple contract debt, the note was rightly taken, and whether it was rightly held and retained by the factors as their own, or otherwise appropriated, was a question merely between them and their employers."

So a factor may sell his own goods with those of his principal, and take a note which includes the amount due for both, as in Hapgood *v.* Batcheller, 4 Met. 573. In that case it appears that the factors had sold goods of the plaintiff's and some of their own in one sale, and had taken a note from the purchaser which included the amount due for the plaintiff's goods and their own; and it was said by the Court, that the sales by the defendant were made in the usual manner, and the terms of credit were reasonable, and that the sales were at the risk of the principals. Accounts had been rendered to the plaintiff by the factors of the sale of the goods, a portion of the proceeds had been paid over, and the note in suit was given for the balance by the factors to the plaintiff. Before the note of the purchasers was due, they became insolvent, and it was held that, as a note for the balance of an account is only *prima facie* evidence of payment, the factors were not liable for so much of the note as included the debt of the insolvent purchaser. See also Vail *v.* Durant, 7 Allen, 408.

It is clear, therefore, that when a note is taken from a purchaser by a factor, for the sale of the goods of several consignors, or for the sale of the goods of one or more consignors and of the goods of the factor, one consignor cannot sue the purchaser for the value of his goods taken separately, although his goods were sold for a definite sum, capable of being ascertained, and which forms a distinct part of the consideration of the note. The note is payment for the whole, it is a contract which the factor had the right to make, and upon which alone the purchaser is liable. The principal is thus deprived of his direct remedy against the purchaser for the separate price of his goods.

In the case at bar, Hills, Turner, & Harmon were importers of and dealers in glass, as well as selling agents for the plaintiff, and they could sell their own goods with those of the plaintiff, in the same manner as they could sell the goods of several principals together. Having authority to do this, and thus mingle the plaintiff's goods with their own, they may make an entire contract with the purchaser for the goods so mingled. And this contract being entire, the remedy, as against the purchaser, must be upon the contract itself. The character of the contract precludes the plaintiff from suing separately for the value of his glass, to the same extent as he would have been precluded if a note had been given by the defendant in payment for the goods sold to him under the written contract. And although an undisclosed principal may maintain an action in his own name against one who has purchased his goods through a factor, yet the purchaser is entitled to all the equities and defences he would have had if the action had been brought in the name of the factor, for the principal has permitted his factor to act as the apparent principal in the transaction. Huntington *v.* Knox, 7 Cush. 371; Barry *v.* Page, 10 Gray, 398; Locke *v.* Lewis, 124 Mass. 1, 7, and cases cited.

No case has been cited, in the very elaborate argument for the plaintiff, in which such an action as this has been maintained; but it is argued that the plaintiff's position is sustained by the only two cases which bear upon this point, — Corlies *v.* Cumming, 6 Cowen, 181; West Boylston Manuf. Co. *v.* Searle, 15 Pick. 225.

The case of Corlies *v.* Cumming is clearly distinguishable. There a factor sold cheese of one of his consignors on a credit of ninety days for a definite and distinct sum, and at the same time sold to the same purchaser cheese belonging to another consignor, and took from the purchaser a note payable to himself for both. As the note by the law of New York was not a payment, it was held that the factor had not made himself liable, for the principal might sue the purchaser for the price of his cheeses, which could be clearly ascertained, in the same manner as he might have done if no note had been taken.

A *dictum* of Chief Justice Shaw in West Boylston Manuf. Co. *v.* Searle is relied on by the plaintiff. "If," he says, "the principal is in a condition to declare on a contract for goods sold, treating the note as a nullity, or as a mere collateral security, not amounting to payment, he might probably recover in his own name." This, as a general proposition, may be correct, but as by our law a promissory note is *prima facie* payment, the principal cannot recover for goods sold, where such a note has been given in payment for his goods.

We are therefore of opinion that the presiding judge correctly ruled that the contract made by the defendant was an entire contract for a gross sum; and that the plaintiff had no right to sever the same and maintain an action in his own name, and subject the defendant to a separate suit for the value of the plate glass belonging to him and included in the contract of sale.

Judgment on the verdict.

ORAMEL G. STEBBINS *v.* WALKER AND ANOTHER.

SUPREME COURT OF MICHIGAN. 1881.

[46 *Mich.* 5.]

ASSUMPSIT. Plaintiff brings error. Affirmed.

Latham & Case, for plaintiff in error.

J. W. McGrath, and *C. I. Walker*, for defendants in error.

COOLEY, J. This case was sent to a referee by the circuit court, and judgment was given in favor of defendant on the referee's report. The important facts in the case are the following: —

For some time prior to June, 1879, and up to August of that year, plaintiff was a dealer in grain at Vermontville in this State, and defendants were commission brokers and members of the Board of Trade of Detroit. As commission brokers they had bought and sold for the plaintiff previous to the 30th of June, 1879, and made advances which were all settled on that day. On August 14, 1879, plaintiff made a conditional sale of his business to his brother Osmyn G. Stebbins. The conditions were to be performed within a week thereafter, but they were not performed, and at the end of the week plaintiff resumed his business and took possession of his property, which in the mean time his brother had had and controlled. A few days before this the defendants had written the plaintiff, soliciting his shipments, and in reply they received the following letter: —

OFFICE OF O. G. STEBBINS,
THORNAPPLE VALLEY MILLS,
And dealer in Grain, Feed, Land, Plaster, etc.
VERMONTVILLE, Mich., Aug. 14, 1879.

MESSRS. WALKER, SUMNER, & CO.:

Your letter of the 4th of August was duly received at my stopping place, and by reason of my absence from home and general inattention to business lies unanswered. At the opening of the new crop trade this season I did not think I should engage in active work at all at present; and as I am yet unable to labor, I do not know when I shall take hold again. I am now seriously contemplating a trip to Colorado.

My brother is at work in a mild way in the wheat business, but he has so far seen fit to ship to another party from whom he gets the same rebate as you offer. His initials are the same as my own, so that if you choose to correspond with him, the same direction will reach him as myself.

Thanking you for your efforts in my behalf,

I remain truly yours,

O. G. STEBBINS.

This letter was understood by defendants to mean that the plaintiff intended to remain out of business for a time, and that the brother Osmyn was then in the wheat business in Vermontville, and thereupon they addressed a letter to Osmyn, soliciting his business. They also wrote to the plaintiff informing him how they understood his letter, and that they had solicited his brother's consignments. To this the plaintiff sent no reply, and until November 26th following defendants supposed the dealings with them in the name of O. G. Stebbins hereinafter mentioned were on behalf of Osmyn G. Stebbins, and had no information and no reason to suspect the contrary. These dealings began after September 17th, on which day plaintiff left home for his health and remained absent until October 24th, leaving his brother Osmyn in charge of his business. While he was gone Osmyn shipped to defendants five car-loads of wheat in the name of O. G. Stebbins and for the plaintiff, but which defendants received, sold, and accounted for, supposing it to be the wheat of Osmyn himself. On these dealings a balance remained due to the defendants of $74.64. There was also sent to defendants a car-load of wheat which was placed in the elevator, but by reason of some mistake, owing to a change of bookkeepers, was not credited to any one. This also belonged to the plaintiff. Early in November defendants also made a purchase of wheat, and also a sale of it which they supposed to be for Osmyn, but which was in reality on an order from plaintiff, on which they realized a profit of $307.50, and which left standing to the credit of O. G. Stebbins on their books $232.86.

Osmyn G. Stebbins left his brother's employ November 5, 1879. On November 15th he telegraphed defendants from Jackson in the name of O. G. Stebbins, asking them to send him $700. Relying upon his personal credit they sent the money. At the same time he requested them to purchase for O. G. Stebbins 3000 bushels of wheat for January delivery. With this request they also complied.

On November 26th defendant Walker was at Vermontville, when he for the first time learned that plaintiff had resumed business, and that all the wheat dealings previous to November 15th had been conducted by Osmyn as agent, not as principal. Plaintiff told Walker he had no interest in the purchase of November 15th, but would take it off defendants' hands. This he could then have done at a profit of $150. Walker declined this offer, but said he would stand upon the purchase until he could realize $700 profit upon it, and then close it out. The wheat was afterwards sold, however, without profit. Afterwards plaintiff had other dealings with defendants which entitled them to claim from him $79.75. The car-load, which by mistake was not credited to any one, was sold by defendants in January following, and realized $452.79. The defendants claimed they were entitled to apply this and also the $232.86 which was in their hands to the credit of O. G. Stebbins, on November 15, 1879, as part payment of the $700, which Osmyn G. Stebbins obtained from them on that day. Plaintiff resisted this claim, and demanded from defendants the proceeds of all the wheat belonging to him which had been forwarded to and sold by them.

The circuit court gave judgment for the defendants, applying the $232.86 and $452.79 in accordance with their claim, and permitting them to recover the balance of $79.25 on subsequent dealings. This would leave a balance of $14.35 of the $700 still unpaid.

Was this judgment correct? We think it was. Defendants from August 14th to November 5th had been dealing with Osmyn G. Stebbins in the belief that he was principal in the business, induced to that belief by the letter and subsequent conduct of the plaintiff, and having no reason to think or suspect the contrary. Plaintiff knew that the manner in which the business was done and the correspondence conducted, was calculated to lead the defendants to suppose that he had retired from the business, and Osmyn had become his successor. When Osmyn left his employment, no notice was given to defendants, and to all appearance the business continued as before. The defendants were therefore not in fault, and were chargeable with no negligence in assuming that Osmyn still continued to be the principal. He had forwarded several car loads of wheat to defendants in the name of O. G. Stebbins prior to November 5th, and received the proceeds in the name of O. G. Stebbins, and it is conceded that payment was properly made to him, though the wheat belonged to the plaintiff. Defendants supposed the wheat belonged to Osmyn, but it is conceded that if they had known the plaintiff was owner, the payment to Osmyn would have been a valid payment, because Osmyn was the plaintiff's agent and doing business in the plaintiff's name. But if a payment to Osmyn before November 5th was good, one after November 5th must have been equally good. Defendants had no notice of any change in the business, and in fact there had been none. The same person who had sent wheat to them, and who they supposed and had a right to suppose was the principal, requested of them an advance, and they made it. The referee reports that defendants relied, in making this advance, on the personal credit of Osmyn; but their reliance on his credit would not preclude their relying also on their lien upon the grain received from him. Liens on property are commonly accompanied by a personal responsibility, and the creditor is entitled to rely upon both.

The case in judgment is a plain case of estoppel. There has been negligence from which one of two parties must suffer, and the responsibility for this negligence justly and exclusively lies at the door of the plaintiff. If he were now to collect of defendants the sum they advanced to his brother while he was acting ostensibly as principal, they would be defrauded, and the plaintiff's negligence would have furnished the opportunity, and the agent. The loss must therefore fall upon the plaintiff, though his intentions may have been entirely honest: Vanneter *v.* Crossman, 42 Mich. 465. Nor has there been any failure here, as there was in Maxwell *v.* Bay City Bridge Co., 41 Mich. 453, to find the facts from which the estoppel springs: they all appear in the referee's report.

It is claimed that defendants waived the lien on the car load of wheat remaining in their hands when they were informed of plaintiff's interest; but the record shows no express waiver, and no facts from which it must necessarily be implied. They did indeed express a willingness to hold the January wheat until the rise in value should make good their loss; but there was no agreement to that effect, and if there had been, a desire to protect the plaintiff against loss might sufficiently account for it. They also declined plaintiff's offer to take the January wheat off their hands, coupled as it evidently was in his mind with leaving them to lose the $700 advance; and for this they cannot be blamed. It was talked over between the parties that defendants should proceed to sell the car load of wheat then on hand; but if plaintiff expected defendants to waive any existing lien, and pay over to him the proceeds, he neither gave any consideration therefor, nor asked or obtained any promise to that effect. The defendants were therefore at liberty to stand upon their rights as they existed at the time they first learned that the business carried on with them by Osmyn in the name of O. G. Stebbins was really the business of the plaintiff.

The judgment must be affirmed, with costs.

The other justices concurred.

ISAAC COOKE & SONS *v.* ESHELBY.

House of Lords. 1887.

[12 *App. Cas.* 271.]

Appeal from a decision of the Court of Appeal.

In April and June 1883 Livesey Sons & Co., cotton brokers at Liverpool, sold to Isaac Cooke & Sons, on the Liverpool cotton market, cotton for future deliveries. Livesey Sons & Co. made these two contracts in their own names, but were really acting as agents for Maximos, their undisclosed principal. Before maturity of the contracts Livesey Sons & Co. suspended payment, and under the rules of the Liverpool Cotton Association, Limited, the contracts were closed in the form of repurchases by Livesey Sons & Co. from Isaac Cooke & Sons. The price of cotton having fallen, the result of this transaction was that a sum of £680 was due from Isaac Cooke & Sons to Livesey Sons & Co. For this sum an action was brought against Isaac Cooke & Sons by Eshelby as trustee in the liquidation of Maximos, who had failed.

The defendants by their defence claimed to set off against the plaintiff's claim money due from Livesey Sons & Co. to the defendants upon a general account.

In answer to the plaintiff's interrogatories whether in the transactions sued on the defendants did not believe that Livesey & Co. were acting as brokers on behalf of principals the defendants said: "We had no belief on the subject. We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals."

At the trial at Liverpool in February, 1884, before BAGGALLAY, L. J., without a jury, it was proved that Livesey & Co. bought and sold both for principals and on their own account, and that Cooke & Sons knew this. BAGGALLAY, L. J., held that the defendants were entitled to the set-off, and gave judgment for them.

The Court of Appeal (BRETT, M. R., LINDLEY and BOWEN, L.JJ.) reversed this decision, and entered judgment for the plaintiff for the amount claimed, on the ground that the defendants were not entitled to the set-off unless they had been induced by the conduct of Maximos the principal to believe, and did in fact believe, that they were dealing with Livesey & Co. as the principals.

Against this decision the defendants appealed.

W. R. Kennedy, Q. C., and *T. G. Carver* for the appellants.

D. French, Q.C., and *Synnott*, for the respondents, were not heard.

Lord HALSBURY, L. C. My Lords, in this case a merchant in Liverpool effected two sales through his brokers. The brokers effected the sales in their own names. The appellants, the merchants with whom these contracts were made, knew the brokers to be brokers, and that it was their practice to sell in their own names in transactions in which they were acting only as brokers. They also knew that the brokers were in the habit of buying and selling for themselves. The appellants with commendable candor admit that they are unable to say that they believed the brokers to be principals; they knew they might be either one or the other; they say that they dealt with the brokers as principals, but at the same time they admit that they had no belief one way or the other whether they were dealing with principals or brokers.

It appears to me that the principle upon which this case must be decided has been so long established that in such a state of facts as I have recited the legal result cannot be doubtful. The ground upon which all these cases have been decided is that the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief. With reference to both those propositions, namely, first, the permission of the real principal to the agent to assume his character, and with reference to the fact whether those dealing with the supposed principal have in fact acted upon the belief induced by the real principal's conduct, various difficult questions of fact have from time to time arisen; but I do not believe that any doubt has ever been thrown upon the law as decided by a great variety of judges for something more than a century. The cases are all collected in the notes to George *v.* Clagett, 2 Sm. L. C. 8th Ed. 118.

In Baring *v.* Corrie, 2 B. & Ald. 137, 144, 147, in 1818, Lord Tenterden had before him a very similar case to that which is now before your Lordships, and although in that case the court had to infer what we have here proved by the candid admission of the party, the principle upon which the case was decided is precisely that which appears to me to govern the case now before your Lordships. Lord Tenterden says of the persons who were in that case insisting that they had a right to treat the brokers as principals: "They knew that Coles & Co. acted both as brokers and merchants, and if they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they made no inquiry." And Bayley, J., says: "When Coles & Co. stood at least in an equivocal situation, the defendants ought in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed, when they bought the goods, that Coles & Co. sold them on their own account. And if so, they can have no defence to the present action."

I am therefore of opinion that the judgment of the Court of Appeal was right. The selling in his own name by a broker is only one fact, and by no means a conclusive fact, from which, in the absence of other circumstances, it might be inferred that he was selling his own goods. Upon the facts proved or admitted in this case the fact of selling in the broker's name was neither calculated to induce nor did in fact induce that belief.

I now move your Lordships to affirm the judgment of the Court of Appeal and to dismiss this appeal with costs.

Lord WATSON.[1] The only facts which have a material bearing upon the appellants' defence are these. According to the practice of the Liverpool cotton market with which the appellants were familiar, brokers in the position of Livesey Sons & Co. buy and sell both for themselves and for principals; and in the latter case they transact, sometimes in their own name without disclosing their agency, and at other times in the name of their principal. In their answer to an interrogation by the plaintiff touching their belief that Livesey Sons & Co. were acting on behalf of principals in the two transactions in question, the appellants say: "We had no belief upon the subject. We dealt with Livesey Sons & Co. as principals, not knowing whether they were acting as brokers on behalf of principals or on their own account as the principals."

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[1] After stating the case. — ED.

That is a very candid statement, but I do not think any other answer could have been honestly made by persons who, at the time of the transactions, were cognizant of the practice followed by members of the Liverpool Cotton Association. A sale by a broker in his own name to persons having that knowledge, does not convey to them an assurance that he is selling on his own account; on the contrary it is equivalent to an express intimation that the cotton is either his own property or the property of a principal who has employed him as an agent to sell. A purchaser who is content to buy on these terms cannot, when the real principal comes forward, allege that the broker sold the cotton as his own. If the intending purchaser desires to deal with the broker as a principal and not as an agent in order to secure a right to set-off, he is put upon his inquiry. Should the broker refuse to state whether he is acting for himself or for a principal, the buyer may decline to enter into the transaction. If he chooses to purchase without inquiry, or notwithstanding the broker's refusal to give information, he does so with notice that there may be a principal for whom the broker is acting as agent; and should that ultimately prove to be the fact, he has, in my opinion, no right to set off his indebtedness to the principal against debts owing to him by the agent.

It was argued for the appellants, that in all cases where a broker, having authority to that effect, sells in his own name for an undisclosed principal, the purchaser, at the time when the principal is disclosed, is entitled to be placed in the same position as if the agent had contracted on his own account. That was said to be the rule established by George *v.* Clagett, Sims *v.* Bond, 5 B. & Ad. 389, and subsequent cases. It is clear that Livesey Sons & Co. were not mere brokers or middlemen, but were agents within the meaning of these authorities, and if the argument of the appellants were well founded they would be entitled to prevail in this appeal, because in that case their right of set-off had arisen before the 20th of July, 1883, when they first had notice that Maximos was the principal.

I do not think it necessary to enter into a minute examination of the authorities, which were fully discussed in the arguments addressed to us. The case of George *v.* Clagett has been commented upon and its principles explained in many subsequent decisions, and notably in Baring *v.* Corrie, Semenza *v.* Brinsley, 18 C. B. N. S. 467, and Borries *v.* Imperial Ottoman Bank, Law Rep. 9 C. P. 38. These decisions appear to me to establish conclusively that, in order to sustain the defence pleaded by the appellants, it is not enough to show that the agent sold in his own name. It must be shown that he sold the goods as his own, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account and not for an undisclosed principal; and it must also be shown that the agent was enabled to appear as the real contracting party by the conduct, or by the authority, express or implied, of the principal. The rule thus explained is intelligible and just; and I agree with Bowen, L. J., that it rests upon the doctrine of estoppel. It would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection.

I therefore agree with the conclusion of the learned judges of the Court of Appeal, and with the reasoning upon which it is founded. A broker who effects a sale in his own name with an intimation, express or implied, that he is possibly selling as an agent, does not sell the goods as his own, and in such a case the purchaser has no reasonable grounds for believing that the agent is the real party with whom he has contracted.

Lord FitzGerald.[1] I concur with my noble and learned friend in adopting at once the decision and the reasons of the Court of Appeal. I have, however, some hesitation in accepting the view that the decisions rest on the doctrine of estoppel. Estoppel *in pais* involves considerations not necessarily applicable to the case before us. There is some danger in professing to state the principle on which a line of decisions rests, and it seems to me to be sufficient to say in the present case that Maximos did not in any way wilfully or otherwise mislead the defendants (Cooke & Sons) or induce them to believe that Livesey & Co. were the owners of the goods or authorized to sell them as their own, or practice any imposition on them. The defendants were not in any way misled.

Order appealed from affirmed; and appeal dismissed with costs.[2]

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[1] After discussing the facts. — Ed.

[2] *Acc.:* Miller *v.* Lea, 35 Md. 396 (1872), where, at pp. 406–407, Alvey, J., said: "The buyer must be cautious, and not act regardless of the rights of the principal, though undisclosed, if he has any reasonable grounds to believe that the party with whom he deals is but an agent. Hence, if the character of the seller is equivocal, if he is known to be in the habit of selling sometimes as principal and sometimes as agent, a purchaser who buys with a view of covering his own debts and availing himself of a set-off is bound to inquire in what character he acts in the particular transaction; and if the buyer chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of his set-off." — Ed.

SECTION V. (*continued*).

(*B*) IN AN ACTION BROUGHT BY THE THIRD PARTY AGAINST THE PRINCIPAL.

NELSON *v.* POWELL.

KING'S BENCH. 1784.

[3 *Doug.* 410.]

THIS was an action of assumpsit for goods sold and delivered, tried at Exeter before Mr. Baron HOTHAM. The facts at the trial appeared to be these: The defendant, by one Thomas his broker, bought goods of the plaintiff. The invoices were made out in the broker's name for goods delivered to him, and were all paid for except a balance, for which the plaintiff pressed Thomas, who had not declared his principal. One of the plaintiff's letters to Thomas was sent by him to the defendant, who, having remitted to Thomas sufficient to pay the plaintiff, wrote to the latter and informed him of that fact. After this the plaintiff again called on Thomas to pay the money as due from him; but this not being done, the plaintiff brought the present action. The jury having found a verdict for the plaintiff,

Lawrence now moved for a new trial, on the ground that the credit had been given to Thomas, and that he alone was liable; but

Lord MANSFIELD held the principal liable whenever he was known, and *The rule was refused.*[1]

HEALD AND OTHERS *v.* KENWORTHY.

EXCHEQUER. 1855.

[10 *Exch.* 739.]

THE declaration was for goods sold and delivered.

Plea. That the selling and delivering in the declaration mentioned was, and consisted in, the sales and deliveries hereinafter in this plea mentioned, and not otherwise; and that the sales and deliveries of the said goods to the defendant, and the purchases by the defendant from the plaintiffs, were made by the agency, on behalf of the defendant, of W. V. Taylor, and not otherwise; and the said purchases, and the acceptance from the plaintiffs of the said goods, were made by, and the said sales and deliveries by the plaintiffs were made to, the said Taylor in his own name and not in the name of the defendant; and that the plaintiffs at the time of, and in and about the said sales and deliveries, gave credit to the said Taylor as buyer of the said goods, and in respect of the prices thereof, and in all respects treated him as a principal, and continued so to credit him and to treat him until after the defendant had made the payments to the said Taylor, and settled with and satisfied him as hereinafter is mentioned; and the plaintiffs did not at any time, until after the defendant had so made the payments to and settled with and satisfied the said Taylor as aforesaid, give credit to the defendant in respect of any of the said sales or prices, or in any way treat the defendant as buyer of the said goods or any part thereof, or as in any way responsible to the plaintiffs, or make any claim or demand on him in respect of any of the said sales or prices; and that after the said sales respectively, and before the defendant knew or had notice or reason to believe that the said Taylor was or would be unable to pay, or that he would not pay the vendors of the said goods the prices thereof in full, according to the terms of the said sales, and when (on the contrary) the defendant had reason to believe, and did believe, that the said Taylor would duly settle with the vendors according to the said terms, he the defendant *bona fide* settled with the said Taylor in respect of the said purchases and prices, and *bona fide* paid the said Taylor, on account of the said goods and the purchases and prices thereof, moneys sufficient, and more than sufficient to pay and satisfy the said prices and all claims of the said Taylor in respect of the said purchases and prices, and being sufficient and more than sufficient to pay and satisfy all claims of the plaintiffs in respect of the said goods and the said prices; and the said Taylor then became, and was, satisfied in respect of the said goods and prices, and of all claims on account thereof, and then became indebted to the defendant, and hath at all times continued and still is so indebted to the defendant; and the defendant hath not since the said settlement been indebted to the said Taylor; that the said payments to the said Taylor were made by the defendant before commencement of this suit, and were made by the defendant at reasonable and proper times, and according to the usual course of dealing between the defendant and the said Taylor, and according to the usual and proper course of business, and not unduly early; and the said times were times which, before and when the defendant made the said payments, were represented by the said Taylor to the defendant to be, and which the defendant before and when he made the said payments had reason to believe and did believe to be, necessary and proper times of payments of the said sums, and necessary and proper, in order to put the said Taylor in funds, and enable him to pay and satisfy the vendors according to the terms of the said sales; and that before he knew or had notice that the plaintiffs had been the vendors, or that the vendors were not paid according to the terms of the said sales, he the defendant had reason to believe, and did believe, that the persons who had sold the said goods to the said Taylor as aforesaid had been paid; and that the defendant did not know, nor had notice until after he had made the payments to and settled with and satisfied the said Taylor as aforesaid, nor until after the defendant had received the said goods from the said Taylor, that the plaintiffs had become or were vendors of the said goods, or any of them, or that they made or had any claim in respect of any of the said goods, or of the prices thereof, nor did the defendant know, nor had he notice until after the said payments to and the settlement with and satisfaction of the said Taylor, what were the terms as to times or modes of payment on which the said Taylor had bought the said goods, or any of them; and the defendant says that, according to the terms of the said sales by the plaintiffs, the said prices were payable to the plaintiffs before the time when the defendant first had notice of any claim or right of the plaintiffs in respect of any of the said goods or prices.

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[1] See Raymond *v.* Crown & Eagle Mills, 2 Met. 319 (1841). — ED.

Demurrer and joinder.

The case came on for argument in last Michaelmas Term (November 13), when the court, inclining to the opinion that the plea was ambiguous, and might perhaps afford a defence, as amounting to the general issue, and the parties being desirous that it should raise the substantial question, the case was ordered to stand over for the purpose of amending the plea. Certain alterations were now made in the plea by the court, to admit that a debt had been created between the plaintiffs and the defendant.

Cleasby in support of the demurrer. It being agreed that the plea shall not be taken to amount to the general issue, it affords no defence to this claim by the seller of the goods against the principal. The simple fact, that a principal has *bona fide* provided his agent with money for the payment of a debt, which money is not paid by the agent to the creditor, does not discharge the principal. [ALDERSON, B. Credit was not given to the agent by the plaintiffs. PARKE, B. The plaintiffs' argument is, that the simple fact of the agent having received the money is no answer to the claim. The defendant was bound to see that the plaintiffs were duly paid. This case does not fall within the principle that the debtor cannot be sued where he has been misled by the creditor to make the payment. The *dicta* of learned judges are to be regarded in this light. Thus in Kymer *v.* Suwercropp, 1 Camp. 110, Lord Ellenborough, C. J., says: "If he," that is the seller of the goods, "lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if in that case the price of the goods has been paid to the broker on account of this deception, the principal shall be discharged." Smyth *v.* Anderson, 7 C. B. 21, and Wyatt *v.* Marquess of Hertford, 3 East. 147, contain *dicta* which may be explained in the same way. In such a case it would be unjust to allow the seller to recover against the principal.] If the plaintiffs had by their conduct altered the state of accounts between the defendant and his agent, the case would have fallen within the same principle. He was then stopped by the court.

Aspland contra. The plea alleges that the goods were delivered to the agent, and that when the payment was made by the defendant to him he had reason to believe, and did believe, that the agent would pay the plaintiffs, and that payment so made to the agent was not unduly early. It has been assumed on the part of the plaintiffs that the rule under which the principal when discovered is liable to the seller is an unlimited one. But the application of that rule depends on the particular facts of the case; for instance, a foreign principal is not liable. [PARKE, B. The question of his liability is one of fact. Where the seller deals with an agent resident in this country, and acting for a foreign principal, the presumption is, that the seller does not contract with the foreigner and trust him, but with the party with whom he makes the bargain. That is a question of fact, and not of law. MARTIN, B. Here the defendant authorized his agent to pledge his credit. The case differs from that where a servant is sent with the money in his hand to make a purchase, for there the master gives no authority to his servant to pledge his credit. PARKE, B. A debt has been created by the defendant's authority. He is bound to see that it is paid. What, then, is there in the plea which precludes the plaintiffs from recovering their debt?] There is no authority precisely in point, although the reports contain several dicta which are in the defendant's favor. In Paterson *v.* Gandasequi, 15 East, 62, Lord Ellenborough, C. J., said, "The case in which I remember that the liability of a principal was carried furthest was Powel *v.* Nelson upon the Western Circuit, of which Mr. Justice Lawrence had a manuscript note. There, a factor made purchases for his principal, who made payments for him on account. Afterwards the factor was pressed for payment by a letter which came to the hands of the principal, who transmitted it to the factor, and with a knowledge of the fact paid him the residue. It was held by Lord Mansfield, C. J., that the principal was liable over to the sellers for the money he had so paid to his factor after notice." In Smyth *v.* Anderson, 7 C. B. 21, Maule, J., in delivering the judgment of the court, cites the *dictum* of Bayley, J., to be found in Thomson *v.* Davenport, 9 B. & C. 78, that "it is said that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment." [PARKE, B. Something, however, must occur to make it unjust to call upon the principal for payment; where, for instance, the seller tells the principal that he will look to the agent for payment, and the principal pays the agent, it would be unjust to hold the principal liable, in case of non-payment by the agent.] Wilde, C. J., in Smyth *v.* Anderson, makes the following observations on

Kymer *v.* Suwercropp; after stating the marginal note and facts of that case, his Lordship says, "The objection, however, was not that the money was paid before it was due, but that it never was paid at all according to the contract. The case therefore does not involve the principle in support of which it has so frequently been cited."

Cleasby was not called upon to reply.

Pollock, C. B. I am of opinion that the plea is bad. It comes shortly to this. A person employs his agent to purchase goods for him, with authority to pledge his credit. The agent does so, and thus creates a debt; and I agree with the remark made by my Brother Parke, that all the cases in which the principal has been held to be discharged, are cases in which the seller has enabled the agent to misrepresent, or where the agent by some conduct adopted by the seller has placed his principal in a worse situation than that he ought to be in. This plea contains nothing of that sort. It merely states that the plaintiffs treated Taylor as the principal, and that the defendant *bona fide* settled with him.

Parke, B. I am of the same opinion. The plea simply states, that, after the contract was entered into between the plaintiffs and a third party, the agent of the defendant, under circumstances which rendered the defendant liable upon it, the latter paid the agent. I am of opinion that this is no defence to the action. It is clear, that, if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly. But there are no doubt cases and *dicta*, which, unless they be understood with some qualification, afford ground for the position taken by the counsel for the defendant. First, there is the *dictum* of Bayley, J., in Thomson *v.* Davenport, where that learned judge lays down the rule, that "if the agent does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable." And he then proceeds to say, "If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to an action brought by the seller, where he had looked to the responsibility of the agent." The expression, "make it unjust," is very vague; but if rightly understood, what the learned judge said is, no doubt, true. If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be unjust for him to do so.

But I think that there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position. This was the ground of the decision in Wyatt *v.* The Marquis of Hertford, where the seller took the security of the agent unknown to the principal, and gave the agent a receipt as for the money due from the principal, in consequence of which the principal dealt differently with his agent on the faith of such receipt, and it was properly held that the seller could not sue the principal. So in the case put by Lord Ellenborough, C. J., in Kymer *v.* Suwercropp, the observations of that learned judge are perfectly correct; for the fact of the seller's allowing the time for payment to elapse might afford evidence of deceit on his part, and of his having thereby induced the principal to pay the agent. Neither does the case of Smyth *v.* Anderson, nor the elaborate judgment of my Brother Maule, contain anything at variance with the principle I have stated. He adopts the proposition expounded by Bayley, J., that the seller cannot recover against the principal, if it be unfair for him to do so. In Smyth *v.* Anderson, which contains a good illustration of this principle, the agent purchased goods on account of his principal, who resided abroad; but at the time of the purchase, although he did not inform the seller who his principal was, the invoice stated that the goods "were brought on account of B." the principal. The seller drew certain bills of exchange on the agent, who became insolvent before the bills arrived at maturity. The principal, after having received advice of the purchaser, and of the acceptance of the bills by the agent, made large remittances on account of the goods to the agent, who at the time of his stoppage was largely indebted to his principal. My Brother Maule says, the court were of opinion that under such circumstances it was unfair and unjust to allow the seller to receive the value of the goods from the principal. I think that there is no authority for saying that a payment made to the agent, as in this case, precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent. There is no averment of that kind here, and consequently the plaintiffs are entitled to recover.

ALDERSON, B. I am of the same opinion. It is clear that the defendant, who is the principal in the transaction, authorized the agent to contract the debt on his account; the defendant afterwards paid his agent money, which, however, he did not pay over to the plaintiffs. Now the defendant is not excused from seeing that the plaintiffs are paid, unless the latter by their acts induced the defendant to make the payment to their agent. Where the seller trusts the agent only, and says that he will consider him as the only party liable, the agent alone is responsible, and the seller cannot proceed against the principal. But there must be some act on the part of the creditor to warrant us in saying that the payment by the debtor to his agent is to be treated as a payment to the creditor. Where a creditor by his conduct induces the debtor to pay a third party, and thereby alters his debtor's position, it would be unjust to call upon the debtor to pay the amount of the debt to the creditor. But there is nothing of that sort in this case, and consequently the defendant is not discharged.

Judgment for the plaintiffs.[1]

PRIESTLY *v.* FERNIE AND ANOTHER.

EXCHEQUER. 1865.

[3 *H. & C.* 977.]

DECLARATION by the plaintiff as secretary of the Melbourne Gas Company. For that Daniel Kavanagh, master of the vessel called "The Queen of Commerce," for a voyage of the said vessel from the port of Liverpool to Hobson's Bay, Port Phillip, signed the following bill of lading: —

"Shipped in good order and condition, except chips and sand-cracks, by Edmund Thompson, &c., agent for Harper and Moore, in or upon the good ship or vessel called 'The Queen of Commerce,' whereof Kavanagh is master for this present voyage, and now lying in the port of Liverpool and bound to Hobson's Bay, Port Phillip, 264 retorts, being marked and numbered and enumerated as per margin, and are to be delivered in the like order and condition, except chips and sand-cracks, or breakage arising from any cause save improper stowage, and, subject to the undermentioned clauses, from the ship's tackle at Hobson's Bay or railway pier (all and every the dangers and accidents of the seas, fire and navigation of whatsoever nature or kind excepted), unto the Melbourne Gas Company, or their assigns, freight for the said goods being payable in Melbourne as per margin, with primage and average accustomed. In witness whereof the master of the said ship or vessel hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished the rest to stand void." (Then followed other provisions, not material to the present question). Averments: That the said Company, by their agents in that behalf, shipped and delivered such goods as are specified in the said bill of lading to the defendants, and they accepted and received of and from the said Company the same on board the said vessel in such order and condition as are mentioned in the said bill of lading, to be by the defendants conveyed in the said vessel to such place and for such purpose, and subject to such terms and conditions as are in the said bill stated and contained; and the said vessel completed the said voyage, and everything has been done and happened and all times elapsed requisite to enable the said Company to have all the said terms observed and performed, and the said goods delivered to the said Company at the place in the said bill of lading specified in that behalf, and in the order and condition contracted for, and to entitle the plaintiff suing as aforesaid to recover in this action in respect of the matters in this count stated. — Breach: That the defendants, although not prevented by the said excepted dangers, accidents, causes, matters or things, or any of them, failed to deliver the said goods to the said Company in the order and condition contracted for, &c.

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[1] MARTIN, B., had left the court during the argument. — REP.

See Macfarlane *v.* Giannacopulo, 3 H. & N. 860 (1858); Smethurst *v.* Mitchell, 1 E. & E. 622 (1859). — ED.

Plea. That the plaintiff as such secretary as in the declaration alleged, and on behalf of the said Company, heretofore, in the Supreme Court of Melbourne, in the colony of Victoria, then having jurisdiction in that behalf, impleaded the said Daniel Kavanagh in the declaration mentioned, as and being the master of the said ship, and signing the said bill of lading, for the same identical causes of action as in the declaration alleged, and such proceedings were thereupon had in the said court that the plaintiff as such secretary recovered against the said Daniel Kavanagh £140 3*s.* for the said cause of action, and his costs of suit in that behalf; and afterwards the plaintiff, as such secretary as aforesaid and on behalf of the said Company, in the Court of Exchequer of Pleas, Westminster, impleaded the said Daniel Kavanagh for and in respect of and upon the said judgment so recovered as aforesaid, and such proceedings were thereupon had in that action that the plaintiff afterwards, by the judgment of the said last mentioned court, recovered against the said Daniel Kavanagh £288 10*s.* 10*d.* and his costs of suit in that behalf, and after the recovery of the said last mentioned judgment, the plaintiff for having satisfaction thereof, caused to be duly issued out of the said Court of Exchequer of Pleas a writ of *ca. sa.* upon the said judgment, and by virtue of which said writ the said Daniel Kavanagh was before this suit duly taken in execution at the suit of the plaintiff, and was kept and detained in custody to satisfy the plaintiff in the said action; and the defendants say that they are being sued in this action in respect of the said Daniel Kavanagh having signed the said bill of lading as master of the said ship on behalf of the defendants as owners thereof, and that they are not otherwise liable in this action.

Replication. That the said Daniel Kavanagh, being a prisoner under the said writ, became bankrupt within the meaning of the statutes in force concerning bankrupts, and thereupon was discharged from custody under the said writ of *ca. sa.*, without the consent of the plaintiff, by act of law under and by virtue of the statutes then in force relating to bankrupts; and that such proceedings were had in the matter of the said bankruptcy that the said Daniel Kavanagh afterwards and before this suit duly obtained an order of discharge under the said statutes, and was thereby discharged of and from the said judgments, and each of them; and the said judgments are and each of them is wholly unsatisfied, and the plaintiff had not at any time before the recovery of the said judgment in the said Court of Exchequer, or before the said Daniel Kavanagh obtained his order of discharge as aforesaid, notice or knowledge that the said bill of lading and contract was made by the defendants or any of them.

The plaintiff also demurred to the plea.

Rejoinder. That, after the said Daniel Kavanagh became and was bankrupt as in the said replication mentioned, and before the commencement of this suit, the plaintiff was admitted to prove, and proved, in respect of the said judgment so recovered in the said Court of Exchequer as aforesaid, against the estate of the said Daniel Kavanagh, under the said bankruptcy, for the amount due upon the said judgment.

The defendant also demurred to the replication.

Quain, argued for the plaintiff.

R. G. Williams (*Aspinall* with him) in support of the plea.

Cur. adv. vult.

The judgment of the court was now delivered by

BRAMWELL, B. We are of opinion our judgment should be for the defendant. If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made the contractee has an election to sue agent or principal, supposes he can only sue one of them, that is to say, sue to judgment. For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other. Further, there is abundance of authority to show that where the situation of the principal is altered by dealings with the agent as principal, the former is no longer subject to an action. But this is the case here. The defendants may or may not be liable to indemnify the master in respect of his costs or his imprisonment. But they are clearly liable to him or his estate, in respect of the damages recovered against him, and proceedings might have been taken against them as soon as judgment was recovered against the master, and before any payment by or execution against him. They are now therefore under a liability to the master or his estate to the extent of the whole claim, and yet it is sought to bring them under a fresh liability for that to the plaintiffs.

If this, then, were the ordinary case we have mentioned, there could be no doubt on the subject. But it is said that the liability of the master of a vessel acting for his owners and their liability where he acts for them is different from the liabilities in ordinary cases of principal and agent, and that first one and then the other may be sued. The plaintiff's argument, then, viz., that the present case is anomalous, is exceptional. When that is contended for strong reason ought to be given for it. What is given here? It is certain that the master's liability is founded on the same considerations as that of an ordinary agent, viz., he makes the contract in his own name. Rich v. Coe, 2 Cowp. 636, Story on Agency, § 296. But it is said that for purposes of commerce it is convenient both master and owner should be suable. So it is, but why to the extent contended for more than in any other case of principal and agent? It might be hard to make a person who deals with the master run after the owner to sue him; but why, if he sues the master, should he afterwards sue the owner merely because it is very right he should be able to sue the captain or owner? In reality no reason can be given for the distinction attempted between this and other cases of principal and agent. It is not said none could be given why in all cases of principal and agent both should be suable, but that there is no particular reason applicable to the masters and captains of ships.

The case, then, must rest, not on principle, but on authority, and that authority is limited to a passage in Story on Agency. It is remarkable that he is of opinion that there was, by the Roman law, an option to sue either, but not both. If so, what he lays down is peculiar to "our law," and doubly anomalous. He gives no reason for it, but cites 2 Livermore on Agency, 267. He (Story) says the second action may be maintained, unless "in the first action he has obtained complete satisfaction of his claim." On reference, however, to Livermore, we say it with great respect, he really says nothing in support of such a proposition. What he says is: "Masters of merchant vessels are personally answerable upon the contracts made by them in relation to the employment of the ship, to repairs, or to supplies furnished for the ship's use. For the law gives to the merchant who contracts with the master a twofold remedy against the owner and against the master." For this he cites Rich *v.* Coe, 2 Cowp. 636, which, though a very questionable decision, justifies Livermore's propositions, but not Story's. It only decides that the owners are liable upon an order by the master for necessaries, though without their authority. It is true Lord Mansfield says the master, the owner and the ship are trusted, but he says nothing to support what is contended for. It is remarkable Story does not cite this authority so cited by Livermore. *Melius est petere fontes quam sectari rivulos.*

Then really there is no authority for this contention, while there is much the other way in the silence of all other writers on the subject. It is not suggested in Abbott on Shipping, p. 91, nor in Kent's Commentaries (see 3 Kent, 161), nor in Maude and Pollock on Shipping, p. 102, nor in Maclachan, p. 128, nor in Parsons on Maritime Law, vol. 1, p. 378. There is one powerful consideration the other way, viz., if the master contracts under seal no action lies on the contract against the owners. Why? If the master makes two contracts, one for himself and one for his owners, why should his contract, being under seal, prevent the owners being sued on that which the master has made for them? Nothing. But if he makes one contract only, as in ordinary cases where the agent contracts in his own name, which the merchant may say binds him because made in his name, or binds his owners because made for them, then the decisions are intelligible and the expression is correct, the owners are not liable because of a technical rule, that a contract under seal cannot bind a person not executing, and not giving authority under seal for its making. See Abbott on Shipping, ed. 1856, p. 169. Leslie *v.* Wilson, 3 B. & B. 171, is not opposed to this. Therefore we give judgment for the defendant.

Judgment for the defendant.[1]

KINGSLEY AND ANOTHER *v.* CHARLOTTE DAVIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1870.

[104 *Mass.* 178.]

CONTRACT by brokers for commissions; submitted to the judgment of the court on these agreed facts: —

"The plaintiffs on November 12, 1868, procured a purchaser for a house belonging to the defendant, who is, and was at that time, a married woman, and held the legal estate in said house in her own right. Previously, John J. Davis, her husband, in his own behalf, and also acting for her and in her presence, requested the plaintiffs to find a purchaser for the house; and in the conversation between the parties, at that time, the defendant also requested the plaintiffs to find a purchaser. On November 20, 1868, the defendant executed a deed of the house to the purchaser procured by the plaintiffs, her husband joining therein. The plaintiffs, at the time they performed said services, supposed that the legal title to the house was in John J. Davis; and they charged him therefor on their books of account. On December 14, 1868, they commenced an action of contract against him in the municipal court for the city of Boston, in which they declared for the same cause of action for which they bring the present action. In said action, on December 29, he was defaulted; and on March 18, 1869, the plaintiffs, since said default, being informed of all the facts, and in particular of the fact that the house belonged to the present defendant at the time they procured the purchaser, caused judgment to be entered against said John J. Davis in said action, and subsequently took out execution against him. Said judgment now remains in force, and unsatisfied. After taking said judgment and execution, the plaintiffs brought the present action."

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[1] In Kendall *v.* Hamilton, 4 App. Cas. 504, 514–515 (H. L. 1879), Lord CAIRNS said: "Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal; but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any autho ity for this proposition is needed, the case of Priestly *v.* Fernie may be mentioned. But the reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent, should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor on discovering the principal, who really has had the benefit of the loan, should be prevented suing him if he wishes to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he, the agent, would have a right of action for indemnity against the principal, while, if the principal were liable also to be sued, he would be vexed with a double action. Farther than this, if actions could be brought and judgments recovered, first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action; they might not necessarily be for the same amounts, and there might be recoveries had, or liens and charges created, by means of both, and there would be no mode, upon the face of the judgments, or by any means short of a fresh proceeding, of showing that the two judgments were really for the same debt or cause of action, and that satisfaction of one was, or would be, satisfaction of both."

With the principal case compare Maple *v.* Railroad Company, 40 Ohio St. 313 (1883). — ED.

G. Morrill, for the plaintiffs.

J. Lathrop, for the defendant.

Morton, J. We are unable to see how, in any aspect of the facts of this case, the plaintiffs can recover. There is no evidence that the plaintiffs performed the services sued for upon the credit of the defendant, or that she entered into a several contract with them. The facts stated, if they show any contract by the defendant, show a joint contract by herself and her husband. Upon such a contract the plaintiffs could not maintain this action. The judgment which he has taken against one of the joint debtors is a bar to any future action against the other. Ward *v.* Johnson, 13 Mass. 148. Gibbs *v.* Bryant, 1 Pick. 118.

But the true inference to be drawn from the facts stated undoubtedly is, that the plaintiffs contracted with, and gave credit to, John J. Davis; and they now claim that he was acting as the agent of the defendant and that they gave him credit in ignorance of this fact. If we assume that he was acting as her agent in contracting with the plaintiffs, yet there is an insuperable obstacle to their right to maintain this action. The general principle is undisputed, that, when a person contracts with another who is in fact an agent of an undisclosed principal, he may, upon discovery of the principal, resort to him, or to the agent with whom he dealt, at his election. But if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot afterwards resort to the principal. In the case at bar, it is admitted that the plaintiffs, after all the facts became known to them, obtained a judgment against John J. Davis upon the same cause of action for which this suit is brought. We are of opinion that this was conclusive evidence of an election to resort to the agent, to whom the credit was originally given, and is a bar to this action against the principal. Raymond *v.* Crown & Eagle Mills, 2 Met. 319.

Judgment for the defendant.[1]

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[1] Compare Beymer *v.* Bonsall, 79 Pa. 298 (1875). — Ed.

ARMSTRONG *v.* STOKES AND OTHERS.

QUEEN'S BENCH. 1872.

[*L. R.* 7 *Q. B.* 598.]

DECLARATION for goods sold and delivered, goods bargained and sold, work and labor, and on accounts stated.

Pleas: 1. Never indebted; 2. Payment; 3. As to the sale of the goods, a special plea.

Issues joined on all the pleas; demurrer to third plea, and joinder.

At the trial of the issues of fact before MELLOR, J., at the Manchester Spring Assizes, 1871, a verdict passed for the plaintiff, with leave to move to enter a verdict for the defendants, the court to have power to draw inferences of fact.

A rule was obtained accordingly, on the ground that there was no evidence of a contract between the plaintiff and the defendants; and also on the ground that, under the circumstances, the plaintiff had no right to come upon the defendants for payment.

Holker, Q. C., and *J. Edwards* showed cause.

Herschell, Q. C., and *Crompton*, in support of the rule.

Cur. adv. vult.

The judgment of the court (BLACKBURN, MELLOR, and LUSH, JJ.) was delivered by

BLACKBURN, J. This was an action for goods sold and delivered. The third plea was demurred to, and issue was also taken upon it. The issue in fact was tried before my Brother MELLOR, when the verdict was entered for the plaintiff, with leave to move to enter the verdict for the defendants. A rule was accordingly obtained, against which cause was shown at the sittings after this term before my Brothers MELLOR, LUSH, and myself, and at the same time the demurrer, was argued. We thought the plea was good, and gave judgment at once for the defendant on the demurrer;[1] but on the rule the question was, whether the substance of the plea, that is, enough of it to constitute a defence, had been proved, and in order to determine that it is necessary to state what the evidence at the trial was.

It was proved that Messrs. J. & O. Ryder & Co. were commission merchants carrying on business at Manchester, sometimes for themselves, and sometimes acting in pursuance of orders from constituents.

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[1] The plea stated the facts very much as they are stated in the judgment; but it alleged in addition that Ryder & Co. were indebted to the defendants after the 11th of August up to their stoppage, and that the plaintiff negligently let the payment from Ryder & Co. to him stand over a long time after the 25th of August, when it became due, and permitted them to retain the money in their hands till they stopped payment. The demurrer was not argued, the plaintiff's counsel at once yielding to the expression of the opinion of the court that the plea was good. — REP.

They were not brokers professing never to act for themselves. The plaintiff, who was a merchant at Manchester, had had previous dealings with Ryder & Co., in the course of which it appeared that he had never inquired whether they had constituents or not. All former transactions had been duly settled between him and J. & O. Ryder, so that the question had never become material.

On the 15th of June, 1871, the plaintiff's salesman made a contract with J. & O. Ryder's salesman, which, as taken down in the plaintiff's book, was as follows: "15th June, 1871. J. & O. Ryder & Co., 200 pieces 39-inch 17 square shirtings, 75 yards at 20*s.* 6*d.*, £205., 1½ per cent, 30 days." The meaning of this was explained to be that the shirtings were to be paid for thirty days after delivery, and then with a deduction of 1½ per cent from the nominal price. As we understood the evidence, this is an ordinary mode of dealing, though the more usual terms in the Manchester market are cash, subject to a discount, varying according to the rate of interest and the agreement of the parties, the rate at this time being about 2 or 2½ per cent. When the agreement is for cash the goods are, in practice, delivered without actual payment, and the price, less the discount, is paid a few days afterwards, generally on the Friday following, that being the ordinary pay-day. When this practice is pursued, there is a period during which the seller has parted with his vendor's lien before receiving the money, though he is probably not bound to do so, as where he has, by the contract, given credit, and the period is much shorter than where credit has been stipulated for.

On the 24th of July the plaintiff sent the goods, which were gray, that is, unbleached shirtings, to J. & O. Ryder, with an invoice, debiting them with the price after deducting the discount, viz. £205. The period of thirty days would elapse on the 23rd of August, but, J. & O. Ryder's pay-day being Friday, actual payment would not, had all gone right, have been made till the 25th of August.

On the 24th the plaintiff received a memorandum from J. & O. Ryder, requesting him to delay applying for payment till the following Friday, September 1st. Nevertheless, his salesman did call upon the 25th, but was refused payment, and told it would be all right on the next Friday. The plaintiff saw in the newspaper an announcement of the death of one of the partners in the firm of J. & O. Ryder, and attributed the delay to this. He was, to use his own phrase in his evidence, considering what to do, but had done nothing, when, on the 30th of August, J. & O. Ryder & Co. stopped payment.

One point that was raised for the defendants may as well be disposed of here. We think that if the plaintiff had, on the non-payment by J. & O. Ryder, any right to come on the defendants, the taking no active step before the 30th was no evidence of any such laches as would deprive him of that right.

To proceed with the evidence. It was not pretended on either side that the plaintiff knew before the 30th of August that the defendants had anything to do with this transaction, so as to afford any evidence, on the one hand, that he had originally parted with the goods on the credit of the defendants, or, on the other hand, that he had elected to give credit to J. & O. Ryder to the exclusion of the defendants. But, after the stoppage of J. & O. Ryder & Co., on examining their books it was discovered that in this case they had been acting as commission merchants for the defendants, and the plaintiff's case was, that, under the circumstances, he was entitled to demand payment from the defendants, as being undisclosed principals of J. & O. Ryder in this transaction.

The evidence as to this was, that the defendants are merchants at Liverpool, who had often before given orders to J. & O. Ryder, sometimes for gray and sometimes for white (that is, bleached) shirtings. When such an order had been previously given for white shirtings, the course of business had always been for J. & O. Ryder to procure gray shirtings, and then to have those gray shirtings bleached, and when they were bleached to deliver them to the defendants, charging them with the cost of the gray shirtings and of the bleaching, with one per cent commission on that amount for placing the order, and also with any charges for packing, &c., and this amount the defendants always paid to J. & O. Ryder. As the defendants knew that J. & O. Ryder were neither manufacturers nor bleachers, they were, of course, aware that J. & O. Ryder must have procured some one to supply the gray cloths and some one to bleach them; but they never were, in any of the previous transactions, brought into communication with those who supplied the goods or those who bleached them, nor did they ever inquire, nor were they ever told, who they were.

There was no running account between the defendants and J. & O. Ryder, but the defendants almost invariably paid on each transaction. It was stated in the evidence that they generally, but "not quite always," paid in cash, that is, as already explained, on the pay-day after the goods were delivered to them.

No inquiry was made on either side as to the nature of the exceptional cases in which the defendants did not pay cash. Those exceptions might have thrown light on the nature of the employment of J. & O. Ryder, or they might not.

In the present case the defendants gave a verbal order to J. & O. Ryder for bleached shirtings. Nothing was said as to the price at which they were to be procured, which was therefore left to the discretion and honesty of J. & O. Ryder; and nothing was said as to the mode in which they were to be paid for, which was, therefore, to be as usual. In consequence of this order J. & O. Ryder's manager went to the plaintiff's salesman. The manager at first wished to buy for cash, but wanted discount at 2½ per cent. Finally they agreed to split the difference, and make it 1½ per cent at thirty days. All this was perfectly *bona fide* between them, and the defendants knew nothing about it.

When the gray shirtings were delivered by the plaintiff to J. & O. Ryder they sent them to the bleacher, who, as usual, cut each piece in two; and having received from J. & O. Ryder 200 pieces of gray cloth, sent back to them 400 pieces of white cloth. Ryder & Co. sent on these 400 pieces of white cloth to the defendants, with an invoice dated the 2nd of August, headed as follows: "Invoice of ten packages of goods purchased and forwarded per carrier to Liverpool, by order and on account of Messrs. Bates, Stokes, & Co. there" (the defendants) "by the undersigned," &c. The defendants were in this invoice charged with the actual money which ought to have been paid to the plaintiff as the price of the goods, viz., £205 less 1½ per cent discount, the actual charge of the bleaching, one per cent on the amount of those two sums as commission, and the amount of some packing charges, making in all £227 10*s.* 9*d.* noted as being due the 11th of August, which was the first pay-day after the goods would be received in Liverpool. On the 11th of August the defendants, with perfect *bona fides*, paid J. & O. Ryder that sum of £227 10*s.* 9*d.*

On this state of the evidence, Mr. Herschell took three points. *First*, he said that the defendants were not undisclosed principals, employing J. & O. Ryder as agents with authority to create privity between the unknown persons who supplied the goods and the defendants. *Secondly*, that even if they were, the defendants, having, before the plaintiff heard of their connection with the matter and before they heard of the plaintiff, honestly and in the ordinary course of business paid J. & O. Ryder, were no longer liable to the plaintiff. And thirdly, that the plaintiff had by laches disentitled himself to sue.

It was admitted that all that was sworn was honestly sworn, and neither counsel required anything to be left to the jury. My Brother MELLOR thereupon directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendants, the court to have power to draw inferences of fact.

The third point taken was disposed of at once; but the other two points were fully discussed, and the authorities brought before us. On these we took time to consider.

The first point depends on a question of fact, viz., what was the authority really given to J. & O. Ryder by the defendants? It is, we think, too firmly established to be now questioned, that, where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, though in fact he was not. It has often been doubted whether it was originally right so to hold; but doubts of this kind come now too late: for we think that it is established law that, if on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected godsend, and is not put to take a dividend from the estate of him with whom alone he believed himself to be contracting, and to whom alone he gave credit, and to leave the trustees of that estate to settle with the undisclosed principal, subject to all mutual credits and equities between them. He may recover the price himself direct from the principal, subject to an exception, which is not so well established as the rule, and is not very accurately defined, viz., that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor.

We have first to consider whether we should draw from the evidence the inference of fact that the defendants were principals, so as to bring the case within the rule, so that if the price had not been paid by the defendants to Ryder & Co. the plaintiff would have a right to be paid the money rather than look to the trustees of the estate of J. & O. Ryder. This depends entirely on what was the real nature of the employment of J. & O. Ryder by the defendants. The defendants not being known in the matter at all to the plaintiff, there is no room for holding them bound by any apparent authority given to J. & O. Ryder. There can be no case against the defendants of holding them out as having their authority, or clothing them with ostensible authority, to a person who did not know that J. & O. Ryder had any principal at all. As to the real authority, there is evidence both ways. The charge of commission is conclusive to show that, to some extent, there was a relation of principal and agent; the defendants were entitled to have the skill and diligence of J. & O. Ryder to get the goods as cheaply as they could; and the defendants were entitled to have the true cost of the goods debited to them with no further addition than the charges and the commission. Then Ryder & Co. did not engage to supply the goods themselves; they only undertook to find persons who would. If prices had risen after the plaintiff made his bargain, and the plaintiff had refused to go on, the now defendants could not have sued J. & O. Ryder for this; they must either have sued the now plaintiff, if there is privity between them, or perhaps have used the name of J. & O. Ryder, as their trustees, to sue, as is suggested by Kelly, C. B., in Mollett *v.* Robinson, L. R. 7 C. P. at p. 119. In the invoice the defendants are not charged as purchasers from J. & O. Ryder, but are debited for goods bought by their order and on their account. This form is also evidence in favor of the plaintiff. But none of these things are conclusive. The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit. Where the constituent is resident in England, the inconvenience is not so great, and we think that, *prima facie*, the authority is given, unless there is enough to show that it was not in fact given. It was strongly urged by the defendants' counsel, that the course of dealing and the mode of settlement by the defendants with J. & O. Ryder were sufficient to show that J. & O. Ryder were not intended to have authority to establish privity of contract between the defendants and those from whom J. & O. Ryder obtained the goods. We agree that it is evidence that way; but we do not feel justified in finding this question in favor of the defendants. If a special jury, who have knowledge of the course of business beyond what we have, had on this ground found a verdict for the defendants, we should not have been dissatisfied with it. Indeed, we feel this so strongly that, if the event of the cause depended upon this point, we should probably have given the defendants liberty to have a new trial, on payment of costs, in order that the opinion of a jury might be taken on that new trial, when the nature of the exceptions from the general habit of paying cash might also be ascertained. But it is not necessary to do this, as we have come to the conclusion that the defendants are entitled to the verdict on the second ground.

It is right, in order to avoid misapprehension, to say that the phrase repeatedly used by the counsel for the plaintiff that the vendor has a right to follow the goods is, in our opinion, calculated to mislead. There are cases, such as that of Wilson *v.* Hart, 7 Taunt. 295, to which such a phrase would be applicable; but those, as is pointed out in 2 Smith's Leading Cases, at p. 332 (5th ed.; p. 351, 6th ed.), proceed on the ground of fraud. In the absence of fraud, unless the person receiving the goods is a party to the contract under which the goods were sold, the vendor has no right to follow them. If the goods were bricks sold to a contractor, he could not charge the owner of the house into which they were built, though he might do so if the person supposed to be the contractor turned out to be really agent for the owner of the house; and the principle is the same in such a case as the present.

The second point raised is of considerable importance. In Railton *v.* Hodgson, and Peele *v.* Hodgson, reported in a note to Addison *v.* Gandasequi, 4 Taunt. 575, 577, Mansfield, C. J., said, "If Hodgson" (the undisclosed principal) "had really paid Smith, Lindsay, & Co." (the insolvent actual purchasers), "it would have depended on circumstances whether he would have been liable to pay for the goods over again; if it would have been unfair to have made him liable, he would not have been so." This was in 1804. It is, however, to be observed, that as Hodgson had not paid either, this was not necessary for the decision. Two cases of Waring *v.* Faveck, 1 Camp. 85, and Kymer *v.* Suwercropp, 1 Camp. 109, which were tried before Lord Ellenborough in 1807, are generally cited on this subject, without, as it seems to us, paying sufficient attention to the fact that Kenyon & Co., in consequence of whose insolvency the questions arose, were London brokers, not commission merchants. A broker always professes to make a contract between two principals, and, though in recent times the strictness of the rules has to some extent been relaxed, in 1807 a London broker was bound by his bond (the form of which will be found in Holt N. P. at p. 431, n.) to make known to the person with whom the agreement is made the name of his principal if required, and not to deal on his own account. In Kemble *v.* Atkins, Holt N. P. 427, it was decided that this did not prevent the broker from making the contract in his own name so as to pledge his personal credit to the seller; but still he must necessarily have had a principal. And, as is laid down in Higgins *v.* Senior, 8 M. & W. at p. 844, it was always competent, notwithstanding this form of the agreement, to show who the person was for whom the broker acted as agent in making the contract, "so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals." In every case, therefore, where the sale is to a broker, the vendor knows that there is or ought to be a principal between whom and himself there is established a privity of contract, and whose security he has in addition to that of the broker, and the principal also knows that the vendor is aware of this and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal. The marginal note in Kymer *v.* Suwercropp, 1 Camp. 109, is, perhaps, too general, even in the case of a broker, as is pointed out by Maule, J., in Smyth *v.* Anderson, 7 C. B. at p. 39, but what was actually decided was probably right.

The next case in order of date is Thomson *v.* Davenport, 9 B. & C. at pp. 86, 88, where Lord Tenterden, in speaking of this subject, says: "I take it to be a general rule, that if a person sells goods, supposing that at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; *subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal.*" And Bayley, J., says: "Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that *the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent.*"

In this case, as in Railton *v.* Hodgson, 4 Taunt. at p. 576, n., the freshly-discovered principal had not paid any one, and therefore the two passages above in italics were no necessary part of the decision, though they are weighty authorities as indicating the decided opinion of two judges of great experience in commercial cases.

In Smyth *v.* Anderson, 7 C. B. 21, 36, the case arose in such a peculiar way that it is difficult to say exactly what was decided. But Maule, J., in his very elaborate and able judgment, expresses a decided opinion that the *dicta* of Chief Justice Mansfield and Bayley, J. (he seems not to have noticed that of Lord Tenterden), "affords a sensible rule on the subject." The latter *dictum* of Maule, J., adds very greatly to the weight of those which preceded. Still, there is no actual decision on the point.

On the other hand, it is stated in a note to the third edition of Paley's Principal and Agent, p. 249 n., that Mr. Justice James Parke was amongst those who did not acquiesce in the decision in Thomson *v.* Davenport, 9 B. & C. 78. It is not said on what authority that statement proceeds, and from the context it would seem that his dissent was rather from the extension of the rule by which the principal might be charged than from the exceptions to that rule. But in Heald *v.* Kenworthy, 10 Ex. 739, 745, he does, as it seems to us, express dissent from the exceptions. The case itself arose on a demurrer to a plea which is set out. But then it is stated that the court thought it might amount to the general issue, and therefore it was amended, but the report does not state what the amendments were. It is not easy, therefore, to say what was the actual decision. It does not, however, appear that in any part of the plea it was stated that the plaintiff was ignorant of the existence of the defendant as principal till after the defendant had paid the agent, nor even that the defendant believed such to be the case. Unless the plea was such as to raise the very point, the opinion of Parke, B. (like those of Mansfield, C. J., Bayley, J., and Maule, J.), is but a *dictum* entitled to high respect as an authority, but not binding as a decision. Parke, B., lays down generally that "if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly." After commenting on several of the cases already referred to, he concludes: "I think that there is no authority for saying that a payment made to the agent precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent." He states this as generally true wherever a principal has allowed himself to be made a party to a contract, and makes no exception as to the case where the other side made the contract with the agent believing him to be principal, and continued in such belief till after the payment was made. He certainly does not in terms say that there is no qualification of the principle he lays down when applicable to such a case; but recollecting how careful Parke, B., always was to lay down what he thought to be the law fully and with accuracy, we think the counsel for the plaintiff were justified in arguing that Parke, B., thought the exception did not exist. And this is, in our opinion, a weighty authority in favor of the plaintiff's contention, more especially as Pollock, C. B., assents in his judgment to the remark thrown out by Parke, B., during the argument, and afterwards more elaborately stated by him in his judgment. And Alderson, B., in his judgment, appears entirely to assent to the judgment of Parke, B.

We think that we could not, without straining the evidence, hold in this case that the plaintiff had induced the defendants to believe that he (the plaintiff) had settled with J. & O. Ryder at the time when the defendants paid them.

This makes it necessary to determine whether we agree in what we think was the opinion of Parke, B., acquiesced in by Pollock, C. B., and Alderson, B.

We think that, if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship. It may be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule. But we find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule; and without deciding anything as to the case of a broker, who avowedly acts for a principal (though not necessarily named), and confining ourselves to the present case, which is one in which, to borrow Lord Tenterden's phrase in Thomson *v.* Davenport, 9 B. & C. at p. 86, the plaintiff sold the goods to Ryder & Co., "supposing at the time of the contract he was dealing with a principal," we think such an exception is established.

We wish to be understood as expressing no opinion as to what would have been the effect of the state of the accounts between the parties if J. & O. Ryder had been indebted to the defendants on a separate account, so as to give rise to a set-off or mutual credit between them. We confine our decision to the case where the defendants, after the contract was made, and in consequence of it, *bona fide* and without moral blame, paid J. & O. Ryder at a time when the plaintiff still gave credit to J. & O. Ryder, and knew of no one else. We think that after that it was too late for the plaintiff to come upon the defendants.

On this ground we make the rule absolute to enter the verdict for the defendants. *Rule absolute.*

CURTIS AND OTHERS *v.* WILLIAMSON AND OTHERS.

QUEEN'S BENCH. 1874.

[*L. R.* 10 *Q. B.* 57.]

DECLARATION for goods bargained and sold, and sold and delivered, and for interest and money due on accounts stated.

Plea, never indebted. Issue thereon.

At the trial before QUAIN, J., at the Winter Assizes at Liverpool, a verdict was entered for the plaintiffs, leave being reserved to the defendants to move to enter a nonsuit.

A rule was accordingly obtained on the ground that the plaintiffs had not elected to go against the defendants, but had elected to proceed against Boulton, the agent.

The facts and arguments sufficiently appear in the judgment of the court.

Nov. 11. *C. Russell*, Q. C., and *Potter* showed cause.

C. Crompton and *Gorst*, in support of the rule.

Cur. adv. vult.

Dec. 10. The judgment of the court (COCKBURN, C. J., QUAIN and ARCHIBALD, JJ.) was delivered by

QUAIN, J. This was an action to recover the price of gunpowder bought of the plaintiffs by one Boulton in his own name, but in reality as agent for the defendants, and for the purpose of being used in a mine which was their property. The fact of the agency was not disclosed at the time of the purchase, but it afterwards became known to the plaintiffs that the defendants were the principals.

After the plaintiffs had acquired this information, Boulton having filed a petition for the liquidation of his estate, an affidavit in the usual form, for the purpose of proving under the liquidation for the price of the powder, was made by a clerk of the plaintiffs, treating Boulton as their debtor, and was sent by post to Birmingham, to be filed in the county court there, in which the proceedings in liquidation were carried on.

Almost immediately after this affidavit had been posted the plaintiffs' attorneys, being apprehensive that a claim against Boulton's estate might prejudice their rights as against the defendants, despatched a telegram to their agent at Birmingham, directing him not to file the affidavit. The telegram, however, was too late, and was not received until after the affidavit had been filed; but no further step of any kind was taken by the plaintiffs in relation to the liquidation proceedings, nor has any dividend been received by them. Shortly after the affidavit had been thus filed this action was commenced against the defendants. There was no evidence whatever that after the fact of the agency had become known to the plaintiffs the state of the accounts between the defendants and Boulton had been in any way altered to the prejudice of the defendants; and the sole question raised by the rule, which was granted to set aside the verdict for the plaintiffs and enter a nonsuit, is, whether, under the circumstances, the making and filing of the affidavit in bankruptcy amounted, in point of law, to a conclusive election by the plaintiffs to treat Boulton as their debtor, so as to preclude them from maintaining this action against his principals. We are of opinion that it did not. There can be no doubt that, in the absence of any alteration of the account to the prejudice of the principals, the plaintiffs, on discovering that Boulton was merely an agent for the defendants, had a right within a reasonable time (Smethurst *v.* Mitchell, 1 E. & E. 622; 28 L. J. (Q. B.) 241), to elect to proceed against the defendants, Thomson *v.* Davenport, 9 B. & C. 78, 86; unless in the mean time, with full knowledge as to who were the principals, and with the power of choosing between them and the agent (Addison *v.* Gandasequi, 4 Taunt. 574, and Paterson *v.* Gandasequi, 15 East, 62), they had distinctly and unquestionably elected to treat the agent alone as their debtor. Principals and agent were equally liable upon the contract, and the vendor had a clear option a. to which of them he would hold responsible. The question is, What is sufficient to constitute a binding election in point of law? In general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge, as was done in the case of Calder *v.* Dobell, Law Rep. 6 C. P. 486; but there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceeding against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal. Whether in regard to proceedings taken against the agent by action at law anything short of judgment and satisfaction would be sufficient to exclude resort to the principal, was the point raised in the case of Priestly *v.* Fernie, which was cited on behalf of the defendants.[1] . . . But it is clear, from the language used by Bramwell, B., in delivering the judgment of the court, that whilst it was considered that judgment against the agent, even without satisfaction, would constitute a conclusive election, yet that no legal proceedings short of judgment would have that effect, for he distinctly points out that by the word "sue" he means "sue to judgment." If the facts in the present case were similar to those in Priestly *v.* Fernie, we should, of course, be bound by the decision in that case to hold that "suing" the principal in the sense in which the word "sue" is there used, would, though the claim remained unsatisfied, amount to a binding election; but the proceedings in question have little analogy, and fall very far short of what occurred in Priestly *v.* Fernie. There two successive actions had been brought against the captain, one abroad and the other in this country, without any intermediate attempt, so far as appears, to hold the shipowner liable, and the agent (the captain) had been actually taken in execution. Here, however, no action was ever commenced against the agent, and every effort was made to intercept and withhold the affidavit in bankruptcy which had been made, as it would seem, without due consideration and without any intention whatever to discharge the present defendants from responsibility. We think it would be going much too far to hold that this was in point of law a binding election to deal with the agent as alone liable, and abandon all right to take proceedings against his principals. It might possibly, in an appropriate case, constitute with other facts some evidence of election to be submitted to a jury; but we cannot regard it in itself as a legal bar to proceedings against the defendants; nor is there any question that, if at liberty to sue the principal at all, the action was brought within a reasonable time. For these reasons we are of opinion that the rule to set aside the verdict and enter a nonsuit should be discharged. *Rule discharged.*[1]

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[1] Here was stated Priestly *v.* Fernie, *ante*, p. 698. — ED.

IRVINE & CO. *v.* WATSON & CO.

COURT OF APPEAL. 1880.

[5 *Q. B. D.* 414.]

THIS was an action brought to recover the price of certain casks of oil. BOWEN, J., on further consideration, gave judgment for the plaintiffs,[2] and the defendants appealed.

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[1] See Gardner *v.* Bean, 124 Mass. 347 (1878); Dyer *v.* Swift, 154 *id.* 159 (1891). — ED.

[2] In the course of his opinion in the Queen's Bench Division, as reported in 5 Q. B. D. 102, 106–108 (1879), BOWEN, J., said: "It is obvious that when, as in Armstrong *v.* Stokes, the seller deals exclusively with the agent as principal, the seller sells knowing, if his buyer turns out to have a principal behind him, the principal will have, at all events, been justified in assuming, as the fact is, that the seller deals simply with the agent. The principal may be expected to arrange with his agent on that basis. If before recourse is had to him the undisclosed principal has put his agent in funds to pay, the seller cannot afterwards object that the undisclosed principal, who had a right to suppose his credit was not looked to in the matter, should have held his hand. The case is altered where the agent when buying states that he has a principal whose existence, though he does not name him, he is authorized in mentioning. I think that the liability of the principal, who under such circumstances pays his agent, to pay over again to the seller, must depend in each case on what passes between the seller and the

Gully, Q. C., and *Crompton*, for the defendants.

W. R. Kennedy (*Sir F. Herschell*, S. G., with him), for the plaintiffs.

Bramwell, L. J. I am of opinion that the judgment must be affirmed. The facts of the case are shortly these: The plaintiffs sold certain casks of oil, and on the face of the contract of sale Conning appeared as the purchaser. But the plaintiffs knew that he was only an agent buying for principals, for he told them so at the time of the sale; therefore they knew that they had a right against somebody besides Conning. On the other hand, the defendants knew that somebody or other had a remedy against them, for they had authorized Conning, who was an ordinary broker, to pledge their credit, and the invoice specified the goods to have been bought "per John Conning." Then, that being so, the defendants paid the broker; and the question is whether such payment discharged them from their liability to the plaintiffs. I think it is impossible to say that it discharged them, unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs, and made such payment in consequence of such belief. But it is contended that the plaintiffs here did mislead the defendants into such belief by parting with the possession of the oil to Conning without getting the money. The terms of the contract were "cash on or before delivery," and it is said that the defendants had a right to suppose that the sellers would not deliver unless they received payment of the price at the time of delivery. I do not think, however, that that is a correct view of the case. The plaintiffs had a perfect right to part with the oil to the

agent acting within the scope of his authority, and on the precise nature of the contract which the agent has lawfully made. In the present instance the plaintiffs were informed that Conning & Co. bought as agents, and that they had an undisclosed principal in the transaction. The plaintiffs sold, trusting partly, but not wholly, to the credit of the agent, for in fact they relied on the credit of an unknown and unnamed principal, to the disclosure of whose name they were entitled on demand. The contract was for cash; the price was, if not received before delivery, to be payable forthwith upon delivery. The essence of such a transaction is that the seller as an ultimate resource looks to the credit of some one to pay him if the agent does not. Till the agent fails in payment the seller does not want to have recourse to this additional credit. It remains in the background; but if, before the time comes for payment, or before, on non-payment by the agent, recourse can be fairly had to the principal whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller, behind the seller's back, of his credit. It surely must, at all events, be the law that in the case of sale of goods to a broker the principal known or unknown cannot, by paying or settling before the time of payment comes with his own agent, relieve himself from responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and if so within what time? It seems to me that it can only safely be made if a delay has intervened which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit, such a delay for example as leads to the inference that the debt is paid by the agent, or to the inference that though the debt is not paid the seller elects to abandon his recourse to the principal and to look to the agent alone." — Ed.

broker without insisting strictly upon their right to prepayment, and there is, in my opinion, nothing in the facts of the case to justify the defendants in believing that they would so insist. No doubt if there was an invariable custom in the trade to insist on prepayment where the terms of the contract entitled the seller to it, that might alter the matter; and in such case noninsistence on prepayment might discharge the buyer if he paid the broker on the faith of the seller already having been paid. But that is not the case here; the evidence before BOWEN, J., shows that there is no invariable custom to that effect.

Apart from all authorities, then, I am of opinion that the defendants' contention is wrong, and upon looking at the authorities, I do not think that any of them are in direct conflict with that opinion. It is true that in Thomson *v.* Davenport, 9 B. & C. 78, both Lord Tenterden and Bayley, J., suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the mean time the state of account between the principal and the agent has been altered to the prejudice of the principal. But it is impossible to construe the *dicta* of those learned judges in that case literally; it would operate most unjustly to the vendor if we did. I think the judges who uttered them did not intend a strictly literal interpretation to be put on their words. But whether they did or no, the opinion of Parke, B., in Heald *v.* Kenworthy, 10 Ex. 739, seems to me preferable; it is this, that "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal." That is in my judgment a much more accurate statement of the law. But then the defendants rely on the case of Armstrong *v.* Stokes, L. R. 7 Q. B. 598. Now that is a very remarkable case; it seems to have turned in some measure upon the peculiar character filled by Messrs. Ryder as commission merchants. The court seemed to have thought it would be unreasonable to hold that Messrs. Ryder had not authority to receive the money. I think upon the facts of that case that the agents would have been entitled to maintain an action for the money against the defendant, for as commission merchants they were not mere agents of the buyer. Moreover, the present is a case which Blackburn, J., there expressly declines to decide. He expressly draws a distinction between a case in which, as in Armstrong *v.* Stokes, the seller at the time of the sale supposes the agent to be himself a principal, and gives credit to him alone, and one in which, as here, he knows that the person with whom he is dealing has a principal behind, though he does not know who that principal is.

It is to my mind certainly difficult to understand that distinction, or to see how the mere fact of the vendor knowing or not knowing that the agent has a principal behind can affect the liability of that principal. I should certainly have thought that his liability would depend upon what he himself knew, that is to say whether he knew that the vendor had a claim against him and would look to him for payment in the agent's default. But it is sufficient here that the defendants did know that the sellers had a claim against them, unless the broker had already paid for the goods.

In this view of the case it is unnecessary to consider the further question raised by Mr. Kennedy, as to whether a payment on a general running account, as distinguished from a payment specifically appropriated to the particular purchase, would be sufficient to bring the case within Lord Tenterden's qualification of the general rule.

Baggallay, L. J. I am of the same opinion. When the case was before Bowen, J., two questions were raised: first, whether the broker had authority to bind and did bind the defendants, and secondly whether, assuming that he had done so, the defendants were exonerated by anything which subsequently occurred. The first question is one of fact, which I agree ought to be answered in the affirmative. Then did anything occur subsequently to discharge the defendants? It is said that they paid the brokers, and that that fact operated as a discharge. I may say that I doubt whether their acceptances being in settlement of a general account could strictly be said to be payment for the oil, but I am content to treat them as such. What then was the effect of that payment? If the *dicta* in Thomson *v.* Davenport are to be taken as strictly correct, they certainly go a long way to support the defendants' contention. But it is to be observed that they were mere *dicta*, and quite unnecessary to the decision. The largeness of those *dicta* has since been dissented from by Parke, B., in the case of Heald *v.* Kenworthy, and with his dissent I entirely agree. He sought to limit the qualification of the general rule to cases in which the seller by some conduct has misled the buyer into believing that a settlement has been made with the agent. And if that limitation is correct, I am of opinion that there is no such payment here as would discharge the defendants.

But reliance is placed upon the case of Armstrong *v.* Stokes as establishing the doctrine that the buyer is released from liability, if he pays the agent at a time at which the seller still gives credit to the agent — and it is contended that as that state of facts existed here, the defendants are accordingly discharged. But I think that is not the true view of the decision in Armstrong *v.* Stokes. It must be accepted with reference to the particular circumstances of that case. There at the time of the payment by the principal to the brokers, the sellers still gave credit to the brokers and to the brokers alone. But that is not the case here; the plaintiffs it is true gave credit to Conning, but they did not give him exclusive credit. I do not think I am running counter to any of the decided cases in thinking that this judgment must be affirmed.

Brett, L. J. The material facts of this case are these. There is a contract for the sale of goods made between the plaintiffs and the defendants through the agency of one Conning, a broker. But in making this contract Conning acted solely as agent of the defendants, not as agent of the plaintiffs at all. The contract was for "cash on or before delivery;" and the goods having been delivered, the defendants pay Conning, who, as I have said before, was their agent and no one else's. Now, apart from authority, I should certainly say that a payment to such an agent could not be a good payment to the plaintiffs. But then it is said that it is a good payment within the *dicta* of Thomson *v.* Davenport; but there the question for the decision of the court was, not whether a payment by the principal to the agent precluded the seller from suing the principal, but, whether the seller could sue the principal at all. The main proposition laid down by Lord Tenterden was this, "that if a person sells goods, supposing that at the time of the contract he is dealing with the principal, but afterwards discovers that the person with whom he has been dealing is not the principal, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal." He then introduces a qualification, "subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." Now the terms of that qualification are certainly very wide, and Bayley, J., in qualifying the above general rule uses equally wide language: "If the principal has paid the agent, or if the state of accounts between the agent and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent."

And Maule, J., in the case of Smyth *v.* Anderson, 7 C. B. 21, expresses himself in the same general terms. But there again the point did not directly call for decision. Now, I think it is not fair to put a strictly literal interpretation on the language used by judges when merely glancing at by matters, with their minds mainly directed to another question, and, tying them down to the very words they used, to assume that those words contained in their opinion an absolutely accurate statement of the law. I do not think those *dicta* were so intended to be read. In Heald *v.* Kenworthy, however, the question directly arose. And Parke, B., after citing the *dictum* of Bayley, J., to the effect that the seller cannot sue the principal if the state of accounts between the principal and the agent would make it inequitable that he should do so, proceeds to ask what equity there can be, unless it is something arising out of the conduct of the seller, something to induce the defendant to believe that a settlement has already been made with the agent.

If the authorities stood there, I should have no doubt that the limitation put by Parke, B., on the earlier wide qualification was correct. But it is suggested that that limitation was overruled in Armstrong *v.* Stokes. I think, however, that the court there did not intend to overrule it, but to treat the case before them as one to which the limitation did not apply. I think they noticed the peculiar character of Manchester commission merchants. Probably their decision means this, that, when the seller deals with the agent as sole principal, and the nature of the agent's business is such that the buyer ought to believe that the seller has so dealt, in such a case it would be unjust to allow the seller to recover from the principal after he paid the agent. Or it may perhaps be that Blackburn, J., finding the wider qualification in the very case which lays down the general rule, felt himself bound by the terms of that qualification, and applied them to the case before him.

If the case of Armstrong *v.* Stokes arises again, we reserve to ourselves sitting here the right of reconsidering it.

The only other question is whether the present case falls within the qualification as limited by Parke, B., whether there was any misleading conduct on the part of the plaintiffs. But the only thing relied on by the defendants on that point was the noninsistence on prepayment by the plaintiffs. And I do not think that that amounted to laches, or was such an act as would justify the defendants in supposing that Conning had already paid the plaintiffs.

BAGGALLAY, L. J. I wish to add that Littledale, J., in the case in Thomson *v.* Davenport, confined his judgment to the general rule.

Appeal dismissed.[1]

MERRILL AND OTHERS *v.* KENYON.

SUPREME COURT OF CONNECTICUT. 1880.

[48 *Conn.* 314.]

ASSUMPSIT for goods sold; brought to the Court of Common Pleas, and tried to the jury on the general issue before MATHER, J.

On the trial it was agreed that the goods for the value of which the action was brought were delivered to one George A. Hoyle, who was carrying on the business of a saloon-keeper in Norwich, ostensibly on his own account, and that the credit was given by the plaintiffs to Hoyle. It was claimed by the defendant that the plaintiffs knew that Hoyle was doing business as an agent when they sold the goods, but this was denied by the plaintiffs.

The plaintiffs claimed that at the time the goods were furnished, and for a long time afterwards, they supposed that Hoyle was the real proprietor of the place and business, and had no reason to suppose otherwise, but that subsequently they received information that led them to believe that he was only an agent, and that the real proprietor was the defendant, and that immediately upon this discovery they ceased to look to Hoyle for payment, and elected the defendant as their debtor, and brought this suit to recover the value of the goods. The defendant denied that he was the proprietor of the saloon, or had any interest in the business, though he admitted that he was the owner of the fixtures and some of the property in the saloon. He also denied that the plaintiffs made their election of him as their debtor as soon as they discovered, as they supposed, that he was the proprietor, but continued to give credit to Hoyle.

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[1] In Davison *v.* Donaldson, 9 Q. B. D. 623, 628 (C. A. 1882), JESSEL, M. R., said: "I am far from saying that there may not be special cases in which mere delay on the part of the plaintiff would be held to be sufficiently misleading conduct; it may amount to a representation that he has been paid."

With the principal case compare Fradley *v.* Hyland, 37 Fed. Rep. 49 (U. S. C. C., S. D. N. Y., 1888). — ED.

It appeared in evidence that two negotiable notes bearing date July 25th, 1877, and payable in two and three months, had been given by Hoyle to the plaintiffs for the account of the goods which were furnished, the account commencing November 25th, 1876, and closing July 31st, 1877, which notes were still retained by the plaintiffs, and have never been surrendered or cancelled, negotiated or paid; and it was claimed by the defendant that the notes were received in payment, which was denied by the plaintiffs.

The plaintiffs requested the court in writing to charge the jury as follows: —

1. If the plaintiffs did not know that Hoyle was acting as agent, while the goods were being furnished, and as soon as they discovered that he was the agent of Kenyon they elected Kenyon as their debtor instead of Hoyle, your verdict should be for the plaintiffs; and, under this head, it is for you to find as a matter of fact, when, if ever, the plaintiffs had such information as required them to make their election. The plaintiffs were not obliged to make their election on a mere rumor, but only on such information as they could rely upon.

2. If the plaintiffs knew, while they were furnishing the goods, that Hoyle was an agent, but did not know whose agent he was, the same rule applies as if they did not know that he was an agent at all.

3. Taking notes for an antecedent debt does not discharge the debt, unless it is expressly agreed between the parties that the notes shall be received as payment. The presumption is that they are not so received.

4. Even if the plaintiffs took the notes as payment, but did not have reason to know at the time that Hoyle was Kenyon's agent, then, unless the notes were paid, on discovering that fact they were still entitled to look to Kenyon.

The court did so instruct the jury.

The defendant requested, in writing, the court to charge the jury, that if the plaintiffs knew that Hoyle was agent, and then received his notes, the presumption was that they were received in payment of the original bill and that they elected Hoyle as debtor. The court declined to so charge, but did charge that if the plaintiffs knew that Hoyle was agent of Kenyon, and then received his notes, the presumption was that they elected Hoyle as their debtor.

The jury returned a verdict for the plaintiffs, and the defendant moved for a new trial for error in the charge of the court.

S. Lucas and *G. C. Ripley*, in support of the motion.

S. S. Thresher and *F. T. Brown*, *contra.*

PARK, C. J. No complaint is made of that part of the charge in which the court instructed the jury that, if the plaintiffs did not know at the time of the sale that Hoyle was acting as agent, and as soon as they discovered that he was so, elected to make his principal their debtor, they had a right to recover, and that they were not obliged to make their election upon a mere rumor, but had a right to have reliable information to act upon; but exception is taken to that part of the charge in which the judge said, "If the plaintiffs knew, while they were furnishing the goods, that Hoyle was an agent, but did not know whose agent he was, the same rule applied as if they did not know he was an agent at all."

The case of Thomson *v.* Davenport, 9 Barn. & Cress. 78, fully sustains this charge of the court.[1] . . .

The case of Raymond *v.* Crown & Eagle Mills, 2 Met. 319, is to the same effect. It was there held that "there must be actual knowledge, on the part of the vendor, of the relation of the parties and their interest in the matter, to exonerate the principal by giving credit to the agent."

Complaint is also made of that part of the charge in which the judge said to the jury that "even if the plaintiffs took the notes as payment, but did not have reason to know at the time that Hoyle was the agent of the defendant, then, unless the notes were paid, on discovering that fact they were still entitled to look to the defendant."

Surely the plaintiffs would not be bound by an agreement to take the notes of Hoyle in payment without any knowledge of the fact that Hoyle was the agent of the defendant, any more than they would be bound by their charge of the goods to him believing him to be the principal. The plaintiffs were entitled to the right of an election to charge the defendant, and no agreement they might make with Hoyle, under a misapprehension of the true character of the party with whom they were dealing, could deprive them of that right. The reason why a party is not bound, when he charges the agent believing him to be the principal, is the want of knowledge that another is the buyer in fact. The same principle must prevail in a case where the agent's notes are taken without that knowledge.

And it is well settled that the taking of the promissory note of a debtor for an antecedent debt is not of itself payment. Davidson *v.* Bridgeport, 8 Conn. 472; Bill *v.* Porter, 9 Conn. 23; Freeman *v.* Benedict, 37 Conn. 559.

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[1] Here was stated Thomson *v.* Davenport, *ante*, p. 637. — ED.

The defendant further complains of the refusal of the court to charge the jury, as requested by him, "that if the plaintiffs knew that Hoyle was an agent, and then received his notes, the presumption is that they were received in payment of the original bill, and that he elected Hoyle as his debtor."

We have already seen that the bare fact that the plaintiffs knew that Hoyle was an agent of some one in the transaction, was not enough to distinguish the case from that class of cases where such knowledge does not exist and sellers deal with agents supposing they are principals. Such being the case, it is clear that the court committed no error in refusing to charge as requested by the defendant. The cases already cited show that the facts stated create no such presumption as that claimed.

A new trial is not advised.

In this opinion the other judges concurred.[1]

SECTION V. (*continued*).

(*C*) IN AN ACTION BROUGHT BY THE THIRD PARTY AGAINST THE AGENT.

FORNEY *v.* BARTLETT SHIPP.

SUPREME COURT OF NORTH CAROLINA. 1857.

[4 *Jones' Law*, 527.]

ACTION of assumpsit, tried before BAILEY, J., at a Special Term, July, 1857, of Lincoln Superior Court.

The evidence was that defendant said he wished to employ the plaintiff to superintend the iron-works at Madison Forge; that if he would undertake the business, he would give him $12.50 per month as long as he continued to work; to which the plaintiff agreed.

Accordingly, the plaintiff took charge of the iron-works, and the first entry he made in the book, in which he kept his account, was as follows: "June 7th, 1852. Commenced work this day for Wm. Shipp; employed by Bartlett Shipp, at $12.50 per month."

It was further proved that plaintiff acted as superintendent about two years and six months, and during that time issued many due bills, payable in iron, and signed the same as agent for William Shipp; that he also signed many receipts in the same way, and made entries in the book of accounts as agent. It was further proved that plaintiff sold iron and iron-ware, to a large amount, for William Shipp.

The court charged the jury that, if the defendant made the contract in his own name, and engaged himself to pay the plaintiff for his work, without disclosing the name of his principal (if he had one), he would be responsible in this action, and the jury should so find; but if the defendant disclosed his principal, or if the plaintiff contracted with him knowing that the defendant was making the contract for, and on account of, William Shipp, and not for himself, he would be obliged to resort to the principal and not to the agent, and the plaintiff in that case could not recover.

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[1] Compare Perkins *v.* Cady, 111 Mass. 318 (1873). — ED.

The defendant's counsel asked the court to instruct the jury that, although the defendant contracted in his name without disclosing his principal, yet, if the plaintiff found out, after the contract was made, and before he commenced work, that he was acting for William Shipp, he could not recover in this action.

The court declined giving such instructions; and the defendant excepted.

The defendant relied upon the fact that the plaintiff had sold iron and castings, to a large amount, belonging to William Shipp, and insisted upon this counter-claim as a set-off.

But the court instructed the jury that this claim in favor of William Shipp was not applicable as a set-off in this suit against the defendant. Defendant again excepted.

There was a verdict in favor of the plaintiff, and judgment was rendered thereupon. Defendant appealed.

Lander and *Avery*, for the plaintiff.

Thompson and *Hoke*, for the defendant.

PEARSON, J. There is no error. We are to assume from the verdict "that the defendant made the contract in his own name, and engaged himself to pay the plaintiff for his work, without disclosing the name of his principal." The plaintiff having done the work, why should not this contract be binding?

It was said in the argument that there was no consideration in respect to the defendant. The proposition is not true. The contract was supported by the consideration of mutual promises between the contracting parties.

The fact that the plaintiff "found out," before he commenced work, that the work was to be done for William Shipp, and not for the defendant (his father), was immaterial; and his honor properly declined to give the instruction asked for. Suppose William Shipp to have been an infant, or a bankrupt, that did not discharge the plaintiff from his promise to do the work; therefore it could not discharge the defendant from his promise to pay for it.

The ruling in regard to the defendant's availing himself of a set-off, by reason of a supposed balance due William Shipp, growing out of the sale of castings, was in strict accordance with the legal rights of the parties. If William Shipp had made payments to the plaintiff (as distinguished from a set-off), for, and on account of, his work, that would have presented a different question. But the fact that the plaintiff (as was alleged) had sold castings for William Shipp, and had failed to account therefor, so as to give him a right to sue for an account, was properly excluded from the inquiry involved in the issues joined between the plaintiff and defendant.

Judgment affirmed.

HUTCHINSON *v.* WHEELER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1862.

[3 *Allen*, 577.]

CONTRACT upon an account for work and labor.

At the trial in the Superior Court, a trial by jury was waived, and, upon facts which are stated in the opinion, judgment was rendered for the plaintiff, and the defendant alleged exceptions.

J. E. Maynadier, for the defendant.

C. C. Esty, for the plaintiff.

DEWEY, J. The defendant, not having disclosed the fact of his agency at the time of making the contract with the plaintiff for services to be rendered by him at a stipulated price, is personally responsible for the payment for all the services rendered under that contract, unless by the subsequent facts, and the acts of the plaintiff in connection therewith, he has as to a part of the demand been discharged from such liability.

These facts are, 1st, That the plaintiff, a short time before the 1st of March, 1857, and several months after the labor was commenced, was told by the foreman in the establishment that the defendant was only an agent, and that the "Feltonville Horse-shoe Company" was the principal; but the plaintiff was not told, and did not know who composed that company. The company was a joint stock company, and was not incorporated. 2dly, The plaintiff after hearing this statement altered the charge on his books for the labor performed under this contract prior to 1st March, 1857, from "E. Wheeler" to the "Feltonville Horse-shoe Company," and this continued as the form of the charge upon the books until a short period before the commencement of the present action, when the plaintiff altered the same to its original form, "E. Wheeler, Dr." In the opinion of the court these facts do not constitute a defence of this action. The agent made no disclosure of his agency that authorized any change in the name of the debtor, nor did he make any reference to any other party who was responsible as principal. The mere casual statement made to the plaintiff by another person did not necessarily affect the liability of the defendant upon the contract he had made with the plaintiff. It is true that the plaintiff upon discovering the undisclosed principal might have the election to resort to him for payment, but he was not bound to do so, when he had contracted with one who did not disclose his agency.

Nor do the facts show any election by the plaintiff to resort to the principal, made under such circumstances as to discharge the agent. It is true the form of the charge on the book was altered, and so remained for some time. But no notice was given of this, and this change was not acted upon, and no attempt was made to enforce the payment of the claim against the principal. And, indeed, it appears that the plaintiff was entirely ignorant who were the parties associated under the name of the Feltonville Horse-shoe Company. He could not have elected to charge the Feltonville Horse-shoe Company under that name as a legal principal, because there was no such legal body. He could not be said to have elected to resort to the individuals composing that company, as his debtors, because their names were wholly unknown to them.

The rulings of the Superior Court upon the question of law raised before that court were correct. *Exceptions overruled.*

COBB, Respondent, *v.* KNAPP, Appellant.

Court of Appeals of New York. 1877.

[71 *N. Y.* 348.]

Appeal from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 10 J. & S. 91.)

The nature of the action and facts are sufficiently set forth in the opinion.

W. A. Coursen, for appellant.

Albert Matthews, for respondent.

Church, C. J. This was an action for the purchase-price of a quantity of wheat alleged to have been sold by the plaintiff to the defendant. The defence was that the defendant purchased the wheat as agent or broker for C. A. Steen & Co. It seems to have been conceded that the defendant did in fact purchase the wheat, as a broker, for the firm named, who were his principals, and the main contention on the trial was whether the defendant at the time of the purchase disclosed his principals, and whether he made the purchase in his own name and upon his own responsibility. The only exception in the case is upon a refusal to grant a nonsuit, and a request to direct a verdict for the defendant. The court charged the jury that a broker, although acting for another, makes himself personally liable if he contract in his own name, and without disclosing the name of his principal, and that this would be so, although the seller supposed at the time that he was acting as a broker or agent for another; that the subsequent disclosure of the principal, and the commencement of an action against him by the seller, would not discharge the broker from personal liability. There were no exceptions to the charge, and I do not understand that the learned counsel for the appellant claims that it was erroneous in these respects; but he insists, from the facts appearing in the case, a nonsuit should have been granted or verdict ordered for the defendant. There was a sharp conflict of evidence between the parties as to what took place at the time of the contract. This court has no power to review the facts any further than to ascertain whether they are sufficient upon any construction, which the jury were authorized to give them to justify a verdict, and whether any fact was conclusively proved which, as matter of law, entitled the defendant to a verdict. The credibility of witnesses, the construction of ambiguous evidence, and in general inferences to be drawn from circumstances, are exclusively for the jury. These views have been so often reiterated by this court, that it seems idle to refer to them, and quite unnecessary to cite authorities to sustain them. It is natural that parties who feel aggrieved by verdicts should struggle to have what they regard as injustice remedied, and hence it is the almost daily experience of this court to have questions of fact pressed upon our attention in some form as questions of law, while, except in a few cases, the review of facts is confined by statute to the Special and General Terms of the courts below. Our jurisdiction is fixed by the constitution and the statute, and we have no authority to depart from their limitations. In this case the evidence of the defendant, which was to some extent corroborated, if true, established clearly a case of non-liability. He testified that he purchased the wheat for Steen & Co., and so informed the plaintiff, and that it was understood that Steen & Co. was to pay the purchase-price, and that the plaintiff did not make any claim against him at the time, nor for several years afterwards. But for the purpose of determining whether it was a legal error to deny the motion for nonsuit, we must take the evidence of the plaintiff. If that was sufficient to sustain the action, the jury had a right to adopt it. The plaintiff testified that not only was the principal not disclosed, but that the defendant expressly purchased the wheat on his own credit, and directed that it be charged to him; that it was charged to him, and a bill made against him, which he repeatedly promised to pay. If the jury adopted the plaintiff's evidence, it made a clear case of liability. (Story on Agency, §§ 266, 267; 44 N. Y. 349.) It is argued that because the defendant stated that the property was for the "Blissville Distillery," and was to be delivered there, that was a sufficient disclosure of the principal, but this is not conclusive. The plaintiff states that he did not know the proprietors of the distillery, and that the defendant directed the property to be charged to him.

The case of Waddell *v.* Mordecai (3 Hill [South Carolina Rep.] 22) is cited. That was an action against the defendant to recover $100 paid on a contract executed by the defendant as agent of a brig, and signed "M. C. Mordecai for the owners." The agent had paid the money to his principals before the commencement of the action, and the court held that the plaintiffs could not recover. The learned judge who delivered the opinion reasoned that the disclosure was sufficient, but put the decision upon the ground mainly, that it appearing that the defendant had acted in good faith and delivered the money to his principals, the equitable action for money had and received could not be sustained. The general current of authority is against the sufficiency of such a signing to relieve the agent from liability, but it is unnecessary to express an opinion of its correctness, because in this case the agent, if the plaintiff's evidence is to be credited, contracted expressly on his own credit. The other case depended on is Southwell *v.* Bowditch (1 Law Rep. [Com. Pleas Div.] 100, and same case on Appeal, p. 374). The contract signed by the defendant was: "I have this day sold by your order, and for your account to my principals, five tons," &c. The Common Pleas Division held this to be a contract of purchase by the broker, and that he was liable. The Court of Appeals reversed the decision, holding that it was a contract of sale by the broker, and not of purchase, and that it must be construed according to its tenor like other contracts. This decision does not aid the defendant.

The case of Raymond *v.* The Proprietors of the Crown and Eagle Mills (2 Met. 319) is in point for the plaintiff.[1] . . .

The subsequent disclosure of the principals by the agent, and the commencement of an action against them, is not conclusive of an election to hold them responsible only. (2 Met. *supra;* 10 Queen's Bench [L. R.] 57.) In the recent case of Beymer *v.* Bonsall (79 Penn. R. 298), it was held that neither the agent nor principal in such a case would be discharged short of satisfaction. The fact of commencing the action and the statements in the complaint were proper for the jury upon the contested fact, but they did not operate as a legal discharge. It was claimed by the plaintiff that the action was commenced upon the representation of the defendant, that a certain responsible person was a member of the firm of Steen & Co., which was untrue; but, however this was, it did not discharge the defendant.

The case was properly submitted to the jury, and if the result is wrong, it was the error of the jury. We are unable to find any exception in the case justifying a reversal of the judgment, and it must be affirmed.

All concur. *Judgment affirmed.*

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[1] Here was stated Raymond *v.* Crown & Eagle Mills, 2 Met. 319. — ED.

SECTION V. (*continued*).

(*D*) IN AN ACTION BROUGHT BY THE AGENT AGAINST THE THIRD PARTY

ATKINSON *v.* COTESWORTH.

KING'S BENCH. 1825.

[3 *B. & C.* 647.]

ASSUMPSIT on a charter party, not under seal, whereby it was mutually agreed between the plaintiff, commander of the ship *Agaphea*, then lying in the river Thames, and the defendant, that the vessel should take a cargo to Pernambuco, and bring a cargo thence to London or Liverpool, according to the directions of the charterers' agent in the Brazils, and deliver the same, on being paid freight, at and after a certain rate therein specified, by a good bill, payable at two months from the day of final discharge. Breach, non-payment of freight. Plea, non-assumpsit. At the trial before ABBOTT, C. J., at the London sittings after last Trinity term, it appeared that the plaintiff, at the time of making the charter party, was the commander of the *Agaphea*, whereof David Hodgins, then resident in Ireland, was owner. Before the vessel returned to England, Hodgins, being dissatisfied with the plaintiff, appointed one Bain as his agent, to receive the freight, and gave notice to the defendant to pay it to him, which he accordingly did; but before it was paid, the plaintiff demanded that it should be paid to himself and not to Bain. Upon these facts the Lord Chief-Justice non-suited the plaintiff, but gave his counsel leave to move to enter a verdict in his favor for £80, which appeared to be due to him from the owner. In Michaelmas term Gurney obtained a rule accordingly, and now

Scarlett and *Campbell* showed cause. The plaintiff in this case was merely the agent of the owner, and made the charter party for his benefit. In the absence of any interference by the owner, he might have claimed the freight from the defendant. But when the owner intervened, and desired the freight to be paid to a third person, the authority of the captain was at an end. He had not any prospective lien for his wages, although, if he had received the money, he might then have set off the sum due for wages, had he been sued by the owner for the money so received. If a factor receives the proceeds of goods sold by him he has a lien on the money, but he cannot claim the proceeds from the vendee, if his principal intervenes, and desires the payment to be made to himself. Smith *v.* Plummer, 1 B. & A. 575, is expressly in point.

Gurney and *Chitty*, *contra*. The case of Smith *v.* Plummer differs materially from the present. It does not appear that any charter party was executed in that case between the captain and the defendant; the latter therefore had never contracted to pay freight to the captain. In the present case, the plaintiff was the person who chartered the ship to the defendant; and it does not appear on the face of the instrument that he was not owner; the defendant must, therefore, be taken to have contracted to pay the freight to him, and could not exonerate himself from his liability by paying it to a third person.

Abbott, C. J. I am unable to discover any solid distinction between the present case and that of Smith *v.* Plummer. Upon the authority of that case, therefore, I am of opinion that the nonsuit was right. The only distinction now pointed out between the two cases is, that in the present instance a charter party was entered into, and that it does not appear that any such instrument existed in Smith *v.* Plummer. Let us suppose that no charter party was made in that case, then the freight would be made payable generally by the bill of lading, signed by the commander of the vessel. Now the charter party entered into by this plaintiff and defendant does not specify to whom the freight was to be paid; in that respect, therefore, the case is the same as if the freight had been stipulated for by a common bill of lading. The master of a ship has no prospective lien on the freight, and cannot insist upon having it paid to himself, although a payment to him in the absence of any notice by the owner to the charterer to withhold it, would be a good and valid payment. For these reasons I think that this rule must be discharged. *Rule discharged.*

GIBSON *v.* WINTER.

King's Bench. 1833.

[5 *B. & Ad.* 96.]

Covenant on a policy of assurance under seal, executed by the defendants, two of the directors of the Indemnity Mutual Marine Assurance Company, wherein, after reciting that the plaintiff had represented to the defendants that he was interested in, or duly authorised as owner, agent, or otherwise, to make the assurance, and had covenanted to pay the premium, it was witnessed, that in consideration of the premises, and of £80, the defendants covenanted with the plaintiff that the capital stock and funds of the company should be liable to pay and make good all such losses as might happen to the subject-matter of that policy in respect of the sum of £4000 thereby assured, which assurance was thereby declared to be upon goods laden on board the ship called *The Courier*, lost or not lost, at and from Rio de Janeiro to a market in Europe. The usual clauses of the policy describing the risks, &c., were then set out. The interest in the goods was averred to be in one Le Quesne, and a loss by the perils of the sea. Breach, nonpayment of the sum of £4000 by the defendants. Plea (among others), that the defendants within a reasonable time after the loss, and before the commencement of this suit, to wit. on, &c., at, &c., paid to the plaintiff, out of the capital stock and funds of the company, the said sum of £4000 in the said policy of assurance mentioned, according to the tenor and effect, true intent and meaning of the said policy; and upon this issue was joined. At the trial before Lord TENTERDEN, C. J., at the London sittings after Hilary term, 1833, the following appeared to be the facts of the case: The policy was effected on goods the property of Mr. Le Quesne of Jersey, who employed the plaintiff and his partner, one Poindestrie, insurance brokers in London, for that purpose. A loss having occurred, a partial adjustment to the amount of £3000 took place in 1829 between the plaintiff and defendants, the defendants then knowing that Le Quesne was the party interested in the goods insured. The defendants on that occasion gave credit to the plaintiff for £1524 9*s* due from him to them for premiums of insurance on ships and property of other persons, in part payment of this £3000, and paid the balance, £1475 11*s*., in cash to the plaintiff. On the 17th of July the plaintiff informed Le Quesne, by letter, that he had obtained a settlement of £3000 on account, which sum would appear to the credit of his, Le Quesne's, account at two months from that date. Le Quesne, in his answer, said, "The same is placed in due conformity." In the first week of October, 1829, the plaintiff became bankrupt, without having paid over to Le Quesne either the amount received by him or that allowed in account by the defendants, and this action was in fact brought by Le Quesne in the name of the plaintiff to recover from the defendants £1524 9*s*., on the ground that the plaintiff was authorized to receive the amount of the loss in money only, and that a payment in any other way was not binding on his principal. Lord TENTERDEN was of opinion that that general rule ought to prevail, unless Le Quesne had, in this case, recognized and adopted the mode of payment; and observed that if the mode of payment had been made known to Le Quesne, and he had not, within a reasonable time, objected to it, he must be taken to have adopted it; that the question was, whether he did know it. Gibson, his Lordship observed, in his letter of the 17th of July, informed Le Quesne only that he had obtained an adjustment to the amount of £3000, not that he had received actual payment of that sum, and that that sum would, at the end of two months, be placed to his, Le Quesne's, credit: Le Quesne, in his answer, after adverting to the adjustment, said, "the same is placed in due conformity." And he told the jury to find for the defendants if they thought Le Quesne meant to give credit for £3000 to Gibson, and to accept him as his debtor instead of the defendants. The jury found for the defendants.

A rule *nisi* was obtained for a new trial, on the ground that Le

Quesne's assent was not proved, and that although in general where an agent is employed to receive money of a debtor, and the debtor pays him money, the debtor is discharged, yet if the debtor does not pay in money, but settles the account by writing off so much money as may be due from the agent to him, the latter is not discharged.

Sir J. Campbell, S. G., *Sir J. Scarlett*, and *Tomlinson* showed cause.

R. V. Richards, *contra*. *Cur. adv. vult.*

DENMAN, C. J. On the trial before the late Lord TENTERDEN, at the sittings after Trinity term, the defendant had a verdict, on the ground that Le Quesne had acquiesced in, and adopted the mode of, payment to the plaintiff, and was bound by it. Mr. Pollock moved for a new trial in the following term: The case was afterwards fully argued before us; and if it had depended upon the propriety of the verdict we should have thought it right to submit the case to the consideration of another jury, for we are by no means satisfied that there was sufficient evidence of adoption by Le Quesne, as he was never correctly informed of the real state of facts.

Another objection was, that as the covenant was with Gibson, and he only could sue upon it, payment to him, in any mode by which he was bound, would be a good payment as against Le Quesne; and that as the settlement with the plaintiff bound him, it equally bound Le Quesne suing in his name. And upon full consideration, we are of opinion that this objection is valid.

The plaintiff, though he sues as a trustee of another, must, in a court of law, be treated in all respects as the party in the cause: if there is a defence against him, there is a defence against the *cestui que* trust who uses his name; and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself.

The following are the authorities which appear to us fully to warrant this position. In Bauerman *v.* Radenius (in which the question was, whether the admission by the plaintiff, who was clearly a trustee for another, could be received in evidence), Lord Kenyon, 7 T. R. 668, says: "If the question that has been made in this case had arisen before Sir Matthew Hale, or Lords Holt or Hardwicke, I believe it would never have occurred to them, sitting in a court of law, that they could have gone out of the record, and considered third persons as parties to the cause. If the plaintiffs may be taken to be off the record, then they may be examined as witnesses; and yet it is not pretended they could have been examined. I cannot conceive on what ground it can be said that they may be considered not as the parties to the cause for the purpose of rejecting their admissions, and yet as the parties to the cause for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule, that an admission made by the plaintiff on the record is admissible evidence." So a release by the plaintiff on the record suing for the benefit of another was decided, in a case before Lord Mansfield (cited in Bauerman *v.* Radenius, 7 T. R. 666), to be a good answer at law, and Lawrence, J., expresses the same opinion in the case last mentioned; and courts of law have been in the habit of exercising an equitable jurisdiction on motion, and setting such releases aside, or preventing the defendant from pleading them, as in Legh *v.* Legh, 1 Bos. & P. 447, Payne *v.* Rogers, Doug. 407, Jones *v.* Herbert, 7 Taunt. 421, and Abbott, C. J., in Scaife *v.* Johnson, 3 B. & C. 422, and many other cases, which practice shows very clearly the opinion of the courts, that, but for their equitable interference, the real plaintiff would be barred. In Craib *v.* D'Aeth, 7 T. R. 670, note (*b*), the circumstances of fraud upon the real plaintiff were replied; but no objection appears to have been taken on this ground, and the general practice is undoubtedly to apply specially to the court. Again, in Alner *v.* George, 1 Campb. 392, where trustees, for the benefit of creditors, sued in the name of the insolvent, Lord Ellenborough held that a receipt in full for the amount by the plaintiff was an answer to the action; and his Lordship said: "If a motion had been made in term time to prevent the defendant from availing himself of this defence, perhaps we might have interfered. Sitting here, I can only look to the strict legal rights of the parties upon the record; and there can be no doubt that a receipt in full, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon him. The plaintiff might have released the action; and it is impossible to admit evidence of his attempting to defraud others."

In Jones *v.* Yates, 9 B. & C. 539, Lord Tenterden says: "We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person;" and therefore it was held, that where one of two partners disposed of some of their effects in fraud of the other, both could not sue in a court of law to recover for them, in an action of trover.

Upon principle, and upon these authorities, we are of opinion that if there be a good defence against the plaintiff, there is a good defence against Le Quesne suing in his name.

The only remaining question is, whether there is a good defence against the plaintiff.

Now, if the plaintiff was suing for himself, it is clear that the plea of payment would have been proved; for credit given to the plaintiff by mutual agreement for the amount of the premiums was equivalent to payment by the plaintiff to defendants of that amount on account of the premiums, and a payment by the defendants to the plaintiff of the same sum on account of the loss.

We therefore think that the defendants were no longer liable; but as this point, upon which we decide the case, was intended to have been reserved, if necessary, by Lord TENTERDEN, in which case a nonsuit would have been directed, we think that a similar rule should be now pronounced. *Nonsuit to be entered.*

ISBERG *v.* BOWDEN.

EXCHEQUER. 1853.

[8 *Exch.* 852.]

THIS was an action on a charter party for freight. The declaration stated that it was agreed by charter party, between the plaintiff, therein described as the master of the ship *Clio*, and the defendant, that the said ship should proceed to certain places in the sea of Azof (in the charter party mentioned), and load a cargo of tallow, &c., to discharge the same at certain ports (also mentioned) at a certain freight, one half of such freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by approved bills on London, at three months' date, or in cash, less discount, at £5 per cent per annum, at merchant's option. The declaration then proceeded to state the loading of the vessel with a complete cargo, and the unloading thereof at the port of discharge, the amount of the freight, that the defendant had notice, and that, although the defendant had paid the plaintiff one-half the amount of the freight, yet he had not paid the residue, or satisfied the plaintiff's claim by approved bills.

The defendant pleaded, as to £87 6*s.*, parcel of such residue, that the plaintiff entered into the charter party as the master of the vessel for and on behalf and as agent of one Carl Gustaff Wolff, the owner; and that the plaintiff has no beneficial interest in the charter party, and has no lien whatever on the residue of the freight or any part thereof; and that the plaintiff has brought this action solely as agent and trustee of the said owner; and that at the time the residue of the freight became due and payable, the defendant gave the plaintiff notice that he elected to pay the residue of the freight in cash less discount, at, &c., and not by bills; and further, that at the time when the residue of the freight became due and payable, the said C. G. Wolff was and still is indebted to the defendant in an amount equal to the said sum of £86 6*s.* The plea concluded by offering to set off that amount in the usual way.

Demurrer, and joinder.

The demurrer was argued in last Easter Term (May 4) by

Unthank, in support of the demurrer.

Mellish, *contra.*

MARTIN, B.[1] Mr. Unthank, in support of the demurrer, contended, that, as the plea was bad at common law, and could only be supported by virtue of the statute of set-off, 2 Geo. 2, c. 22, s. 13; 8 Geo. 2, c. 24, s. 5, inasmuch as the plaintiff in the action was not the debtor to the defendant, the case was not within the statute. Mr. Mellish, on the other hand, admitted that the plea was bad at common law, but contended that the statute had received a construction in several cases, which he cited, and to which we shall presently refer; and that, upon such construction, the plea could be maintained.

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[1] After stating the case. — ED.

The statute enacts, "That where there are mutual debts between the plaintiff and the defendant one debt may be set against the other." This is the whole enactment as applicable to the present case, and upon its true construction the question depends. If the words of the statute had been, that where there were "mutual debts" the one might be set against the other, the argument of Mr. Mellish would have had more weight; but those are not the only words, for the debts are to be mutual debts between the plaintiff and the defendant, and there is no debt here due from the plaintiff at all; and except the words "between the plaintiff and the defendant" can be excluded, the plea cannot be maintained.

In support of his view, Mr. Mellish cited the case of Coppin *v.* Craig, 7 Taunt. 243, where a plea in substance the same as the present was pleaded. The plea was not demurred to, and its validity or non-validity in point of law seems never to have been considered at all, and the matter decided by the court was quite collateral to the present question. So also a case of Jarvis *v.* Chapple, 2 Chit. Rep. 387, where a similar plea was pleaded, was relied on. That was an action by an auctioneer for goods sold and delivered, and the defendant pleaded that the plaintiff sold as agent for one Tappinger, who was indebted to the defendant, which debt was pleaded as a set-off. The plaintiff replied, that the goods were not the goods of Tappinger, and were not sold by the plaintiff as his agent; upon which issue was joined. The plaintiff was nonsuited at the trial, and the application to the court was to set aside this nonsuit. It is at once, therefore, obvious that the present question could not, by possibility, have arisen under such circumstances.

The case of Carr *v.* Hinchliff, 4 B. & C. 547, and several other cases decided on the same principle, were also cited. It is quite true that there are expressions in the judgments of the learned judges in that case which seem to support Mr. Mellish's argument; but the real ground upon which that and many other cases proceeded, decided on the same point, is, that where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal. The cases of Carr *v.* Hinchliff, George *v.* Claggett, Rabone *v.* Williams, &c., are all explained on that principle in Tucker *v.* Tucker, 4 B. & Ad. 750. By this case, and that of Wake *v.* Tinkler, 16 East, 36, and a case referred to by Marryatt (Lane *v.* Chandler, 7 East, 153), the cases of Bottimley *v.* Brook, 1 T. R. 622, and Rudge *v.* Buck, 1 T. R. 622, must be considered as entirely overruled; and the case of Tucker *v.* Tucker goes far to show that the statute of set-off is confined to the legal debts between the parties, the sole object of the statute being to prevent cross actions between the same parties.

The case of Stackwoad *v.* Dunn, 3 Q. B. 822, was cited on behalf of the defendant. It is enough to say, that this case goes much beyond that. In that case, it seems to have been ruled that, the demurrer having confessed the truth of the pleas, the parties to the suit ought to be considered those who are alleged in the plea, and so the set-off was between the parties. The cases cited in Story on Agency, page 361, sect. 409, as the authorities for what is there stated, are those already adverted to from 7 Taunt. 237 and 243, and have been shown not to support the general proposition.

In this case the party whom the defendant agreed to pay was the plaintiff, but the plaintiff was not the party who agreed to pay the defendant the debt sought to be set off; and we think that, looking at the plain words of the statute, we best give effect to the true rule now adopted by all the courts at Westminster for its construction, by holding that, inasmuch as the debts are not mutual debts between the plaintiff and the defendant, the one cannot be a set-off against the other.

This is acting upon the rule as to giving effect to all the words of the statute, a rule universally applicable to all writings, and which, we think, ought not to be departed from except upon very clear and strong grounds, which do not, in our opinion, exist in this case.

Judgment for the plaintiff.[1]

RHOADES *v.* BLACKISTON AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1871.

[106 *Mass.* 334.]

CONTRACT for breach of an agreement to sell and deliver coal. At the trial in this court, before COLT, J., the plaintiff testified that after the making of the alleged agreement, and its breach by the defendants, he was adjudged a bankrupt; "that he made the agreement while acting as agent of Alonzo V. Lynde, under authority from him, and made it as agent; that he owed Lynde a large sum of money, and had transferred his coal business to him as security for the debt; that it was agreed between them, that Lynde was to furnish the capital, and was to receive all the profits of the business, except enough to support the plaintiff and his family, until the debt should be paid; that after the debt was paid the property was to be his, and the profits of the business; and that he had no property in the coal, or interest other than as stated, and his own money was not invested in the business; but that he was to have his living out of the business until the debt was paid."

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[1] *Acc.:* Alsop *v.* Caines, 10 Johns. 396 (1813). — ED.

The defendants objected that the plaintiff could not maintain the action, and the judge reported the case for the determination of the full court, if the court should be of opinion that the plaintiff could not maintain the action, judgment to be for the defendants, otherwise the case to stand for trial.

T. H. Sweetser and *C. Abbot*, for the plaintiff.

W. A. Field, for the defendants.

Colt, J. It is a well-established rule of law, that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. If the agent sues, it is no ground of defence that the beneficial interest is in another, or that the plaintiff, when he recovers, will be bound to account to another. There is an additional reason for giving this right to the agent, when he has a special interest in the subject matter, or a lien upon it. But the rule prevails when the sole interest under the contract is in the principal. The agent's right is of course subordinate to and liable to the control of the principal, to the extent of his interest. He may supersede it by suing in his own name, or otherwise suspend or extinguish it, subject only to the special right or lien which the agent may have acquired. Colburn *v.* Phillips, 13 Gray, 64. Fairfield *v.* Adams, 16 Pick. 383. Story on Agency, § 403.

In this case, the contract relied on was made by the plaintiff in his own name, as agent for an undisclosed principal, who does not now in any way interpose. But admitting the law of principal and agent as that stated, the defendants further contend that the plaintiff's right of action passed to his assignees in bankruptcy, who were appointed in proceedings commenced after the alleged breach. It appears that the plaintiff made the contract in the course of a business which he was carrying on for Alonzo V. Lynde, and which he had previously transferred to Lynde as security for a debt, with the agreement that after the debt was paid the property was to be his with the profits of the business, Lynde furnishing all the capital and receiving all the profits, except enough for the support of the plaintiff and his family, until the debt should be paid. And it is claimed that upon these facts the plaintiff had such a legal and equitable interest in the contract that it must pass by the bankruptcy proceedings to the assignees.

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial as well as legal interest in, and which is to be applied for the payment of his debts. To a plea that the plaintiff is a bankrupt, and that all his estate vested in his assignees, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested by prior assignment in a third party, for whose benefit the suit is prosecuted. If, however, the bankrupt has any beneficial interest in the avails of the suit, then the whole legal title vests in his assignee, and the action must be in his name, for there cannot be two legal owners of one contract at the same time. Webster *v.* Scales, 4 Dougl. 7. Winch *v.* Keeley, 1 T. R. 619. Carpenter *v.* Marnell, 3 B. & P. 40.

In most of the English cases in which these rules have been applied, there was an assignment of a chose in action by the bankrupt to a third party, made before the bankruptcy, and they have mainly turned on the question whether the transfer was absolute or only as security for debt, and if as security only, then further, on the question whether the security was of greater value than the debt secured, at the time of the bankruptcy. The case of D'Arnay *v.* Chesneau, 13 M. & W. 796, 809, relied on at the argument, was of this description, and Baron Parke there declared "that if the debt to be secured was less than the debt assigned, and there was nothing more than a simple assignment of the debt as a security, the right of action would vest in the insolvent's assignees. In such a case they would have an immediate interest in the sum to be recovered, from which benefit to the creditors might result, and they would not have been bound to refund all they had recovered to the equitable assignee of the debt (their *cestui que trust*), which is the proper criterion." Dangerfield *v.* Thomas, 9 Ad. & El. 292.

The court are of opinion that the rule in these cases, if ever applicable to a case where an agent sues upon a contract made in the course of his agency, where the suit is subject to the control of the principal, cannot be applied to defeat the plaintiff's action here. The pledged property consisted of a business to be carried on with the capital of the party to whom it was transferred. The contracts made in the course of it were the contracts of the principal. The agent had no immediate beneficial interest in them. His interest was only in the future profits, and that contingent on their being sufficient to pay the debt he owed. The contract of Lynde to restore the property to the plaintiff was executory, and there was no claim that the contingency had happened upon which the business and property were to become the plaintiff's. The inference from the facts reported is, that it did not. The support which he was to have for himself and his family was plainly in compensation for his agency in the business. And there is nothing to show that the creditors in bankruptcy have any valuable interest in the contract declared on. Parnham *v.* Hurst, 8 M. & W. 743. Ontario Bank *v.* Mumford, 2 Barb. Ch. 596. 3 Parsons on Contracts, 479. *Case to stand for trial.*

BLISS *v.* SNEATH.

SUPREME COURT OF CALIFORNIA. 1894.

[103 *Cal.* 43.]

APPEAL from a judgment of the Superior Court of San Mateo County.

The facts are stated in the opinion.

G. W. McEnerney and *Stanly, Hayes & Bradley*, for appellant.

B. Waters, for respondent.

TEMPLE, C. This is an appeal from a judgment for plaintiff upon the pleadings.

The action is for rent alleged to be due upon an indenture of lease. It is contended that the complaint does not sufficiently aver demand and nonpayment. The allegation is: "That the plaintiff has demanded the payment of said sum, but to pay the same, or any part thereof, the defendant refused, and still refuses." A general demurrer was interposed, which apparently was never passed upon, but was waived by answering. The objection not having been taken by special demurrer, the pleading must now be held sufficient. Grant *v.* Sheerin, 84 Cal. 197.

The defendant answered, admitting the demand of plaintiff, but setting up, as a partial defence, a claim against the plaintiff's wife. The answer avers that, in all the transactions set forth in the complaint, plaintiff acted solely and wholly as the agent of Martha S. Bliss, his wife; that the present action is prosecuted by him as agent of said Martha S. Bliss, and for her sole and exclusive use, benefit, and behalf. The answer then proceeds to aver a demand against said Martha S. Bliss, which existed at the time the action was commenced, and asks that such demand be set off against and deducted from the claim of plaintiff, and admits plaintiff's right to take judgment for the excess of plaintiff's demand over and above his claim against Martha S. Bliss. On motion, plaintiff obtained judgment for the full amount of his demand without trial.

The sufficiency of the allegations in the answer must be tested by the same rule applied to the complaint. If the allegations in the answer would be sufficient in a complaint to sustain a judgment, they are sufficient here. Judged by this rule, the allegation is sufficient to show that plaintiff is suing merely as the agent of his wife. The defence is not really a counterclaim. That is a demand which may be the basis of a judgment against the plaintiff.

Here the matter pleaded is purely defensive to the demand sued on.

"'Where the agent sues in his own name,' says Mr. Evans (Evans, Ag. 387), 'the defendant may avail himself of all defences which would be good at law and in equity: (a) as against the agent, who is the plaintiff on the record, or (b) as against the principal, for whose use the action is brought.'" Mechem, Ag. § 762.

It is said, however, that, even admitting this principle, it cannot apply here, because the defence set up is a debt created or arising from a statutory liability, and is not, therefore, a cause of action arising upon a contract.[1] . . .

I think the judgment should be reversed, and a new trial had.

HAYNES, C., and SEARLS, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, and a new trial ordered.

McFARLAND, J., FITZGERALD, J.

DE HAVEN, J., concurring. I concur in the judgment. Assuming the matters alleged in the answer to be true, it was error to give a judgment in favor of plaintiff for the full amount demanded in the complaint.

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[1] Passages dealing with this contention are omitted. — ED.

CHAPTER VI.

THE PRINCIPAL'S DUTIES TO THE AGENT.[1]

SECTION I.

Reimbursement or Indemnity.

CHILD *v.* MORLEY.

KING'S BENCH. 1800.

[8 *T. R.* 610.]

ASSUMPSIT for money paid, laid out, and expended for the use of the defendant; upon an account stated; for work and labor as a broker for the defendant, and on a *quantum meruit;* to which the defendant pleaded the general issue. At the trial before Lord KENYON at Guildhall, the case appeared to be this: —

Morley, being possessed of £10,000 three per cent consolidated stock, applied to Child, a stock-broker, to sell it for him for the next opening, the stock being then shut. The defendant's direction to the plaintiff was to sell at 60 if he could; if not, for 59 and a fraction. Child accordingly bargained with two persons, Rutt and Shepherd, for the sale of this stock at 59 and a fraction for the next opening, not disclosing to them at the time the name of his principal. In the mean time and before the transfer day the stock rose to 62. The defendant being afterwards called upon to make good his engagement to the purchasers refused so to do, alleging that the plaintiff had exceeded his authority in selling at too low a price. Whereupon the plaintiff, considering himself bound as the broker who had contracted with Rutt and Shepherd for the sale of the stock to make good his engagements to them, paid them the difference of the price of the stock when bargained for, and when it ought to have been transferred, amounting to £576 8*s*., and brought this action against Morley to recover that sum, and a further sum of £12 10*s*. for his commission as broker on the sale of the stock. And the jury, under Lord KENYON's direction, found their verdict for the amount of the two respective sums, discriminating at the time between them.

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[1] The principal's duty to remunerate the agent is treated in works on Contracts and Quasi-Contracts. See also Osborn *v.* The Governors of Guy's Hospital, 2 Str. 728 (1725); Taylor *v.* Brewer, 1 M. & S. 290 (1813); Davies *v.* Davies, 9 C. & P. 87 (1839); Bryant *v.* Flight, 5 M. & W. 114 (1839); Baxter *v.* Gray, 3 M. & G. 771 (1842), s. c. 4 Scott, N. R. 374; Oxford *v.* McFarland, 3 Ind. 156 (1851); Cook *v.* Fiske, 12 Gray, 491 (1859); Lockwood *v.* Levick, 8 C. B. N. S. 603 (1860); Hill *v.* Williams, 6 Jones' Eq. 242, 248–249 (1861); Morris *v.* Barnes, 35 Mo. 412 (1865); Scully *v.* Scully, 28 Iowa, 548 (1870); Bixby *v.* Moor, 51 N. H. 402 (1871), s. c. Wambaugh's Cases for Analysis, 160; Parker *v.* Walker, 86 Tenn. 566 (1888); Gilchrist *v.* Clarke, 86 Tenn. 583 (1888); Holden *v.* Starks, 159 Mass. 503 (1893). — ED.

A rule was obtained by law in the last term, calling on the plaintiff to show cause why the verdict should not be set aside on several grounds. 1st, Because the transaction for the sale of the stock, as between the plaintiff and Rutt and Shepherd, was illegal and void within the statute 7 Geo. 2, c. 8, against stock-jobbing; and the purchasers could not have enforced the contract against the plaintiff, there being no stock in his name to be transferred. 2dly, Because no person can make another his debtor by a voluntary payment of the other's debt due to a third person; more especially in this case, when by the defendant's refusal to pay the money to the purchasers of the stock there was a direct notice to the plaintiff not to pay it. 3dly, Because, considering the relation in which these parties stood to each other, that of principal and agent, the plaintiff as agent had no right to pay money for his principal against his consent, in order to found an action against him, even admitting that the principal was bound to pay it to third parties; for the agent in these transactions is the only witness for his principal, and the latter thereby loses the benefit of his testimony. 4thly, Because at any rate this form of action was misconceived; if the plaintiff had been damnified by the defendant's neglecting to transfer the stock, he should have brought an action on the case for the special damage.

Erskine, *Garrow*, and *Henderson* now showed cause against the rule.

Lord KENYON, C. J. There is no pretence to say that this is a stock-jobbing transaction within the statute. The parties intended a *bona fide* sale of stock, of which Morley, on whose account it was sold, was then actually possessed; and the question is whether this may not be done through the intervention of a broker though he does not disclose his principal at the time; of which no doubt can be made. Nothing can be more unjust than the defence which has been set up to the whole of this demand; and that consideration may at first view of the case have tended to warp my judgment. But I cannot perceive what benefit the defendant can propose to himself by such conduct; for the court have no doubt but that at all events the verdict must stand for the £12 10*s*., the amount of the plaintiff's commission as broker, under the count for work and labor. And I think that some method or other will be found for making the defendant pay the amount of the difference which the plaintiff has honorably settled on account of his principal's not making good his engagement. But as to that part of the demand, there is a difficulty in the form of action; and perhaps it would have been better framed *ex delicto* than *ex contractu.* I admit that no man can by a voluntary payment of the debt of another make himself that man's creditor, and recover from him the amount of the debt so paid; but what pressed on my mind was that the plaintiff was under some sort of compulsion to pay the differences. We know that it is the common practice on the Stock Exchange for the broker who is employed to sell stock not to disclose the name of his principal at the time of making the bargain; and the buyer deals with him upon the confidence of his character. Therefore I considered that his character was at stake in making good the engagement he had entered into on behalf of his principal; and having been placed in that situation of responsibility by the act and procurement of the defendant, I considered that his paying the differences under such circumstances was not altogether a voluntary act, but done under the pressure of a situation in which he was involved by the defendant's breach of faith. I remember a case in Rolle's Abridgment where a party met to dine at a tavern, and after dinner all but one of them went away without paying their quota of the reckoning, and that one paid for all the rest; and it was holden that he might recover from the others their aliquot proportions. If the plaintiff here had been bound as guarantee for the defendant to the purchasers of the stock, there could have been no doubt but that he might have recovered his whole demand in this action. However, upon the whole, considering the difficulties of the case in its present shape as to the sum recovered for the differences, I think it would be better to frame another action for this part of the demand better adapted to the nature of the case.

LAWRENCE, J. My difficulty is this: if Child contracted to sell the stock on his own account, then the case falls directly within the prohibition of the Act of Parliament, because he really was not possessed of the stock so bargained to be sold. But if he acted as broker or agent for Morley, which he legally might, and his contract would then be valid within the statute, he ought in that case to have permitted Morley to settle or not with the purchasers as he pleased; and the plaintiff should not have taken upon himself to pay the money without the consent of his principal, more especially after that principal had refused to pay it. In this general view of the case the payment by the plaintiff would be at his own peril, and he could not recover in this action as for money paid to the use of the defendant. The only ground on which (as it seems to me) the verdict in this case could have been supported for the whole demand was by considering the plaintiff as standing in the situation of a guarantee for the sale of the stock to the purchasers. Taking the transaction as now disclosed to be legal within the statute, there could be no objection to the plaintiff's becoming the guarantee of such a legal contract; and then if he had paid the money on the default of the defendant, he would have stood in the common situation of a surety paying money for his principal; and it might have been a question whether, if by the general usage of the Stock

Exchange brokers contracting for the sale of stock and not disclosing the names of their principals were considered as impliedly pledging their own credit for the faithful performance of the contract, such general usage might have been deemed equivalent to an express guarantee on the part of the plantiff, and then the money paid by him in default of his principal would have been money paid to the use of the defendant. But difficulties occur in this view as the facts now stand, and therefore it seems more proper that the verdict should only be entered up for the amount of the brokerage.

PER CURIAM, *Ordered accordingly.*[1]

HURST *v.* HOLDING.

COMMON PLEAS. 1810.

[3 *Taunton*, 32.]

THIS was an action for money lent, and upon an account stated. Upon the trial of the cause at the Guildhall Sittings after Hilary Term, 1810, before MANSFIELD, C. J., the proof was, that the defendant, who resided at Liverpool, having written to the plaintiff on the 7th of February to purchase him 33 bags of damaged Surat cottons at 23*d.* per lb., to be paid for in one month, with the usual East India Company's allowance; the plaintiff, on the 9th, bought cottons for less than the price named, to be paid for in one month; and at the time of the sale paid £87 12*s.* for custom-house duties, and £61 more, as the allowance to the East India Company, and on the 11th sent the cottons to the Axe Inn in Aldermanbury, to be forwarded by the Paddington Canal to Liverpool, but with instructions to deliver them to the plaintiff's order. They were forwarded on the 18th from the Axe. Whitley, who had sold the cottons, afterwards hearing rumors disadvantageous to the credit of the defendant, applied to the plaintiff to stop the cottons, who, in consequence, on the 27th, gave directions at the Axe Inn that the cottons should not be delivered to the defendant otherwise than upon payment of the price. The person who received this order wrote to his agent in Liverpool accordingly on the same day, and the goods did not arrive in Liverpool till the 10th of March, when the month's credit was expired. The carriers at Liverpool, by the plaintiff's direction, upon the day after their arrival, tendered the cottons to the defendant, upon payment of the money, but he refused to accept them or pay for them: upon which the plaintiff, who had in the mean time, on the 11th of March, paid Whitley £407 12*s.* 4*d.* for the price of the cottons, by the same agent sold them on the 19th of May by auction at Liverpool, for the account of the defendant. It was in evidence, that the plaintiff was in the practice of buying cottons, as broker, for the defendant; and it was alleged that his usual course of dealing was to send them to the Axe in Aldermanbury, to be forwarded to Liverpool to be delivered to his own order. This action was brought to recover the price of the cottons, which the plaintiff had paid to Whitley; the duties he had paid at the custom-house; the allowances he had paid to the East India Company; and his own commission for purchasing them. MANSFIELD, C. J., thought he was not entitled to recover either; and the jury, under his direction, found a verdict for the defendant, with liberty to move to enter a verdict for the plaintiff for £87 12*s.*, the amount of the duties paid at the custom-house, if the court should be of opinion that he was entitled to recover that sum.

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[1] See Taylor *v.* Stray, 2 C. B. N. S. 175 (Ex. Ch., 1857). — ED.

Vaughan, Serjt., in Easter Term, moved, as well upon the point reserved as upon the ground that the plaintiff was entitled to recover the commission, which he had earned by making the purchase, at a time anterior to any misconduct in himself, and which he could not forfeit by what happened afterwards.

Shepherd and *Best*, Serjts., on this day, showed cause against the rule on both grounds: the goods being bought at a month's credit, the purchaser is entitled to insist upon their being delivered in the ordinary course of trade; but contrary thereto, the goods are detained by the plaintiff's procurement until the month is expired, and are directed to be then delivered only upon payment of the price. The broker is not entitled to his commission unless he does his duty, which he violates by stopping the goods from coming to his employer's hands. If Whitley, of himself, without the aid of the plaintiff, had stopped the cottons, the plaintiff might have recovered; but, under the present circumstances, if he were agent for both parties, yet if he forwarded the interests of the one by sacrificing those of the other, he is not entitled to recover commission against the latter. The same reason prevents his recovering the duty, for if he were entitled to recover it against the defendant, he would receive it twice over; for he is already repaid the duties, inasmuch as he has sold the goods, increased in value by the amount of the duties paid, and has received the price, and therein the amount of the duties, from the last purchaser. Even if the defendant, and not the plaintiff, had prevented the bargain being completed, the plaintiff could not have recovered commission, which is not due till the completion of the contract; though he might have maintained an action against the defendant for preventing him, as broker, from completing a purchase upon which he would have been entitled to commission.

Vaughan in support of his rule. The plaintiff pays the sums of £87 12*s.* for the duties, and £61 for allowances to the East India Company, on the 10th of February, upon the taking the goods from the India house, in the due discharge of his duty, in pursuance of the instructions given him on the 7th. He was bound to pay these sums; for he could not otherwise get the cottons out of the warehouse. He was on that day therefore entitled to be repaid these sums; it was a vested right. On the 11th he delivered the goods at the Axe, which was a delivery to the defendant, whence they are forwarded on the 18th; and although on the 27th the plaintiff gives directions at the Axe that the goods shall not be forwarded, yet they were then out of the power of the carriers there, and the order was inoperative. No action could be maintained against the plaintiff for misconduct; but if any could, yet that would not vacate his right to recover these debts already incurred; and as it is not the course of trade for brokers to charge interest on the sums they advance, his only compensation for these advances is in the shape of the commission, which is therefore due. It was not in proof that the goods were stopped in consequence of the imprudent order given on the 27th, and fraud is not to be inferred.

MANSFIELD, C. J. I do not know that the plaintiff is entitled even to the duties, though it may be a very hard case. For what is the case? The plaintiff buys cottons according to his instructions, and sends them, and by some accident they do not set out till the 18th. It is in evidence that they were stopped on the canal, the plaintiff says, by the seller; but if so, the seller could have known where to stop them only by communication with the plaintiff; when they arrive and are offered to the defendant he will not take them, the price had then fallen. The plaintiff writes on the 27th, the price of the goods not then being payable, to stop them, unless upon payment of the money. I have no note of any evidence that the plaintiff had previously sent to Liverpool other goods directed to his own order. On the 11th the plaintiff pays voluntarily for the goods, not in consequence of any direction from the defendant. So long after as the 19th of May, the plaintiff himself takes the goods and sells them. If he did it out of honor to save the defendant's credit, the utmost he could do would be, on paying Whitley, to be permitted to sue the defendant in Whitley's name for the price of the goods. Instead of that he pays the money, and endeavors, in a short way, to recover for money paid. Having himself taken possession of the goods, what right has he to charge the commission? As for the duties, he is paid them in the increased price of goods which he receives.

HEATH, J. The difficulties under which the plaintiff labors, he has brought on himself by deserting his duty as a broker.

LAWRENCE, J. It was admitted by the plaintiff's counsel, that if, through the misconduct of the plaintiff, the defendant does not get the goods, the defendant is not bound to pay for them. Now, as far as the evidence goes, it appears that the goods arrived on the 10th of March; that on the 11th the plaintiff took to the goods, and afterwards sold them. There is, therefore, every reason to believe that the non-delivery was occasioned by the act of the broker himself.

CHAMBRE, J. Certainly there was no delay in making the purchase; but the delivery at the Axe is not a delivery to the defendant; because the plaintiff sends them to be delivered to his own order, and before their arrival at Liverpool he sends orders that they shall not be delivered to the defendant till the time of credit is up: having then taken the goods, how can he possibly recover either for commission or for the money paid in his own wrong for the goods?

Rule discharged.[1]

D'ARCY *v.* LYLE.

SUPREME COURT OF PENNSYLVANIA. 1813.

[5 *Binn.* 441.]

THIS was an action of *indebitatus assumpsit*, in which the plaintiff declared for money paid, laid out, and expended, money lent and advanced, money had and received, and work, labor, and services. It was tried before YEATES, J., at a *Nisi Prius* in December last, when a verdict was found for the plaintiff, damages $3,500; and upon a motion by the defendant for a new trial, his Honor reported the facts to be as follows: —

On the 4th of August, 1804, the plaintiff, who was then about to proceed to Cape Français upon commercial business, received from the defendant a power of attorney to demand from Suckley & Co. at the Cape, who had been the defendant's agents, all his goods remaining unsold in their hands, and to settle by compromise or in any manner the plaintiff thought most beneficial, all accounts of the defendant with that house. On the voyage, the plaintiff, in consequence of being chased by a French privateer, threw overboard, among other papers, the power of attorney. He stated this fact to Suckley & Co. upon his arrival, who consented to deliver up the goods, upon his promising to pay a balance which they alleged to be due from the defendant; and this being assented to by the plaintiff, they proceeded to deliver the goods. Before the delivery was complete, one Thomas Richardson attached them with other goods of Suckley & Co., to secure a debt due by them to the house of Knipping & Steinmetz of Charleston, for whom he was agent. The plaintiff interposed a claim on behalf of the defendant; and on the 26th of November, 1804, the Chamber of Justice decreed that he should retain possession of the merchandise, on his entering into a recognizance in the sum of $2,089, conditioned to produce within four months an authentic letter of attorney from the defendant, or on default to pay Richardson as the agent of the Charleston house, the said amount, which was the invoice value of the merchandise. The recognizance was given on the 30th of November; and on the 6th of December following the plaintiff personally appeared in the clerk's office of the Civil Tribunal where it was entered, and caused an act to be made, setting forth that his recognizance or submission in November should be null, as he had received the power of attorney, and notified it to Richardson. In November, 1805, the plaintiff, having sold the goods, forwarded an account current to the defendant, making the net balance $2,509.60. On the 1st of December, 1805, he by letter directed the defendant to pay over to a friend all his funds, after deducting the balance due to himself; and on the 19th of April, 1806, having had some misunderstanding with the defendant, he wrote his final letter, closing his correspondence, and declining any further concern with him. Up to this time Dessalines was Emperor, and favored the plaintiff.

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[1] See Capp *v.* Topham, 6 East, 392 (1805). — ED.

In March, 1808, the powers of government at the Cape being in Christophe, who was the friend of Richardson, and the plaintiff continuing to reside as a merchant at the Cape, Richardson instituted a suit against the plaintiff in the Tribunal of Commerce, to recover from him the value of the goods, which by the decision of the Chamber of Justice had been decreed to him as the defendant's agent in 1804. The amount of the claim was $3,000, which by a memorial presented by the plaintiff to the tribunal (no part of the record of this court being produced) appeared to be founded on an alleged promise of the plaintiff to pay so much for Suckley; but in the memorial the plaintiff denied the promise, asserted that this was no other than the transaction about the security to produce a power of attorney, that he was no longer an agent for Lyle, and had settled the matter with him, and that Richardson was endeavoring to make them change the just and wise decision made more than three years before. On the 14th of May the Tribunal of Commerce gave judgment for D'Arcy. Richardson appealed to the Civil Tribunal of the first district of the Province of the North, sitting at the Cape. That court on the 1st of June confirmed the sentence of the lower court. Richardson had previously applied to the President, Christophe, who interfered in the proceedings, and on the 31st of May sent an order for the imprisonment of D'Arcy's lawyer, who was tied and sent to the fort. To this another order succeeded, that D'Arcy and Richardson should fight each other, and that the issue of the combat should be fatal to one or the other. A friend of D'Arcy waited upon Christophe, remonstrated against the order, and procured the commander of a British vessel of war, then in the harbor, to do the same; but the President insisted upon the combat, unless D'Arcy would pay to Richardson the sum claimed as the value of the goods. D'Arcy having determined not to pay the money, the parties met, but neither of them was injured. On the same day another order came from Christophe, that D'Arcy and Richardson should again fight at six o'clock on the following morning, and that he, Christophe, would be there himself to see the affair settled. The friends of D'Arcy, deeming it dangerous for him to remain longer at the Cape, prevailed upon him to attempt his escape; but he was intercepted by the President's order. The same friends then advised him to pay the money, and preserve his own life, that of his lawyer and the judges, all of whom were in danger from the parts they had taken. The plaintiff still refused. About dusk of the same evening Christophe sent for D'Arcy, and had a conversation with him, the purport of which was not in evidence; but on the next day, after the judgment of the lower court had been confirmed, D'Arcy in open court retracted his defence, consented that both judgments should be reversed, that his memorial should be burnt by the public agent, and that he should be condemned to pay Richardson the $3,000 he claimed, and the costs. He retracted his oath also, that he owed Richardson nothing, because, as the record of the court set forth, Richardson had since made him remember some facts his memory did not furnish him when he took the oath. The court accordingly reversed the judgments, condemned D'Arcy to pay Richardson the $3,000, "for so much he had engaged to pay him for Suckley & Co., for merchandise which the latter had delivered to him as belonging to Mr. James Lyle, whom the said D'Arcy represented, for which the tribunal do reserve to Mr. D'Arcy his rights, that he may prosecute the same if he thinks proper against Lyle or Suckley." On the 22d of June, D'Arcy paid the $3,000 and the costs.

Judge YEATES charged the jury, that if they were satisfied the plaintiff individually promised to pay Richardson the $3,000, he could not recover. But the record showed that there was a review of the suit in 1804, respecting the goods of the defendant received from Suckley & Co., as the judgment referred the plaintiff to the defendant for compensation. The plaintiff was in no fault; he stood out until the safety of all concerned in the business was endangered. He did not pay voluntarily. The jury must decide whether the loss arose from his private engagement, or from his having received the goods as agent of the defendant. If they were satisfied that the money was extorted from the plaintiff as the defendant's agent, he might recover under the count for money paid to the defendant's use. A loss of money incurred by the agent without fault, ought to be compensated by the principal.

The motion for a new trial was argued at December term last.

Tod and *Rawle* for the defendant.

Hare and *Tilghman*, *contra.*

TILGHMAN, C. J., after stating the facts, and remarking that, although the records were very imperfect, he thought it sufficiently appeared that the proceedings in 1808, were connected with those of 1804, either as an appeal from the judgment in 1804 or a revival of the suit in a new form, proceeded as follows: —

This is one of those extraordinary cases arising out of the extraordinary situation into which the world has been thrown by the French revolution.

If the confession of judgment by the plaintiff had been voluntary, it would have lain on him to show that the $3,000 were justly due from the defendant to Richardson, or the persons for whom he acted, or that they had a lien on the goods of the defendant to that amount. But the confession of judgment was beyond all doubt extorted from the plaintiff by duress, and he did not yield to fears of which a man of reasonable firmness need be ashamed. The material fact on which this case turns is, whether the transactions between the plaintiff and Richardson were on any private account of the plaintiff, or solely on account of the defendant. That was submitted to the jury, and we must now take for granted that the proceedings at the Cape against the plaintiff were in consequence of his having received possession of the defendant's goods from Suckley & Co. I take the law to be as laid down by Heineccius, Turnbull's Heinec. c. 13, p. 269, 270, and by Erskine in his Institutes, 2 Ersk. Inst. 534, that damages incurred by the agent in the course of the management of the principal's affairs, or in consequence of such management, are to be borne by the principal. It is objected that at the time when judgment was rendered against the plaintiff he was no longer an agent, having long before made up his accounts, and transmitted the balance to the defendant. But this objection has no weight, if the judgment was but the consummation of the proceedings which were commenced during the agency. As such I view them, and I make no doubt but they were so considered by the jury. It is objected again, that no man is safe if he is to be responsible to an unknown amount, for any sums which his agent may consent to pay, in consequence of threats of unprincipled tyrants in foreign countries. Extreme cases may be supposed, which it will be time enough to decide when they occur. I beg it to be understood, that I give no opinion on a case where an agent should consent to pay a sum, far exceeding the amount of the property in his hands. That is not the present case, for the property of the defendant, in the hands of the plaintiff in 1804, was estimated at $3,000. The cases cited by the defendant show that if the agent, on a journey on business of his principal, is robbed of his own money, the principal is not answerable. I agree to it, because the carrying of his own money was not necessarily connected with the business of his principal. So if he receives a wound, the principal is not bound to pay the expenses of his cure, because it is a personal risk which the agent takes upon himself. One of the defendant's cases was, that where the agent's horse was taken lame, the principal was not answerable. That I think would depend upon the agreement of the parties. If A. undertakes, for a certain sum, to carry a letter for B. to a certain place, A. must find his own horse, and B. is not answerable for any injury which may befall the horse in the course of the journey. But if B. is to find the horse, he is responsible for the damage. In the case before us, the plaintiff has suffered damage without his own fault, on account of his agency, and the jury have indemnified him to an amount very little, if at all, exceeding the property in his hands, with interest and costs. I am of opinion that the verdict should not be set aside.

YEATES, J. Several legal exceptions against the plaintiff's recovery in this suit were taken by the defendant's counsel in the course of the trial, which have been relinquished upon the argument on the motion for a new trial. It is now contended that the payment made by D'Arcy to Thomas Richardson was voluntary, and unconnected with the agency under Mr. Lyle, and that, were it otherwise, the defendant as principal is not responsible to the plaintiff for injuries done by a despot to him as a special agent, after the determination of his authority.

The cause was put to the jury to decide whether the conduct of the plaintiff as agent of the defendant was correct, and whether the payment of the $3,000 under the sentence of the court of Hayti was extorted under color of law from him for acts done by him during his agency. The jurors by their verdict have established the affirmative of both questions, and I was far from being dissatisfied therewith: I feel no disposition to disturb their decision.

I see no reason whatever for retracting the opinion I had formed on the trial, that where a factor has acted faithfully and prudently within the scope of his authority, he is entitled to protection from his constituent, and compensation for compulsory payments exacted against him under the form of law for the transactions of his agency. The flagitious conduct of Christophe, President of Hayti, compelled the litigant parties under his savage power into a trial by battle, in order to decide their civil rights. He influenced the Civil Tribunal of the first district of the Province of the North, sitting at the Cape, "to set aside a former judgment rendered by the tribunal of commerce, and of their own court, and to condemn D'Arcy," according to the language of the sentence, "to pay to Thomas Richardson $3,000, for so much he had engaged to him to pay for Suckley & Co. for merchandise which the latter had delivered to him as belonging to James Lyle, whom the said D'Arcy represented, for which the tribunal do reserve to D'Arcy his rights, that he may prosecute the same, if he thinks proper, against the said Lyle or Suckley," &c.

The defendant appointed the plaintiff his attorney, to settle and collect a debt in a barbarous foreign country. The plaintiff has transacted that business with fidelity and care, and remitted the proceeds to his principal. He risked his life in defence of the interests of his constituent, under the imperious mandate of a capricious tyrant, holding the reins of government. He has since been compelled, by a mockery of justice, to pay his own moneys for acts lawfully done in the faithful discharge of his duties as an agent; and I have no difficulty in saying, that of two innocent persons, the principal and not the agent should sustain the loss.

In Leate *v.* Turkey Company Merchants, Toth. 105, it was decreed, that if a consul beyond sea hath power, and do levy goods upon a private merchant, the company must bear the loss, if the factor could not prevent the act of the consul. The decree is founded in the highest justice, and its reason peculiarly applies to the present case. D'Arcy was doomed by the cruel order of an inexorable tyrant, either to pay the $3,000, or in his hated presence to fight his antagonist until one of them should fall.

Upon the whole, I am of opinion that the motion for the new trial be denied.

BRACKENRIDGE, J. Whatever conditional stipulation it might have been necessary for D'Arcy, the agent of Lyle, to have made, provided that stipulation was not so much against the interest of Lyle as to come under the denomination of an unreasonable stipulation, and to constitute a mal-agency respecting the subject of the agency, Lyle, the principal, must have been bound by it. The giving bond to produce the power of attorney, in order to receive the goods of Lyle, out of the hands of Suckley, which would seem to have been detained under the claim of Richardson, might be deemed prudent; and had the power of attorney not have been produced, owing to no fault of D'Arcy, but to accident, or the impossibility of getting it in time, Lyle might be considered as bound to pay the bond, as the goods had been disposed of for his benefit. But the power of attorney was received, and the bond satisfied; and we hear no more of this. It is on an entire new ground, that a claim was advanced by Richardson against D'Arcy as the agent of Lyle. It is that of an agreement or stipulation by him (D'Arcy), that in consideration of having obtained a delivery of the goods of Lyle, he would pay the debt due by Suckley, and in whose possession the goods of Lyle were, a debt due and owing from Suckley to him (Richardson) as agent for a house in Charleston. Had he made such agreement, and it should turn out that this debt was beyond the value of the goods received for the use of Lyle, it would be an unfaithful, being an improvident agency; and he would not be considered as entitled to recover from Lyle, more than the value of the goods which he had received, and the money arising from the sale of which had come to the hands of Lyle. But D'Arcy admits that he had made no such agreement or stipulation whatever, on behalf of Lyle, in order to receive his goods, or to have them delivered to him. How then can he claim against Lyle?

It is alleged to be on the ground that Richardson had compelled him from a fear of life to acknowledge such agreement. It was on the allegation of Richardson, that Christophe, the master of the gang, interfered, and compelled D'Arcy to acknowledge such agreement. He compelled him to come into a court of his, who had given judgment to the contrary, and confess such agreement; in other words, to retract a denial of such agreement, and give his court color for reversing the judgment before given. This cannot be distinguished from a compulsion without color, to retract a denial, and confess an agreement. It is the same thing as if Richardson and Christophe, out of doors, had compelled through a fear of life D'Arcy, not only to pay money, but to acknowledge that he had agreed to pay it. A common carrier has carried the money of B. to pay C. He is met by a gentlemanly footpad, who says that the money is his so carrying to C. It is denied by A., who is suffered to go on. But on his return, he is again accosted by the same footpad, who alleges that he agreed to pay him that sum or a greater, on condition that he should be suffered to go on and carry to C. It is denied, but the master of the gang interposes, and says he shall acknowledge the agreement. The acknowledging the agreement never made is but the *sub modo* of the robbery. It is but the robbery of the carrier, under a pretence of having carried the money of B., which he the footpad alleges belonged to him, and which he the carrier had agreed on his first journey to be the fact, and now on his return should pay him, and even a greater sum. In this case it would appear to be as perfectly a pretence as that of the wolf in the fable, accusing the lamb of disturbing the stream. Why is it that a carrier must be answerable for goods notwithstanding a robbery? It is the policy of the law, founded on the possibility of a carrier procuring himself to be robbed. Will not the same policy be in the way of an agent recovering for an alleged robbery; robbed more especially not of the goods in his possession, but of other goods, on account of having had these? Settling such a principle would render it unsafe to have an agent at all. There are two things or circumstances which take this case entirely out of all reason and justice: the remaining in the country after the agency as to the principal had been closed, and it being the act of the agent himself that gave color to the compulsion. He was put in fear, fear of his life; a fear that would excuse or justify a constant and resolute man; that is clear. But it is his misfortune, and I can consider Lyle under no obligation to indemnify him for the loss. His redress, if he shall ever be able to obtain any, must be against the spoiler, or those for whom he may have acted, or who may have obtained the advantage of his wrong. There is a third circumstance in this verdict which would justify a new trial: the sum given being beyond the value of the goods or money, even with interest, which D'Arcy the agent alleges to have been paid, on account of obtaining possession of the property of Lyle. But on the two first grounds, I do not think him entitled to recover. I see nothing of an appeal from a proceeding under a claim made or interposed against the goods of Lyle. Nor am I able to see anything like a growing out of the claim; it may be said to be engrafted on it, or adscititious to it, or springing up with it. But the act of D'Arcy himself, confessing an agreement, is the only thing that can connect; and this he admits did not exist. His agency for Lyle might be said to be the occasion, but could not be considered the cause of his loss. But it was rather the occasion of the pretence that was set up, and to which D'Arcy himself gave sanction; and if he has saved his life by that, he must keep his life as that for which he sustained the loss. It is not more nor less than if an agent, having resisted a claim, set up against his *quondam* principal, and to avoid a challenge, should come into one of our courts, and move to have the judgment in his favor set aside, and to confess a judgment against his principal, which, if allowed, might be to any amount. It is a question with moralists whether it is lawful for the sake of life or property to depart from truth.

Propter vitam, vivendi perdere causas.

Where a person had a right to expect the truth, it is not lawful, however under circumstances it may be excusable. But for one to evade a risk by departing from the truth, and to attempt to throw the loss upon another person, is totally inadmissible; it cannot be done. If any argument could be drawn from the circumstance of the master of the gang, Christophe, being a principal as to the force, it must be evident that it might be owing to the indiscreet expressions respecting Christophe, and his influence upon the administration of justice in his courts, that induced him to interpose. This was the act of Richardson. I am, therefore, of opinion for the defendant.

New trial refused.[1]

ADAMSON *v.* JARVIS.

COMMON PLEAS. 1827.

[4 *Bing.* 66.]

A VERDICT was entered for the plaintiff upon a count which stated, that defendant on the 18th of April, 1817, to wit, at London, was possessed of divers cattle, goods, and chattels of great value, to wit, of the value of £1100, and being so possessed thereof, afterwards, to wit, on, &c., at, &c., represented and affirmed to plaintiff that the defendant was legally and of right entitled to sell and dispose of said cattle, goods, and chattels, and then and there requested plaintiff to put up and expose the same to sale by public auction for him defendant; that plaintiff, confiding in the said representation and affirmation of defendant, and believing the same to be true, and not knowing to the contrary thereof, did afterwards, to wit, on, &c., at, &c., put up and expose to sale by public auction the said cattle, goods, and chattels, and then and there sold the same to divers persons there then assembled for the purchase thereof, for a large sum of money, to wit, the sum of £601 2*s.* 9*d.*; and plaintiff, after deducting and paying thereout divers sums of money which he plaintiff was entitled to deduct and bound to pay thereout, amounting in the whole to a large sum of money, to wit, the sum of £187 18*s.* 11*d.*, paid over the residue thereof, to wit, the sum of £413 3*s.* 10*d.* to defendant; whereas in truth and in fact defendant deceived and defrauded plaintiff in this, to wit, that defendant was not at the time of the said sale legally or of right entitled to sell and dispose of the said cattle, goods, and chattels, or of any part thereof, to wit, at London aforesaid.

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[1] See Southern *v.* How, Cro. Jac. 468 (1617–18), s. c. Bridgman, 125. — ED.

Plaintiff further said, that afterwards, to wit, on the 16th of May, 1822, at Westminster, to wit, at, &c., before the Right Honorable Sir Robert Dallas and his companions, then being his present Majesty's justices of the bench, there, to wit, at, &c., one Joseph Somersett, as the true and lawful owner of the said cattle, goods, and chattels at the time they were so exposed to sale as aforesaid, brought a certain action against plaintiff to recover the value of said cattle, goods, and chattels so sold by plaintiff as aforesaid, and such proceedings were thereupon had in the said action that the said Joseph Somersett afterwards, to wit, in Trinity term in the third of the reign of his said present Majesty, before the said justices of the bench at Westminster aforesaid, to wit, at, &c., by the consideration and judgment of the said court recovered against plaintiff a large sum of money, to wit, the sum of £1100 as and for the value of the said cattle, goods, and chattels so sold by plaintiff as last aforesaid, and the further sum of £95 for costs and charges by Somersett about his said suit in that behalf expended, making together the sum of £1195 as by the record and proceedings thereof still remaining in the said court at Westminster aforesaid more fully appears, to wit, at, &c.

That afterwards, to wit, on the 23d of November, in the year last aforesaid, at London aforesaid, he plaintiff was forced and obliged to pay, and then and there did pay, to said Joseph Somersett the said sum of £1195, and was also then and there forced and obliged to lay out and expend a certain other large sum of money, to wit, the sum of £500 in and about defending the said action so brought against him as last aforesaid, and in and about taking and pursuing other necessary proceedings made incumbent upon him in consequence of the said sale and the said recovery; of all which premises the said defendant afterwards, to wit, on, &c., at, &c., had notice, and then and there ought to have paid and satisfied to plaintiff the said sums of money which he plaintiff was so forced and obliged to pay, lay out, and expend as aforesaid, and was then and there requested by plaintiff to pay him the same; nevertheless defendant not regarding his duty in that behalf, but intending and contriving to defraud and injure plaintiff in this respect, did not nor would (although often requested) pay or satisfy to plaintiff the said sums of money above mentioned, or any or either of them, or any part thereof, but hath hitherto wholly refused, and still doth refuse so to do, and the same and every part thereof still remain wholly due and unpaid to plaintiff.

Taddy, Serjt., in the last term moved for a rule *nisi* in arrest of judgment, on the ground that the count was ill conceived. It was neither *ex contractu* nor *ex delicto.* There was no retainer of the plaintiff by the defendant stated, no employment of him for reward, no promise on either side to raise an assumpsit; and there was no allegation of fraud, of malicious misrepresentation, — no *scienter*, — to constitute a tort; on the contrary, whatever might have been the case at the time of the sale, at the time of the representation it appeared that the defendant was lawfully in possession of the property in question. Haycraft *v.* Creasy, 2 East, 92, was an express decision to show that an action of tort would not lie unless the misrepresentation complained of were wilful, and intended to deceive.

Wilde, Serjt., *contra*. Enough is stated on this count to warrant a judgment against the defendant, after verdict. The representation that the defendant was entitled to sell amounts to an express warranty to save the plaintiff harmless; it would have been a warranty to a purchaser, and is equally so to an agent. Where there is an express warranty, it is not necessary to aver that the defendant knew it to be false, or that he intended to defraud. It is sufficient if the defendant be alleged to have stated as true that which he had not ascertained to be so. Even, however, if deceit were necessary to impose liability, deceit is here sufficiently averred in the allegation that the defendant by his representations deceived and defrauded the plaintiff, and the receipt by the defendant of the proceeds of the sale is conclusive to show that he persisted in his misrepresentation to the last. Crosse *v.* Gardner, Carth. 90, is in point for the plaintiff. In that case the defendant had affirmed that certain oxen which he sold to the plaintiff were his, when in fact they belonged to another person. It was there objected, as in the present case, that the declaration neither stated that the defendant deceitfully sold them, nor that he knew them to be the property of another person; and yet it was holden that the action lay. That case (with others to the same effect in 1 Roll. Abr. 95. Cro. Jac. 474) was confirmed in Pasley *v.* Freeman, 3 T. R. 51, where the defendant was held liable for the consequences of a fraudulent misrepresentation, although he derived no benefit from it. In the present case the defendant reaped all the profit he proposed by the misstatement he made to the plaintiff.

Taddy. No contract between the plaintiff and defendant is stated on the record; they must, therefore, be both considered as joint tort feasors, and the present action as nothing else but an attempt by one tort feasor to recover contribution from another, which the law does not permit. In all the cases cited there was a contract between the parties: as in Crosse *v.* Gardner, where the defendant sold the oxen to the plaintiff; in 1 Roll. Abr. 95, and Cro. Jac. 425, where an agent sold lands to the plaintiff under an express warranty. In the present case there is no contract between the plaintiff and defendant, but only a request made to the plaintiff by the defendant to commit a trespass. But the declaration ought to have shown either a breach of contract, or a false affirmation made with intent to deceive. A declaration on a tort arising out of a contract ought always to show that a contract existed between the parties, Max *v.* Roberts, 12 East, 89. And a declaration on a false representation ought at least to allege a *scienter*, Pasley *v.* Freeman. Haycraft *v.* Creasy. If a declaration such as the present be held sufficient, every tort-feasor may recover compensation against his companion. The plaintiff ought to have required a bond of indemnity of the defendant before he proceeded to sell.

Cur. adv. vult.

Best, C. J. A motion has been made in arrest of judgment after verdict. The plaintiff relies on the second count, on which only his verdict and judgment are to be entered.

Stripped of the technical language with which it is encumbered, the case stated on the second count is this: that the defendant, having property of great value in his possession, represented to the plaintiff that he had authority to dispose of such property, and followed this representation by a request that the plaintiff would sell the property for him, the defendant. The plaintiff, believing the representation of the defendant as to his right to the property, and not knowing, either at the time the representation was made, or at any time after, that it was not his, as the agent of the defendant, sold the property; and after paying such sums out of the proceeds as he was bound to pay, and making such deductions as he had a right to make, and which the defendant appears to have allowed, paid the residue to the defendant.

The defendant, who had induced the plaintiff to make this sale by his false representation and request to sell, and who, after the sale, continued to assert his right to sell, and confirmed the agency of the plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been that the plaintiff, supposing, from the defendant's false representations, he had an authority which he had not, and acting as the defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods, and has been obliged to pay damages and costs, whilst the defendant, the sole cause of the sale, quietly keeps the fruits of it in his pocket.

It has been stated at the bar that this case is to be governed by the principles that regulate all laws of principal and agent: — Agreed: every man who employs another to do an act which the employer appears to have a right to authorize him to do undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have. A contrary doctrine would create great alarm.

Auctioneers, brokers, factors, and agents do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrong-doers, and could not recover compensation from him who had induced them to do the wrong.

It was certainly decided in Merryweather *v.* Nixan, 8 T. R. 186, that one wrong-doer could not sue another for contribution; Lord Kenyon, however, said "that the decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." This is the only decided case on the subject that is intelligible.

There is a case of Walton *v.* Hanbury and others, 2 Vern. 592, but it is so imperfectly stated that it is impossible to get at the principle of the judgment.

The case of Philips *v.* Biggs, Hardr. 164, was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.

From the inclination of the court on this last case, and from the concluding part of Lord Kenyon's judgment in Merryweather *v.* Nixan, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

If a man buys the goods of another from a person who has no authority to sell them, he is a wrong-doer to the person whose goods he takes; yet he may recover compensation against the person who sold the goods to him, although the person who sold them did not undertake that he had a right to sell, and did not know that he had no right to sell. That is proved by Medina *v.* Stoughton, 1 Salk. 210, Sanders *v.* Powel, 1 Lev. 129, Crosse *v.* Gardner, Carth. 90, 1 Roll. Abr. 91, l. 5, and many other cases.

These cases rest on this principle, that if a man, having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action.

It has been said that is because there is a breach of contract to rest the action on, and that there is no contract in this case. This is not the true principle; it is this: he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages.

But here is a contract: the plaintiff is hired by defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale.

The above-cited cases show that a *scienter* is not necessary in this case, although it was necessary in the case of Haycraft *v.* Creasy and the cases of that class. In these cases, a party who had no interest was applied to for his opinion; if he gave an honest, although mistaken one, it was all that could be expected.

But it has been said, you have not shown that the affirmation was false at the time it was made; for the breach is, not that plaintiff had not authority to sell at the time he said he had, but at the time of the sale, which was subsequent.

But the complaint is, that defendant affirmed he had power to sell, and followed that affirmation by a request to sell; which affirmation and request induced plaintiff to sell when defendant had no right to give him authority to make such sale. This affirmation and request caused the plaintiff to do an act which has been injurious to him and beneficial to the defendant.

For this injury plaintiff is entitled to compensation, whether the affirmation was false or true at the time it was made.

If defendant had authority to sell at the time he employed plaintiff, but ceased to have that authority at the time of the sale, he should have informed plaintiff of this change in his situation, and prevented him from doing what he ought not to have done; at all events, he should not have taken the proceeds of the sale.

If after verdict we can collect a cause of action, or infer that proof must have been given at the trial, that will support the action, and the judgment may be sustained.

In Weston *v.* Mason, 3 Burr. 1725, which was an action on a bond brought against the sureties of the sheriff's bailiff, the condition recited that the sheriff had appointed the bailiff for the hundred of East Gotson, and it did not appear that the warrant which he was charged not to have returned was directed to him as bailiff of that hundred; but the court said that, being in arrest of judgment, as it did not appear that it was not directed to him as bailiff of that hundred, which the defendant might have shown, it was sufficient. In Bull *v.* Steward, 1 Wils. 255, in an action against the bailiffs of the borough for an escape, it did not appear that the cause of action arose within the jurisdiction of the court; but it was held that after verdict the court would presume anything proved at the trial which was necessary to be proved, unless the contrary appeared on the face of the record.

On these authorities the court might say, as the defendant has not shown that he was authorized to sell at the time he affirmed he was, and as it is proved he was not authorized at the sale, we will presume that he never had authority at any time. But the main ground is, that he has created a belief in the plaintiff that he had authority when he clearly had no authority.

Max *v.* Roberts, which has been cited, does not apply: it did not appear that defendant had ever undertaken to carry the goods, and therefore he could not be answerable for taking them out of the due course of the voyage. *Rule discharged.*[1]

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[1] *Acc.:* Coventry *v.* Barton, 17 Johns. 142 (1819); Betts *v.* Gibbins, 2 Ad. & E. 57 (1834); Moore *v.* Appleton, 26 Ala. 633 (1855).

And see Fletcher *v.* Harcot, Hutton, 55 (1622), s. c. *sub nom.* Ballersey's Case, Winch, 48; Dugdale *v.* Lovering, L. R. 10 C. P. 196 (1875); Palmer *v.* Wick and Pultneytown Steam Shipping Co., [1894] A. C. 318, 324, 333 (H. L. Sc.). — Ed.

DUNCAN AND ANOTHER *v.* HILL.
THE SAME *v.* BEESON.

EXCHEQUER CHAMBER. 1873.

[*L. R.* 8 *Ex.* 242.]

APPEALS in two actions involving the same question.

In the first, Duncan *v.* Hill,[1] the appeal was against the judgment of the Court of Exchequer discharging a rule to enter a nonsuit, or to reduce the damages to £1688 19*s.*, which had been obtained on the ground that the further damages claimed were not damages recoverable against the defendant, and that in that respect the plaintiffs were not legally damnified or entitled to indemnification, or otherwise to recover in the action.

The plaintiffs were stockbrokers who had been employed by the defendant to buy and sell shares for him upon the Stock Exchange. In 1870 they bought for the defendant large quantities of stocks and shares for the 15th of July, and on that day, by the defendant's instructions, carried them over to the next account day (29th of July), paying differences amounting to £1688 19*s*. On the 18th of July the plaintiffs, being unable to meet their engagements, by reason of various persons for whom they had effected contracts (and amongst others the defendant) failing to make their due payments, they were declared defaulters; and, according to the rules of the Stock Exchange, all their transactions were closed at the prices current on that day.[2] The result of this was to make them liable to pay a further sum for differences upon the stocks and shares so carried over by them for the defendant. The plaintiffs had paid a dividend of 6*s.* 6*d.* in the pound to their Stock Exchange creditors, and a further dividend was expected. This action was brought in the names of the plaintiffs, but for the benefit of their creditors, to recover the sum of £6013 13*s.* 5*d.*, which included the £1688 19*s.*, as well as the sum which the defendants became liable to pay upon their being declared defaulters.

In the second action, Duncan *v.* Beeson,[3] the appeal was against the judgment of the Court of Exchequer discharging a rule to enter a nonsuit which had been obtained on the ground that the defendant was not liable to make good any part of the loss incurred by the closing of defendant's share account upon the plaintiffs becoming defaulters on the Stock Exchange; that the account was closed contrary to defendant's authority and against his will, and owing to the plaintiffs' own defaults, and that defendant was not liable to indemnify plaintiffs against the loss thereby occasioned to or paid by the plaintiffs; that no usage of the Stock Exchange was proved sufficient to make the defendant liable to this action, and that the usage, if any, did not extend to entitle a broker to charge a loss arising from his own default against his principal.

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[1] Reported L. R. 6 Ex. 255, where the pleadings are set out.— REP.

[2] See Rules 142, 167, 169, L. R. 6 Ex. 257, n. — REP.

[3] Reported L. R. 6 Ex. 268, n. — REP.

The plaintiffs were the same as in the other action, and the facts were similar, except that the sum paid by the plaintiffs for differences in carrying over the stocks on the 15th of July had before action been repaid by the defendant. The sum sought to be recovered was £425.

Joseph Brown, Q. C. (*Sir J. B. Karslake*, Q. C., and *J. O. Griffits* (in Duncan *v.* Hill), and *Philbrick* (in Duncan *v.* Beeson), with him, for the defendants in both actions.

Sir J. D. Coleridge, Q. C., S. G. (*Powell*, Q. C., and *Day*, Q. C., with him), for the plaintiffs in the first action.

Powell, Q. C. (*Murphy* with him), for the plaintiffs in Duncan *v.* Beeson, did not argue.

The judgment of the courts (BLACKBURN, KEATING, GROVE, BRETT, QUAIN, ARCHIBALD, and HONYMAN, JJ.) was delivered by

BLACKBURN, J.[1] Both actions, whatever be the precise form of them, are actions, in contemplation of law, brought by the plaintiffs, as brokers and agents, against the defendants, as their principals, for an indemnity. They are founded upon allegations that the agent has incurred a loss by reason of having acted as agent for his principal. They are actions founded on the ordinary and general principles of common law with regard to implied indemnities. It must be admitted that the plaintiffs were authorized by the defendants to enter into contracts in their behalf according to the rules of the Stock Exchange. It must be admitted that for any loss incurred by the agent by reason of his having entered into such contracts according to such rules, unless they be wholly unreasonable, and where the loss is without any personal default of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect. But it is argued, that where the agent, as in this case, is subjected to loss, not by reason of his having entered into the contracts into which he was authorized to enter by his principal, but by reason of a default of his own, that is to say, as in this case, by reason of his insolvency, brought on by want of means to meet his other primary obligations, it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal, and consequently there is no promise which can be implied on the part of his principal to indemnify him; and in the present cases there certainly was no express promise to this effect. These allegations, both as to fact and law, seem to us to be correct. There was no failure by the defendants in any part of their undertakings; there was no evidence that the insolvency of the plaintiffs was occasioned by reason of their having entered into the contracts for the defendants; it is consistent with the evidence that the plaintiffs would have become insolvent precisely at the same time as they did if they had not entered into any contract for either of the defendants. The plaintiffs' insolvency was, so far as regards the defendants, entirely the result of their own default. We think there is no implication of law to force upon the defendants an obligation to indemnify the plaintiffs in such a case.

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[1] After stating the facts. — ED.

We think, therefore, that the judgment below should be reversed, and the rule in the case of Duncan *v.* Hill be made absolute to reduce the damages to £1688 19*s.*, and in the case of Duncan *v.* Beeson that the rule be absolute to enter a verdict for the defendant.

Judgment reversed.

MAITLAND *v.* MARTIN.

SUPREME COURT OF PENNSYLVANIA. 1878.

[86 *Pa.* 120.]

ERROR to the Court of Common Pleas, No. 2, of Philadelphia county.

Assumpsit by Caroline Martin against Camille D'Invilliers and John J. Maitland, trading as C. D'Invilliers & Co., to recover the value of certain bonds purchased by said firm as brokers. D'Invilliers died after suit brought, and it was afterwards proceeded with against Maitland alone.

The facts are fully stated in the opinion of this court. At the trial, PRATT, J., charged the jury as follows: "The plaintiff, a sister of Mr. Martin, places money in the hands of defendants, as brokers. Mr. Martin, as agent for his sister, gave a written order to buy South Carolina bonds. He says April and October. Defendants say January and July. On written order April is erased and July substituted. Mr. Martin says that after the purchase he was informed by defendants that the purchase made on his order was of January and July bonds. He then objected, but was told that these were just as good as the others, and afterwards said nothing. There was no positive acceptance on his part further than acquiescence goes. The bonds were never delivered to Martin. You must judge whether Martin by his conduct allowed defendants to believe that he acquiesced.

"We find these bonds in the hands of the defendants as the property of the plaintiff.

"In 1875 the defendants were directed to sell the bonds. An order was sent by defendants to a New York broker to sell. The following day the bonds were shipped. This was the 14th of May. [On the same day — the 14th — the defendants were advised by their New York correspondent that the bonds were sold, and a check was sent over for the amount, and was received by defendants. This was a completed transaction.]

"The purchaser found, upon seeing the bonds, that three of them were not marketable, and refused to receive them. Defendants thereupon purchased other bonds and delivered them to the purchaser, leaving three of the bonds ordered by the plaintiff to be sold, on hand.

"At the time of this sale the defendants were agents for the plaintiff, in relation to these bonds. An authority to sell does not imply an authority to buy. An agent who exceeds his authority adopts the act as his own, and is no longer agent.

"[Plaintiff ordered her bonds sold at thirty-three, and they were sold at that price. If you believe this, then, as matter of law, D'Invilliers was responsible for rescinding the contract.] They thereby adopted the theory of the purchaser, accepted the return of the bonds, and purchased others to supply their place, and fill their contract. By this act they relieved the purchaser from liability to be sued upon his contract.

"[If defendants rescinded the contract and took back the bonds sold, and bought others to fill the contract, without authority from the plaintiff, they adopted the loss as their own.]

"[If the defendants agreed to take these bonds back without the consent and authority of their principals, and substituted others purchased by them in lieu thereof, they accept these bonds as their own. The three bonds are in the hands of defendants as their property], and the measure of damages would be the amount realized from the sale, less their lawful commissions."

The verdict was for the plaintiff for $1784.54, and after the entry of judgment the defendant took this writ, alleging that the court erred in the foregoing portions of the charge contained in brackets.

George Bull and *James H. Campbell*, for plaintiff in error.

Thomas J. Diehl, for defendant in error.

MERCUR, J. This action was brought by the defendant in error for money had and received for her use. The money sought to be recovered came into the hands of the plaintiffs in error under the following circumstances: In August, 1873, being brokers in the city of Philadelphia, they purchased for the defendant in error five South Carolina bonds, of the nominal value of $1000 each. She left the bonds in their possession. They were sealed up in an envelope, her name indorsed thereon, and deposited in the safe of the plaintiffs in error in the "Fidelity." They thus remained until May, 1875, when she instructed the plaintiffs in error to sell them at thirty-three per cent. There being no market in Philadelphia for them, on the 12th of May they directed their correspondents, Cecil, Stout & Thayer, brokers in New York, to sell them. By despatch, on the 14th of May, they advised the plaintiffs in error that they had sold at the price named. Immediately thereafter the plaintiffs notified the defendant of the sale. On the same day the plaintiffs forwarded the bonds to their correspondents by express, and requested a draft to be remitted for net proceeds. On receipt of the bonds, Cecil, Stout & Thayer, remitted the proceeds to plaintiffs in error on the 15th May. On the 17th May, and while the proceeds remained in the hands of the plaintiffs in error, they were notified by Cecil, Stout & Thayer, that three of the bonds were not fundable, and not a good delivery at the price for which they had sold them; and, therefore, they had purchased others at the same price to supply the place of those not fundable, and held the plaintiffs in error for the sum thus advanced. On the same day the plaintiffs in error advised the defendant of the substance of this notice, and further requested her to consider the sale of 3000 of the bonds reported by them sold, as cancelled. They also directed Cecil, Stout & Thayer, to return the three bonds not accepted, and draw on them for the sum paid. Thereupon Cecil, Stout & Thayer, returned the bonds, and the plaintiffs in error paid them the sum which they had advanced.

The plaintiffs in error offered to return the three bonds to the defendant, and account for the proceeds of the two others; but she denies their right to hold her responsible for the money thus paid by them, and seeks to recover the whole sum agreed to be paid for the five bonds.

It appears, by the evidence, that about the 1st of June, 1874, the treasurer of the State of South Carolina issued a notice that certain bonds of that State had been declared null and void by the legislature, and would not be recognized. Thereupon, June 2d, 1874, the New York Stock Exchange made an order that the bonds embraced in said notice should not pass, as a good delivery, on a sale of regular "South Carolina bonds," after that date. Three of these bonds appear to have been repudiated by the legislature, and at the time of the sale, in May, 1875, were not fundable, and as a consequence were almost worthless. Cecil, Stout & Thayer, professed to sell "fundable bonds" only. They supposed all of the five to be of that class. The purchaser had a right to suppose he was buying such. Discovering that three of them were not of that kind, he refused to accept them. Cecil, Stout & Thayer, thereupon replaced them with such bonds as filled the contract. If these facts be proved, they undoubtedly had a valid claim against the persons in whose behalf they agreed to make the sale. At the time the plaintiffs in error directed them to make the sale, they did not disclose the name of their principal; yet this in no manner changed the legal rights and liabilities between her and them. The specific bonds were her property. The plaintiffs were her agents to effect a sale. It was to be made for her benefit. The plaintiffs were bound to due care, prudence, and diligence in the execution of the powers committed to them. These they appear to have exercised. They kept their principal informed of their action. The defendant is not shown to have sustained any damage by reason of any information being withheld from her. These bonds had depreciated while owned by her. If the plaintiffs in error, while acting as her agents in effecting the sale, without any fault on their part, became liable, she, and not they, must bear the loss.

The object to be effected was a sale of the bonds. The plaintiffs in error, as well as Cecil, Stout & Thayer, were acting as agents to reach that end. An agreement to sell fundable bonds, and a payment by the purchaser to one agent, and his transmission to another agent, did not necessarily complete the transaction.

It required a delivery, or a readiness to deliver, the bonds, of the kind sold, according to the contract. Anything less than that left the transaction incomplete, unless further fulfilment was waived.

In fully perfecting a sale the plaintiffs in error were strictly in the line of their duty. We discover nothing affecting their good faith. If, then, without fault on their part in the honest management of the business of the defendant, they incurred damages, those damages must be borne by her and not by them. Stocking *v.* Sage, 1 Conn. 519; D'Arcy *v.* Lyle, 5 Binn. 441; Whart. on Agents, sect. 316.

If the plaintiffs in error in good faith carried out the contract made with the purchaser, they did not thereby adopt the loss as their own and relieve the defendant from her legal obligation to reimburse them. Although they took back the bonds, without the express consent and authority of the defendant, yet they did not thereby necessarily accept them as their own. If the facts are found to be as stated, the purchaser was justified in refusing to accept the bonds. If so justified, it was clearly within the general scope and authority of the plaintiffs in error, as her agents, to fulfil the contract, and their acts, in contemplation of law, became her acts. Although, by failing to disclose their principal, the plaintiffs in error may have become personally liable to Cecil, Stout, & Thayer, yet that does not bar the right of the plaintiffs in error to require the defendant to make their loss good. It therefore follows that many portions of the charge were too unfavorable to the plaintiffs in error, and the assignments are substantially sustained.

Judgment reversed, and a venire facias de novo awarded.[1]

READ *v.* ANDERSON.

COURT OF APPEAL. 1884.

[13 *Q. B. D.* 779.]

APPEAL by the defendant from the judgment of HAWKINS, J., in favor of the plaintiff, after trial upon further consideration.

The facts of the case are fully stated in the report of the judgment of HAWKINS, J., 10 Q. B. D. 100, and also are briefly mentioned in the judgments of BRETT, M. R., and BOWEN, L. J., hereinafter set forth.

Petheram, Q. C., and *Mitcalfe Dale*, for the defendant.

Finlay, Q. C. (*R. A. McCall* with him), for the plaintiff.

Cur. adv. vult.

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[1] See Saveland *v.* Green, 36 Wis. 612 (1875). — ED.

Brett, M. R. This case was tried before Hawkins, J., without a jury, and the question was as to the plaintiff's right to recover from the defendant money paid in discharge of bets. The plaintiff was a turf commission agent; that is to say, he betted for other persons. The learned judge has found many of the questions in dispute as questions of fact, and it seems to have been thought that the Court of Appeal cannot dispute his findings; but the Court of Appeal is not bound by the findings of fact by a judge who tries a case without a jury. As to the transaction itself between the plaintiff and the defendant, it was of a well-known description: the defendant did not bet himself, but he hired the plaintiff to bet for him; he gave to the plaintiff authority to pay and to receive money, and it is a contract between principal and agent and not between vendor and purchaser. The contract determines the kind of the employment, and the commission is payable in respect of making bets and not of paying them. One ordinary principle of the law as to principal and agent is that unless a principal is prevented by certain circumstances, the nature of which is familiar to us, he can revoke the authority of the agent. In the present case the defendant had given to the plaintiff authority to pay and receive; but he revoked the authority before payment: can the agent sue the principal? The real question is whether the defendant, as principal, could revoke the authority given to the plaintiff as agent. The evidence given before Hawkins, J., proves that when a member of Tattersall's makes bets and does not pay them if lost, he is liable to be turned out of the room; and if he is turned out, he cannot carry on his business as a turf commission agent. The question is whether the law will imply an undertaking by the defendant, that he will not revoke the plaintiff's authority to pay bets which have been lost. If a principal employs an agent to perform an act, and if upon revocation of the authority the agent will be by law exposed to loss or suffering, the authority cannot be revoked. But in the present case no claim could be lawfully enforced against the agent. It is true that the betting contract was made by the plaintiff in his own name on behalf of his principal; nevertheless, it could not be enforced against him. If the other party to the bet had lost it, and had declined to pay it, he could not have been compelled to do so. But it has been contended that although this view is true, the law puts it into the plaintiff's power to enforce payment by the defendant of the amount of the bet, because unless it is paid the plaintiff will suffer a loss in his business; but the plaintiff's business, although it may not be illegal, is directly objected to by the law, and the contracts made by him in his business cannot be enforced: it is a business of which the law ought not to take notice, and therefore the inconvenience and the loss, which the plaintiff may suffer in his objectionable business, form no ground for an action for revoking an authority which the principal ought not to have given. The cases, in which an authority cannot be revoked, ought to be confined to those cases in which the agent will upon revocation suffer what the law deems to be an injury. I think that the judgment of Hawkins, J., was wrong.

Bowen, L. J. I regret that I cannot agree with the Master of the Rolls, and that I cannot take the same view of this case as he does. The plaintiff was a turf commission agent, and the defendant was a licensed victualler at South Shields. Bets were made by the plaintiff at the defendant's request, and these bets were lost. The plaintiff made the bets in his own name, not in the defendant's; and after the bets had been made and lost, the defendant revoked the authority to pay conferred upon the plaintiff. Had the defendant any right at this eleventh hour to revoke and retract the authority given to the plaintiff? It is true that this is a transaction between a principal and an agent: there is a delegation of power to the agent: there is a mandate to the agent; and, subject to certain exceptions, a principal it is said may revoke a mandate which he has given. But there is something in this transaction beyond a mere mandate given or power delegated to an agent. There is a contract of employment between the principal and the agent, which expressly or by implication regulates their relations; and if as part of this contract the principal has expressly or impliedly bargained not to revoke the authority and to indemnify the agent for acting in the ordinary course of his trade and business, he cannot be allowed to break his contract. What was the contract or bargain? Was the original contract that the plaintiff should be at liberty to make bets for the defendant, and should be liable at any moment to have the authority conferred upon him withdrawn? Or was it that the defendant employed the plaintiff to make bets and undertook to indemnify him against payment of any bets which he should make on the defendant's behalf? It will not be denied that if a principal employs an agent to do something which by law involves the agent in a legal liability, the principal cannot draw back and leave the agent to bear the liability at his own expense. That is not the case here, because the payment of bets cannot be enforced by law; but by the usage of his business known to both parties at the time of the employment, and with reference to which usage the contract of employment was made, the betting agent became liable as a matter of business to make good a lost bet at the risk of losing his character and customers; and in the present case Hawkins, J., has found, in accordance with the evidence, that the plaintiff would have suffered very serious pecuniary inconvenience if he had failed to pay the bets which had been lost. Was the defendant entitled to turn round and tell the plaintiff not to pay the bets, and to thus put him into the position of being expelled from the room where he carries on his business? What is the inference of fact to be drawn as to the true bargain between them? Can it be said that the plaintiff took upon himself the risk of embarking upon this perilous adventure without such an indemnity? As an inference of fact, it seems to me that it was well understood to be part of the bargain that the principal should recoup his agent, and should not revoke the authority to pay, but should indemnify the agent against all payments made in the regular course of business. I feel the force of the point that the obligation to pay a lost bet relied upon by the plaintiff is not recognized by law; but the plaintiff has placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted, I think, to indemnify him from the consequences which would ensue in the ordinary course of his business from the step which he had taken. There is a great deal of apparent difficulty in this case, because the action relates to betting and wagering; but the contract sued on by the plaintiff is not a wagering contract. I feel great reluctance to differ from the Master of the Rolls, but on the whole I am of opinion that the judgment of HAWKINS, J., was right and ought to be affirmed.

FRY, L. J. In this case I agree with BOWEN, L. J. I confine myself to expressing my concurrence with the views which he has expressed at length. I adopt his views as my own. *Judgment affirmed.*[1]

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[1] See Pidgeon *v.* Burslem, 3 Exch. 465 (1849); Smith *v.* Lindo, 5 C. B. N. S. 587 (1858); Thacker *v.* Hardy, 4 Q. B. D. 685 (C. A. 1878); Seymour *v.* Bridge, 14 Q. B. D. 460 (1885); Perry *v.* Barnett, 15 Q. B. D. 388 (C. A. 1885).

The doctrine of the principal case was abrogated by the Gaming Act, 1892 (55 & 56 Vict. c 9). See Tatam *v.* Reeve, [1893] 1 Q. B. (1892).

In Bibb *v.* Allen, 149 U. S. 481, 497-499 (1893), JACKSON, J., for the court said: "We know of no principle on which the agent can be deprived of a right to his commissions and advances in the execution of his agency for a principal on the ground that he has not avoided a contract which was not in strict conformity with the statute of frauds, in the absence of any instruction or instructions from the principal not to comply therewith. Contracts not in conformity with the statute are only voidable and not illegal, and an agent may, therefore, execute such voidable contracts without being chargeable with either fraud, misconduct, or disregard of the principal's rights. If the statute of frauds was not complied with in making the sale contracts in the present case, we do not see that the defendant was in a position to take advantage thereof, or that such want of compliance with the statute, after the contracts were executed, would constitute any defence to the action. The suit was not brought on these contracts of sale, which the plaintiff in error claims were voidable under the New York statute of frauds. It is an action by the agents against their principal to recover for work and labor performed, and money paid out at the principal's instance and request, and in the settlement of the principal's business, in which the agent had authority to make disbursements for him. In the present case the plaintiffs had, by their contract, rendered themselves personally responsible for the losses which might, and did, occur under the contracts of sale made for account of the defendant, and as such agents they are entitled to recover against their principal the full amount expended by them for him in the transactions. If in closing out the contracts of sale, profits had been realized on the transactions, whether by reason of decline in the price of cotton, or by the purchases 'to cover' the cotton sold, the brokers would, upon well-settled principles, have been liable to their principal for the same. They could not have set up or interposed as a valid defence to such liability that the contracts of sale out of which the profits were realized were not enforceable under the statute of frauds, or were voidable by the agents or the purchaser with whom they contracted. Neither can the principal interpose such an objection as against the agent's right to commission or to reimbursement for his outlays, after the execution of contracts, merely voidable for want of writing. Coward *v.* Clanton, 79 Cal. 23; Morrill *v.* Colehour, 82 Ill. 618. It is a well-established principle, which pervades the whole law of principal and agent, that the principal is bound to indemnify the agent against the consequences of all acts done by him in the execution of his agency, or in pursuance of the authority conferred upon him, when the actions or transactions are not illegal. Speaking generally, the

MOHR AND OTHERS *v.* MIESEN.

SUPREME COURT OF MINNESOTA. 1891.

[47 *Minn.* 228.]

APPEAL by defendant from an order of the district court for Ramsey County, OTIS, J., presiding, refusing a new trial after a verdict of $2,005.78 for plaintiffs. The jury found specially that "the arrangement between plaintiffs and defendant with reference to the transactions in controversy contemplated the purchase and sale of actual grain for future delivery, and did not contemplate the making of gambling contracts only," and also that "the contracts in evidence were made by and between the plaintiffs and other members of the Chamber of Commerce, for the purchase and sale of grain actually to be delivered by warehouse receipts, if either party to them should require it, and that said contracts were not simply gambling contracts."

Jno. H. Ives, for appellant.

C. H. Hamilton and *Morris & Williams*, for respondents.

VANDERBURGH, J. The plaintiffs sue defendant for money paid and expended for his use in the purchase and sale of grain. The answer sets up that the purchases and sales referred to were not actual or veritable purchases and sales of grain, but were merely colorable, and "were gambling transactions, whereby the plaintiffs in form undertook to buy and sell on the Chicago or Milwaukee boards of trade, ostensibly for future deliveries, but without any intention or expectation on the part of the plaintiffs or defendant that the same would be actually delivered, large quantities of wheat and barley, with the expectation and intention on the part of both plaintiffs and defendant of wagering on the market prices, and that the amounts which defendant would win or lose would be governed by and determined upon the fluctuations in the quotations of the boards of trade." The record shows that the plaintiffs were members of the Milwaukee Chamber of Commerce, and were brokers negotiating purchases and sales of grain, and accustomed to buy upon margins under the rules of the Chamber, and to make advances for customers, and to charge commissions for their services. The defendant during the time of the transactions in controversy was a dealer in wines and liquors in the city of St. Paul. These transactions opened by the receipt by plaintiffs of a telegraphic despatch from the

agent has the right to be reimbursed for all his advances, expenses and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses and disbursements are reasonable, and have been properly incurred and paid without misconduct on the part of the agent. If, in obeying the instructions or orders of the principal, the agent does acts which he does not know at the time to be illegal, the principal is bound to indemnify him, not only for expenses incurred, but also for damages which he may be compelled to pay to third parties. The exception to this rule is where the transaction for which the agent is employed is illegal, or contrary to good morals and public policy." — ED.

defendant on November 11, 1886, directing them to "sell ten thousand bushels May wheat." On the following day they accordingly executed the order. February 10th defendant directed the plaintiffs to buy 10,000 bushels May wheat, which order was in like manner executed the same day. This closed the transaction, so far as the defendant was concerned. The two contracts were adjusted on the basis of the difference in prices at the dates specified, and a statement showing the difference sent to defendant; that is to say, the two contracts were adjusted on the basis of such difference in prices, without waiting for their literal fulfilment, and without any actual delivery of wheat. A large number of other similar purchases and sales of wheat and barley, amounting to hundreds of thousands of bushels, were made by plaintiffs for defendant, and disposed of in like manner, during the year 1887. Some of the "deals" were closed with a profit, others with a loss, to defendant, which was charged up to him by the plaintiffs. During this time the defendant paid out no money for grain whatever, but at plaintiffs' instance, to cover margins for which advances had been made by them on a falling market, he had paid them between the 10th day of November, 1886, and the 1st day of January, 1888, the sum of $2,462.50, leaving due them, as they claim, the amount demanded in this action. The last transactions, as per statement sent to defendant by plaintiffs, were the reported sale of 10,000 bushels February barley, December 30, 1887, and purchase of 10,000 bushels February barley, January 3, 1888, difference (loss) reported January 4, 1888, at $275.[1] . . .

It becomes material, therefore, to inquire into the intention of the parties in entering into contracts purporting to be for the future delivery of commodities, and the plaintiffs must be shown to be *in pari delicto* to defeat a recovery in this action.[2] . . .

The testimony of the defendant, which is undisputed, shows or tends to show that he did not intend to make actual *bona fide* purchases and sales of grain, but intended to "deal in futures" solely, and the manner in which the business was conducted and the several "deals" closed and adjusted by the plaintiffs is consistent with this theory, and tends to support it; and, while this circumstance might not alone be sufficient to establish the fact that plaintiffs, or the third parties with whom they dealt in executing the orders of the defendant, had notice that defendant's object was not to buy and sell grain, but to speculate in the price of grain merely, yet the manner in which the business involving these transactions was conducted was certainly an element to be considered with other circumstances in determining the question of their good faith. Hill *v.* Johnson, 38 Mo. App. 383; Crawford *v.* Spencer, 92 Mo. 498, (4 S. W. Rep. 713). It is not necessary to prove that plaintiffs had express notice of defendant's purpose. The understanding between the parties may be gathered from the facts and attending circumstances. This is well settled, and upon this point evidence of the defendant's occupation, residence, financial ability; that he never delivered or received or proposed to deliver or receive any grain; that he was not a dealer; and that the orders to purchase were made without reference to or far in excess of his ability to pay for, with other facts of like character, was competent. Cobb *v.* Prell, 5 McCrary, 85 (15 Fed. Rep. 774); Carroll *v.* Holmes, 24 Ill. App. 453, 458, 459; *In re* Green, 7 Biss. 338, 344; Crawford *v.* Spencer, *supra;* Lowry *v.* Dillman, 59 Wis. 197 (18 N. W. Rep. 4); Sprague *v.* Warner (Neb.), 41 N. W. Rep. 1115; Watte *v.* Wickushun, 27 Neb. 457 (43 N. W. Rep. 259); Williams *v.* Tiedmann, 6 Mo. App. 269, 276; Hill *v.* Johnson, 38 Mo. App. 383, 392. The plaintiffs concede that it was apparent from his correspondence that the defendant's transaction were mostly for speculative purposes. They knew he was in the saloon business, and not in the grain business. The jury might find from the facts disclosed by the evidence that the plaintiffs knew that he had not the means to buy grain with, and did not desire or need it, but was operating for the differences only.

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[1] Here followed a passage explaining what contracts for future delivery are wagers, and citing 22 Am. L. Reg. 613, n.; Rumsey *v.* Berry, 65 Me. 570; Kirkpatrick *v.* Bonsall, 72 Pa. 155.—ED.

[2] Here followed a passage to the effect that the burden of establishing illegality rests upon the party who asserts it, disapproving Barnard *v.* Backhaus, 52 Wis. 593, 600, and approving Crawford *v.* Spencer, 92 Mo. 498.—ED.

The statutes of Wisconsin, where the business was done, were not introduced in evidence. The rights of the parties will therefore be determined by the rules of the common law, as generally accepted and applied in this country. Harvey *v.* Merrill, 150 Mass. 1 (22 N. E. Rep. 49). And it is generally held as the common-law doctrine that all wagering contracts are illegal and void as against public policy. Irwin *v.* Williar, 110 U. S. 499, 510 (4 Sup. Ct. Rep. 166); Harvey *v.* Merrill, *supra.* No cause of action arises in favor of a party to an illegal transaction; nor will the law lend its aid to enforce any contract which is in conflict with the terms of a statute, or sound public policy or good morals. *In re* Green, 7 Biss. 338; Armstrong *v.* Toler, 11 Wheat. 258; Ruckman *v.* Bryan, 3 Denio, 340. And there is no reason why a broker or commission merchant should be favored or exempted from consequences resulting to other parties who aid or assist in unlawful transactions. Barnard *v.* Backhaus, *supra.* It was through the agency of the plaintiffs that the defendant was attempting to carry on an unlawful business. They executed his orders, advanced money for margins, and settled the differences. The contracts were all made in their names, and he was not known in the transactions with third parties, and they were personally responsible to the persons with whom they dealt in making the purchases and sales in question. Under such circumstances it would, of course, be difficult to ascertain whether the latter had notice of the nature of the agreement or understanding existing between the parties to this action; but it was clearly important and material to show that the plaintiffs were cognizant of defendant's illegal purposes, and were engaged in promoting them; and, if they were, the court will not aid them to recover moneys advanced in furtherance of such schemes. The plaintiffs, as brokers or commission merchants, might well decline to aid in transactions of that character; and, if they would do so, a great deal of that kind of gambling would cease, as, in the majority of cases, the ventures could not be made without their financial assistance. As between them and their customers the same strict rule should be applied as in other cases. Carroll *v.* Holmes, 24 Ill. App. 453, 460; Hill *v.* Johnson, 38 Mo. App. 383; Tied. Sales, p. 490, § 302.

The plaintiffs' counsel, however, concedes in his brief in this court that if, by the arrangement between the parties to this suit, they were to undertake gambling transactions, then the intent of third parties was not material. But the defendant's counsel insists that the charge of the court on this subject, including the instructions asked by plaintiffs, would warrant the jury to infer that it was necessary for the defendant to make it appear that the parties with whom plaintiffs dealt were also *in pari delicto.* Upon this point the charge, taken as a whole, is perhaps not entirely clear; but we think if there was any ambiguity or uncertainty in the charge on the question, the defendant should have asked more specific instructions.

It is also assigned as error that the court erred in refusing defendant's second request to charge, which was in substance that, in order to prove notice or knowledge on the part of the plaintiffs of the designs and intentions of the defendant, it is not necessary that defendant should have written or said to any of the plaintiffs that such was his design; but the jury were to determine the understanding of the parties from all the circumstances connected with the transactions between them, and that upon this question they were " entitled to consider the fact that at the time the plaintiffs sold the barley for the defendant in October, November, and December, 1887, one of the plaintiffs stated that he had no reason to believe that the defendant had the barley at the time of such sales; and the further fact that during a part, at least, of the time of such transactions, the defendant was behind with his margin, and was being pressed by plaintiffs for money to make the margins good; and that plaintiffs immediately after closed these deals as well as all prior deals, considered the transaction at an end so far as defendant was concerned, and, instead of charging him with the purchase of any wheat, sent him statements charging him with, or crediting him with, as the case might be, the difference between the purchase and the selling price." These instructions were not covered by the general charge, and we think should have been given. Some of the evidence was perhaps of slight importance; but we think, with other facts and circumstances in the case, it was all proper to be considered by the jury in determining the knowledge of the plaintiffs and the real nature of the arrangement between the parties; and without such instructions the jury were in danger of being led to believe, as the court subsequently stated.

that there must be an express agreement, and that a mere understanding between the parties was not sufficient.

We think evidence of the general character of transactions in the chamber between other dealers was properly rejected; but for the error above referred to there should be a new trial.

Order reversed.[1]

SECTION II.

Responsibility for Injuries.

(*A*) THE FELLOW-SERVANT RULE

PRIESTLEY *v.* FOWLER.

EXCHEQUER. 1837.

[3 *M. & W.* 1.]

CASE. The declaration stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant's, in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the said van, with the said goods; and it became the duty of the defendant, on that occasion, to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby: nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried thereby, in consequence of the neglect of all and each of which duties the van gave way and broke down, and the plaintiff was thrown with violence to the ground, and his thigh was thereby fractured, &c. Plea, not guilty.

At the trial before PARK, J., at the Lincolnshire Summer Assizes, 1836, the plaintiff, having given evidence to show that the injury arose from the overloading of the van, and that it was so loaded with the defendant's knowledge, had a verdict for £100. In the following Michaelmas Term, *Adams*, Serjt., obtained a rule to show cause why the judgment should not be arrested, on the ground that the defendant was not liable in law, under the circumstances stated in the declaration. In Hilary Term,

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[1] See Irwin *v.* Williar, 110 U. S. 499, 509–510 (1884); Harvey *v.* Merrill, 150 Mass. 1, 11 (1889), s. c. Wambaugh's Cases for Analysis, 167; Barnes *v.* Smith, 159 Mass. 344 (1893). — ED.

Goulburn, Serjt., and *N. R. Clarke*, showed cause. The declaration is sufficient, at least after verdict. One objection will probably be, that it does not state that the plaintiff was to be conveyed in the van, but only that he was to go with and take the goods by the van. But, taking all the allegations together, the statement is sufficient after verdict. It is stated that the plaintiff was on the van in pursuance of the defendant's directions. [The court intimated that the declaration was sufficient as to this point.]

Secondly, the action is maintainable on general principles of law. There is no valid distinction between this case and that of an ordinary coach passenger; the service of the servant is the consideration here, as the money of the passenger is there. [Lord ABINGER, C. B. The passenger pays his money in consideration of being carried, and there is an implied contract that he shall be carried safely: and he has no means of knowing how the coach is constructed or loaded. Here the servant is on the premises, and has the means of knowledge. It is not the case of a servant hired for that particular occasion, but of a general servant.] It does not appear on the face of the declaration, that the plaintiff knew the van was overloaded, and it cannot be intended after verdict: on the other hand, it does appear that the defendant knew it. The question therefore is, whether a master who directs a servant to get upon an overloaded vehicle, the servant giving his service for taking care of the master's goods carried therein, is not liable if the servant sustains an injury by its breaking down in consequence of such overloading. It is not merely the omission of not using a sufficient vehicle, but an act of commission in allowing it to be overloaded. Suppose a coach passenger saw, when he got up, that the coachman was intoxicated or the horses unruly, would his right to recover for an injury in consequence be affected? [PARKE, B. I apprehend the contract would only be to carry as safely as could be, in the condition in which the passenger knew the vehicle to be. Lord ABINGER, C. B. Could a stage-coachman, who has a restive horse to drive, which he knows to be so, sue his master for an injury done him by the horse? The plaintiff was not bound to go by an overloaded van; he consents to take the risk. If it had appeared that the master undertook that the van was sufficient, it would be different.] It might have been more proper to allege that the defendant so undertook, but the declaration is in substance equivalent to that, at least after verdict, since it states that it was the defendant's duty to use proper care that the van should not be overloaded. The promise and the duty are co-extensive.

Adams, Serjt., *contra*. The cause of action, supposing that any exists, arises out of an implied contract on the part of the master so to load the van as that the plaintiff should be carried safely; but he cannot be made liable in this action on the case except there be a common-law liability such as to raise a duty. To found any action against the defendant, several circumstances must combine. First, it must appear that the carriage was overloaded by the defendant's direction or with his knowledge; and this it may be admitted the declaration does disclose. Secondly, it ought to appear that the plaintiff was ignorant of the overloading, which is nowhere suggested. Thirdly, the defendant must have ordered the plaintiff to go on the van. There is no clear averment that that was the fact: the "desire and direction" of the defendant, in pursuance of which the plaintiff alleges that he went on the van, is only to go with it and take care of the goods. [Lord ABINGER, C. B. That is an ambiguous expression; the plaintiff interprets the ambiguity to mean that he was to go in the van; and we may so interpret it after verdict.] But further, it ought to be shown that it was necessary for the plaintiff to do so in order to perform his duty, and (which is perhaps the same proposition in more general terms) that the order was a lawful command, which he was bound as a servant to obey. The mere command of the master will not render him liable, unless the thing commanded fell fairly within the necessity of the servant's duty. There ought to have been an averment that it was necessary for the performance of his duty of conveying the goods that he should go in the van. But even if all these circumstances concurred, they would not constitute a common-law liability, but a liability arising out of a contract, and the action should have been assumpsit, not case. To render the defendant liable in case, the existence of malice, express or implied, was necessary.

Cur. adv. vult.

The judgment of the court was now delivered by

Lord ABINGER, C. B. This was a motion in arrest of judgment, after verdict for the plaintiff, upon the insufficiency of the declaration. [His lordship stated the declaration.] It has been objected to this declaration, that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it. For, as the declaration contains no charge that the defendant knew any of the defects mentioned, the court is not called upon to decide how far such knowledge on his part of a defect unknown to the servant, would make him liable.

It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

The inconvenience, not to say the absurdity of these consequences, affords a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

We are therefore of opinion that the judgment ought to be arrested.

Rule absolute.[1]

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[1] See the comment in Fifield *v.* Northern Railroad, 42 N. H. 225, 241 (1860). — Ed.

MURRAY *v.* SOUTH CAROLINA RAILROAD COMPANY.

COURT OF ERRORS OF SOUTH CAROLINA. 1841.

[1 *McMullan's Law*, 385.]

BEFORE O'NEALL, J., Charleston, July extra term, 1838.

This was an action on the case, against the defendants, for an injury sustained in their service.[1]

The plaintiff was a second fireman employed by the defendants. He selected the engineer under whom he was to serve. Upon the plaintiff's second or third trip the engine ran over a horse, and was thrown from the track. As a consequence, the plaintiff's leg was crushed between the engine and the tender. There was evidence tending to show that the accident resulted from the carelessness of the engineer in not stopping the engine as soon as cautioned by the plaintiff and the other fireman. The engineer was skilful and sufficiently experienced.

The jury were instructed that the plaintiff's service subjected him to all the ordinary risks and perils of the employment. Each officer of the company, as to strangers and inferiors, was to be considered as the company; and every command or act given or done by him must be regarded as given or done by the company themselves. If a superior officer had given an order to an inferior to do an act not necessary to be done, and not within the duty of the inferior, and in doing it injury resulted to the inferior, then the company would be responsible. If, in running the road, a superior officer (the engineer) did his duty so carelessly as to subject a servant of the company to unnecessary danger, and which the servant could not avoid, then the company would be liable. But if the peril from which the injury resulted was unavoidable, or if the engineer did everything ordinary prudence suggested to avoid it, and, notwithstanding, a servant sustained injury, it would be one of the risks to which his contract of service subjected him, and he could not recover. So, too, if the servant (the second fireman) did not do his duty, and to its neglect (as not letting down the brake) the injury might be fairly ascribed, then, in that case, his injury would be attributable to himself, and he could have no redress against the company.

The jury found for the plaintiff.

The defendants appeal on the annexed grounds:—

1. Because the plaintiff, being a fireman actually employed on the car to which the accident occurred, cannot recover against the company in whose service he was.

2. Because the ordinary risks of the occupation of the plaintiff are

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[1] The reporter's statement of the evidence has been condensed. — ED.

to be sustained by himself, and the accident was the result of such risks.

3. Because the plaintiff himself was partly in charge of the car to which the accident occurred, and might have prevented it himself by the timely discharge of his own duty.[1] . . .

Blanding, for the appellants.

Curia, per EVANS, J. In the consideration of the question involved in this case, I shall assume that the verdict establishes the fact that the plaintiff's injury was the effect of the negligence of the engineer, and then the question arises whether the railroad company is liable to one servant for an injury arising from the negligence of another servant. The business of the company is the transportation of goods and passengers. Its liability in these respects is, in general, well defined and understood by the profession; and if the plaintiff's case came within any of the principles applicable to these cases, we should have no difficulty in deciding it. The application of steam power to transportation on railroads is of recent origin, but the principle by which the liability of a carrier is fixed and ascertained is as old as the law itself. There is nothing in the fact that the defendant is a corporation, except that of necessity it must act altogether by agents. The liability is precisely the same as if the defendant was an individual acting by the agency of others. The principle is the same, whether you apply it to a railroad, a steamboat, a wagon, a stage-coach, or a ship. If this plaintiff is entitled to recover, I can see no reason why the owner of any of the above modes of conveyance should not be liable under the same circumstances. If the owner of a wagon should employ two men, one to drive and the other to load, and either of them should so negligently perform his work as to injure the other, the owner of the wagon would be liable. The principle will extend to all the vocations of life wherein more than one person is employed to effect a single object; and a new class of liabilities would arise which I do not think has ever heretofore been supposed to exist. It is admitted, no case like the present has been found, nor is there any precedent suited to the plaintiff's case unless he stands in the relation of a passenger to the company. In this point of view his counsel has chosen to regard him, for I understand the declaration alleges he was a passenger. Now, a passenger is everywhere spoken of as one who pays for transportation. In all the operations necessary for this he is passive. The moment he becomes an operator, for then his character is changed, he becomes the servant of the company, and not its passenger. It would be a confusion of terms so to regard him. He is no more a passenger than a sailor or a stage-driver. There is nothing in the definition of bailment, or the classification of the different kinds of liability growing out of that relation, which applies to the plaintiff's case, and if he is entitled to recover, it must be on principles which apply equally to all operations of life in which agents are employed.

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[1] The other grounds of appeal were disregarded by the Court of Errors. — ED.

There is no question that, in general, the principal is liable for the acts of the agent performed in the execution of his agency, or in and about the business of his principal. Thus, the owners of a railroad would be liable to passengers for an injury sustained by the negligence of any of its servants, superior or subordinate, because it is implied in the undertaking to carry, not only that the road and cars are good, but that the servants employed are competent and will perform their duty. For the loss of goods the law annexes a still greater responsibility. So, also, if one employ an agent to execute any work whereby an injury may result to a stranger, the law requires it to be done with care, and if a stranger sustain an injury, his principal is liable, as was decided in O'Connell *v.* Strong, Dud. 265. But the plaintiff is neither a passenger nor a stranger, and if he can recover, it must be in his hermaphrodite character as a passenger-fireman. In the cases above enumerated, the principal is represented by the agent, and unless he be liable, the great operations of life cannot be carried on, — no man would have adequate security for his person or his property. The owner of goods would not trust them on a railroad or a steamboat, if his only security was the liability of the mere servants employed. No passenger would commit his safety to a railroad, steamboat, or stage-coach, if, in case of injury, he could look to none but the agents usually employed about these modes of transportation. So, also, no man would have any guaranty for the security of his property, if his only remedy for negligence was the irresponsible or insolvent agents which another might employ. In all these, and similar cases, the reasons of the liability of the principal are clear, and the law books are full of cases or precedents which apply to them; but it is not so with the plaintiff's case; there is neither authority nor precedent for it.

It was said in the argument that if the engineer had been the owner of the road he would have been liable. Of this I apprehend there would have been no doubt, but then his liability would have arisen, not from his being the owner, but because the injury arose from his own act. That he is now liable seems to me to admit of no doubt. But it by no means follows as a consequence that because he is liable those who employ him are liable also. One acting as agent may subject himself to liability in a variety of cases for which his principal would not be liable; and this may be as well in cases of contract as in cases of tort. The extent of the liability of the principal for the acts of the agent can, in general, be readily ascertained from the object of the contract and the relative position of the parties. A passenger desires to be transported from one place to another; the carrier undertakes to do this, and is liable if he fails. It is wholly immaterial by whose default the injury resulted. There has been a breach of the contract, and he has a right to look to him with whom his contract was made. With the plaintiff the defendants contracted to pay hire for his services. Is it incident to this contract that the company should guarantee him against the negligence of his co-servants? It is admitted he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones? Neither are within his contract — and I can see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it. The engineer no more represents the company than the plaintiff. Each in his several department represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance by each of his several duties. If the fireman neglects his part the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me, it is, on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another; and, as a general rule, I would say, that where there was no fault in the owner, he would be liable only for wages to his servants; and so far has this doctrine been carried, that in the case of seamen, even wages are forfeited if the vessel be lost and no freight earned.

In the above observations, I have endeavored to confine myself strictly to the case before the court. It is not intended to prejudge other questions which may arise between the company and its servants; nor do I mean to say that a case may not occur where the owner, whether an individual or company, will be liable for the acts of one agent to another; but then it must be in such cases as where the owner employs unfit and improper persons as agents, by whose ignorance or folly another is injured. Upon such a case, it will be time enough to express an opinion when it arises. The present is not such a case. The engineer, according to the evidence, was competent, though he may have been rash in the particular instance in which the plaintiff's injury was sustained. He was known to the plaintiff as well as to the company, for it appears by the report that he selected the engineer under whom he was willing or prepared to serve. It seems to me the plaintiff is not, therefore, entitled to retain his verdict, and a motion for a new trial is granted.

RICHARDSON, EARLE, BUTLER, HARPER, and DUNKIN, JJ. and CC., concurred.

JOHNSON, C. I concur in this opinion, and will only add a word in illustration of my own views of the question. The foundation of all legal liability is the omission to do some act which the law commands, the commission of some act which the law prohibits, or the violation of some contract, by which the party is injured. There is no law regulating the relative duties of the owners of a steam car, and the persons employed by them to conduct it. The liability, if any attaches, must therefore arise out of contract. What was the contract between these parties? The plaintiff, in consideration that the defendants would pay him so much money, undertook to perform the service of fireman on the train. This is all that is expressed. Is there anything more implied? Assuming that the injury done was in consequence of the negligence of the engineer, the defendants would not be liable unless they undertook to answer for his diligence and skill. Is that implied? I think not. The law never implies an obligation in relation to a matter about which the parties are or may, with proper diligence, be equally informed. No one will ever be presumed to undertake for that which a common observer would at once know was not true. The common case of the warranty of the soundness of a horse, notoriously blind, may be put in illustration. The warranty does not extend to the goodness of the eyes, because the purchaser knew, or might have known, with proper care, that they were defective.

Now, the plaintiff knew that he was not to conduct the train alone. He knew that he was to be placed under the control of the engineer. He knew that the employment in which he was engaged was perilous, and that its success was dependent on the common efforts of all the hands; and, with proper diligence and prudence, he might have been as well, and it does not follow that he might not have been better, informed than the defendants, about the fitness and security of all the appointments connected with the train. If he was not, it was his own want of prudence, for which defendants are not responsible. If he was, he will be presumed to have undertaken to meet all the perils incident to the employment.

There is not the least analogy between this case and that of common carriers of goods or transporters of persons. They are liable in respect to the price paid. Not so here. The plaintiff paid nothing for his transportation; on the contrary, he was to be paid for his labor, and for the perils to which he was exposed, as incident to his employment. No prudent man would engage in any perilous employment, unless seduced by greater wages than he could earn in a pursuit unattended by any unusual danger.

O'NEALL, J., dissenting. This case was tried by myself, and although, had I been on the jury, I should have found for the defendants, yet there were certainly facts in the evidence which might have led another to a different conclusion; and, therefore, I am not disposed to disturb the verdict. This makes it necessary to consider the legal doctrine which I laid down to the jury. In substance, I held, that if the injury to the plaintiff resulted from the negligence of the engineer, then the plaintiff was entitled to recover. This doctrine a large majority of my brethren think erroneous, and however much deference is due to their opinions, yet, as I consider them to be wrong, I think it my duty to state my own views.

This case is one of the first arising out of the conveyance of human beings by locomotives on railroads. It goes beyond the ordinary case of a passenger, and presents a claim on the part of a hired servant, against his employers, for an injury sustained in their service. If it arose out of any of the old-fashioned modes of conveyance, managed by the defendants themselves, could there be a doubt that they would be liable, if the injury resulted from negligence ? Take the case of a stage-coach, driven by the owner, and let it be supposed that the plaintiff was hired as a guard, and that he was injured in that employment, by the careless driving of the defendant, who would hesitate to say that he was entitled to recover? No one who had a proper regard to legal principles. Is there any distinction in law as to the effect which the employment of the plaintiff is to have, in the different kinds of service in which he may engage? I think there is none. If Mr. Tupper, the able and efficient officer of the company, had, in person, managed the engine, and the plaintiff had been injured by his carelessness, I would most respectfully ask, how could it be pretended that the company was not liable? I admit here, once and for all, that the plaintiff, like any other servant, took, as consequence of his contract, the usual and ordinary risks of his employment. What is meant by this? No more than that he could not claim for an injury against which the ordinary prudence of his employers, their agents, or himself could provide. Whenever negligence is made out as the cause of injury, it does not result from the ordinary risks of employment.

How far are the defendants liable for the acts of the engineer? In the language used in Bacon's Abridgement, tit. Master and Servant, letter R, " it is highly reasonable that they should answer for such substitute, at least *civiliter;* and that his acts, being pursuant to the authority given him, should be deemed the acts of the master." Now to this authority, it will not do to say the defendants did not authorize the engineer to run his engine so carelessly as to injure the plaintiff. They put him in command of it, and authorized him with it to run the road. If, in the doing of this act, which is according to their authority, he acts negligently, then they are liable for the consequences, for they result from the doing of their business, by one then employed by them. The cases of Drayton *ads.* Moore and Parker & Co. *v.* Gordon, Dudley, 268, and of O'Connell *v.* Strong, Id. 265, are full to this point. In ordinary cases, this would not be questioned. But it is supposed that this case is not governed by the ordinary rules applicable to cases of liability, arising out of the relation of master and servant. I am at a loss to conceive any just reason for this notion. The law, it seems to me, is to be regarded as a general science, applicable to every case coming within the letter or the reason of the rule. Where it is within neither, it becomes an exception to it. It is only necessary to state this case, to see that it is within both the letter and reason of the rule ; for the defendants employ the plaintiff to act under the command of another of their servants. In such a case, the servant in command is in the place of the employers. When they hire another to engage in a service, where neither his own care nor prudence can shield him from injury, which may arise from the act of another of their agents having the control of him, the question of their liability depends upon the care used by such superior agent. The ordinary rule in cases of hiring goods is. that the hirer should use that degree of care which a prudent man would take of his own goods. If this degree of care is shown, then the hirer is not liable for any injury which may result to the goods hired. This rule, it seems to me, must, necessarily, be that which applies to this case. Is more favor to be bestowed on a man's goods than on his person? It would be strange that this should be so. It may be tested, however, by inquiring if the plaintiff, instead of himself, had hired his negro man to the defendants as second fireman, and he had lost his leg by the carelessness of the engineer, would not the defendants have been liable? It seems to me that they would, or one section of the law of bailments would be repealed by the Court of Errors. There can be no difference in the law as applicable to the white man or the slave, in a contract of hiring. Both are capable of self-preservation, and both are capable of wrong and right action; and in the capacity of firemen, both are under the orders of the engineer, and must look to him for safety.

In the cases of Drayton *ads.* Moore, and Parker & Co. *v.* Gordon, Dud. 272, it was said, "When a master employs slaves in any public employment or trust, such as tradesmen, ferrymen, wagoners, patroons of boats, or masters of vessels in the coasting or river navigation, he undertakes, not only for their skill and faithfulness to all who may employ them, but also for their general skill and faithfulness to the whole community." This rule stated as to slaves applies more forcibly to hired servants, and my brother Johnson, who then resisted the rule as to slaves, admitted it in its fullest extent as to hired servants. Taking this as settled law, how stood the plaintiff in his contract with the defendants in relation to the engineer? Had he not the right, according to law, to regard the defendants as contracting both for his skilfulness and faithfulness? It seems to me there can be no doubt about it. Well, this being so, if the engineer was negligent, the defendant's undertaking for his faithfulness was broken, and they are most clearly liable.

It is, however, urged (and that is, as I understand, the ground on which the Court of Errors decides the case) that this case is one of novel impression, and not to be decided by the ordinary rules of the law of bailment. Conveyance by locomotives on railways is supposed to be more analogous to shipping than anything else; and hence, unless a sailor could recover for an injury arising from the neglect of the master, it is supposed that a fireman cannot, for an injury arising from the neglect of the engineer. Before I discuss the case in this new aspect, I deny that any mode of conveyance on land is to be put on a footing with the navigation of the ocean in ships. That is governed by principles of law coeval with society, and in many respects common to every civilized nation of the earth. Conveyances on land are also regulated by a very ancient and well-settled law wholly distinct from the other. It will, however, be sufficient to show, by one plain view, that the law applicable to mariners cannot affect this case. Unless a vessel earns freight, the mariner is entitled to no wages. Suppose a locomotive running from Charleston to Aiken should burn up the entire train, and thus earn no freight, would not all the hands hired by the defendants to manage her be entitled to their wages? There could be no more doubt that they would, than that a man hired to drive my wagon to Charleston, who, by some unforeseen accident, should lose his load, would still be entitled to his wages. This shows that in the very beginning there is such a difference in the law of a ship and that of a locomotive that it is impossible the law of the former can decide the right of a servant employed in the latter to recover for an injury arising from the neglect of the engineer.

But if it were otherwise, and this case depended upon maritime law, still I am inclined to think the plaintiff ought to recover. No exactly analogous case can be found. In Phillips on Insurance, 463, Judge Story is represented as saying, in the case of *The Saratoga:* "It appears to me, that upon the established doctrine of our law, where the freight is lost by inevitable accident, the seamen cannot recover wages, as such, from the shipowner." I concede that this dictum is the true law regulating a mariner's right to wages. If the freight was lost by the master's neglect, it could not then be ascribed to inevitable accident; and then, I think, the seaman would be entitled to recover. If this is true in relation to wages, the same rule must hold as to the mariner's right to recover for any injury arising from the negligence of the master.

But it is said, it would be impolitic to make the defendants liable for any injury accruing to a fireman from the neglect of the engineer. This would be worth inquiring into with great care in the legislature; but, in a court, I think we have nothing to do with the policy of a case; the law of it is our guide. But if we are to look to the policy, then I should argue that the more liability imposed on the railroad company, the more care and prudence would be thereby elicited. This result is what the community desires. For it secures life and property committed to their care.

I think the motion ought to be dismissed.

Gantt, J., concurred.

J. Johnston, Chancellor, also dissenting. It may not diminish the force of the observations made by Mr. Justice O'Neall, if I state very briefly the reasons which induce me to concur in his dissent. It is admitted that the duties and liabilities between masters and hired servants result only from the nature and terms of the contract which forms the relation; and that neither party is allowed to extend or abridge the contract. That the master cannot exact other services than those stipulated for; nor, by any indirection, subject the servant to any other than the ordinary perils incident to the employment; and that if he does by any agency whatever, or by any means, whether of design or negligence, accumulate upon the servant, while in the performance of his duty, any dangers beyond those inherent in the service itself, they fall upon the latter, not as a servant (for his contract does not bind him to endure them), but as a man, and the law entitles him to redress.

It is also admitted that these principles are not confined to cases where one servant only is employed, but prevail when a plurality are at the same time engaged by the same master. Their application, however, in cases of the latter description, depends upon the terms of the contract. If several jointly contract to perform a specified duty, the master is not liable to either of them for injuries resulting from the faithlessness or negligence of his coadjutor; all of them being, substantially, agents for each other, to perform their joint undertaking. But when their engagements are several, each undertaking for himself to perform distinct offices, in a matter susceptible of a division of labor, each stands to the master in the same relation, and is entitled to the same rights, as if he was the only servant employed. The master is responsible to him, as he would be to a stranger, for the misconduct of the others, who are exclusively his, the master's, agents. Now, this is admitted to be the general law upon the subject; and it is applicable to the servants of a railroad company, as well as to those of any other employer, unless there be something to take them out of its operation. No instance of master and servant has been pointed out where these principles do not obtain, except the case of a ship's crew; but that stands clearly upon special grounds of usage. If the servants employed about a railroad are excepted out of the general rules relating to agency, the exception, with the grounds and reasons of it, must be shown, otherwise the employers will be as liable to any one engaged in their service, for injuries inflicted on him by other agents, in the course of their employment, as a planter would be to a hired hand for maltreatment by his overseer.

I presume no one will contend that the rule applicable to service in a railroad company is, that the company is not liable to any agent, for any injury, provided the company can only show that another of its agents has inflicted it. Would it do to say, for example, — and upon what principle could it be said, — that a superintendent of the hands engaged in repairing the road may, with impunity to the company, abuse his authority to the injury of their health? Or, if the cars were to be run at night, and, through the neglect of hands set apart to watch the road and remove obstructions, the whole train were lost, and any officer or hand on board were crippled, certainly no one means to assert that none of these could claim compensation from the company, but must look exclusively to the irresponsible agents (perhaps slaves), hired by the company, through whom the injury accrued. And yet, how is a rule to be laid down — I wish to hear the rule stated — which would include that case and exclude this? The fidelity of the hands detailed to superintend the road, in the case I have supposed, would be as essential to the common enterprise of running the cars, as the fidelity of the hands on board to their respective duties. If the idea is indulged, that there is, in any branch of this enterprise, an implied undertaking among the servants to do the work jointly, and to waive the neglect of each other, what will constitute such an understanding? Where are its limits? Does it arise from the intimate connection of the hands? Then I wish to be informed what degree of intimacy, what strength of association, is demanded, to raise the implication? Where is the line?

I give no opinion upon the evidence. I take the verdict for the facts; and, according to the finding of the jury, the plaintiff faithfully performed his particular duty, and, while performing it, was injured by the faithlessness or negligence with which the company, acting in the person of another agent, executed a duty incumbent upon them. Ought the plaintiff's remedy to be doubtful?

The elements of the contract between him and the defendants are these: on their part, so far as they were to contribute to the propelling of the cars, that they would carry him safely; and, on his part, that on the trip he would perform certain offices. With respect to the last, he was their servant; with regard to the first, he was their passenger; and as their passenger they have crippled him. The distinction is plain, and the propriety of applying it would be as plain, if instead of being stationed where he was, he had only been a clerk, hired by the company, to travel up and down in the cars, and take a minute of their operations. Yet, on principle, no discrimination can be drawn against him on account of his being a fireman, and not travelling clerk; because he had as little connection with, or control over, the department from which his injury sprang, or the agent to whom it was exclusively committed by the defendants, as if he had been assigned any imaginable duty in the remotest part of the train.

FARWELL *v.* THE BOSTON AND WORCESTER RAILROAD CORPORATION.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1842.

[4 *Met.* 49.]

In an action of trespass upon the case, the plaintiff alleged in his declaration that he agreed with the defendants to serve them in the employment of an engineer in the management and care of their engines and cars running on their railroad between Boston and Worcester, and entered on said employment, and continued to perform his duties as engineer till October 30, 1837, when the defendants, at Newton, by their servants, so carelessly, negligently, and unskilfully managed and used, and put and placed the iron match rail, called the short switch, across the rail or track of their said railroad, that the engine and cars, upon which the plaintiff was engaged and employed in the discharge of his said duties of engineer, were thrown from the track of said railroad, and the plaintiff, by means thereof, was thrown with great violence upon the ground; by means of which one of the wheels of one of said cars passed over the right hand of the plaintiff, crushing and destroying the same.

The case was submitted to the court on the following facts agreed by the parties: "The plaintiff was employed by the defendants, in 1835, as an engineer, and went at first with the merchandise cars, and afterwards with the passenger cars, and so continued till October 30, 1837, at the wages of two dollars per day; that being the usual wages paid to engine-men, which are higher than the wages paid to a machinist, in which capacity the plaintiff formerly was employed.

"On the 30th of October, 1837, the plaintiff, then being in the employment of the defendants, as such engine-man, and running the passenger train, ran his engine off at a switch on the road, which had been left in a wrong condition (as alleged by the plaintiff, and, for the purposes of this trial, admitted by the defendants) by one Whitcomb, another servant of the defendants, who had been long in their employment, as a switch-man or tender, and had the care of switches on the road, and was a careful and trustworthy servant in his general character, and as such servant was well known to the plaintiff. By which running off, the plaintiff sustained the injury complained of in his declaration.

"The said Farwell (the plaintiff) and Whitcomb were both appointed by the superintendent of the road, who was in the habit of passing over the same very frequently in the cars, and often rode on the engine.

"If the court shall be of opinion that, as matter of law, the defendants are not liable to the plaintiff, he being a servant of the corporation, and in their employment, for the injury he may have received from the negligence of said Whitcomb, another servant of the corporation, and in their employment, then the plaintiff shall become nonsuit; but if the court shall be of opinion as matter of law, that the defendants may be liable in this case, then the case shall be submitted to a jury upon the facts which may be proved in the case; the defendants alleging negligence on the part of the plaintiff."

C. G. Loring, for the plaintiff.

Fletcher & Morey, for the defendants.

SHAW, C. J. This is an action of new impression in our courts, and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose, — that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431; M'Manus *v.* Crickett, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law — like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy — or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests; it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. Priestley *v.* Fowler, 3 Mees. & Welsb. 1; Murray *v.* South Carolina Railroad Company, 1 McMullan, 385.

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. Copeland *v.* New England Marine Ins. Co., 2 Met. 440–443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited; a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590, *et seq.*

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer.[1]

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

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[1] See Winterbottom *v.* Wright, 10 M. & W. 109; Milligan *v.* Wedge, 12 Ad. & E. 737. — REP.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction.

Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and if so, it must be on the ground that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine: Whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company — are questions on which we give no opinion. In the present case the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained. *Plaintiff nonsuit.*[1]

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[1] *Acc.:* Hutchinson *v.* York, 5 Exch. 343 (1850); Wigmore *v.* Jay, 5 Exch. 354 (1850).

In Bartonshill Coal Co. *v.* Reid, 3 Macq. 266, 282–284 (1858), Lord CRANWORTH said: —

"Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible. In general it is sufficient for this purpose to show that the person whose neglect caused the injury was at the time when it was occasioned acting, not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim '*Respondeat superior*' prevails, and the master is responsible.

"Thus, if a servant, driving his master's carriage along the highway, carelessly runs over a bystander, or if a gamekeeper employed to kill game carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or brick from a scaffold, and so hurts a passer-by; — in all these cases (and instances might be multiplied indefinitely) the person injured has a right to treat the wrongful or careless act as the act of the master: *Qui facit per alium facit per se.* If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible, and the law does not permit him to escape liability because the act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business. Third persons cannot, or at all events may not, know whether the particular injury complained of was the act of the master or the act of his servant. A person sustaining injury in any of the modes I have suggested has a right to say, 'I was no party to your carriage being driven along the road, to your shooting near the public highway, or to your being engaged in building a house. If you choose to do, or cause to be done, any of these acts, it is to you, and not to your servants, I must look for redress if mischief happens to me as their consequence.' A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risks without their consent. This consideration is alone sufficient to justify the wisdom of the rule which makes the person by whom or by whose orders these risks are incurred responsible to third persons for any ill consequences resulting from want of due skill or caution.

"But do the same principles apply to the case of a workman injured by the want of care of a fellow-workman engaged together in the same work? I think not. When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself; he knows, if such be the nature of the

GILLSHANNON *v.* THE STONY BROOK RAILROAD CORPORATION.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1852.

[10 *Cush.* 228.]

ACTION on the case for injuries sustained by the plaintiff, a laborer in the employment of the defendants, by the negligence of their servants and agents. It was tried in this court before BIGELOW, J., by whom the evidence was reported for the consideration of the whole court. From this evidence it appeared that the plaintiff was a common laborer, employed in repairing the defendants' road-bed, at a place several miles from his residence. Each morning and evening, he rode with other laborers to and from the place of labor on the gravel train of the defendants. This was done with the consent of the company, and for mutual convenience; no compensation being paid, directly or indirectly by the laborers, for the passage, and the company being under no contract to convey the laborers to and from their work.

While thus on the way to their work on one occasion, a collision took place with a hand-car on the track, through the negligence of those having charge of the gravel train, as the plaintiff contended, and he was thrown off and run over by the gravel train, for which injury this action was brought. The plaintiff had no charge or care over the gravel train, and there was some evidence that the gravel train was not sufficiently supplied with brakemen. If upon these facts the jury would be justified in finding a verdict for the plaintiff, the case was to stand for trial; otherwise the plaintiff to become nonsuit.

B. F. Butler (*J. G. Abbott* with him), for the plaintiff.

T. Wentworth (*G. F. Farley* with him), for the defendants.

DEWEY, J. If the relation existing between these parties was that of master and servant, no action will lie against the defendants for an injury received by the plaintiff in the course of that service, occasioned by the negligence of a fellow-servant. Farwell *v.* Boston and Worcester Railroad, 4 Met. 49; Hayes *v.* Western Railroad, 3 Cush. 270.

It was attempted on the argument for the plaintiff to take the case out of the rule stated in those cases, upon the ground that the nature of the employment of these servants was different, the plaintiff being employed as a laborer in constructing the railroad bed, and not engaged in any duty connected with running the trains, and so not engaged in

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risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken."

The principal case is reprinted in 3 Macq. 316. — ED.

any common enterprise. The case of Albro *v.* Agawam Canal Co., 6 Cush. 75, seems to be adverse to these views, and goes strongly to sustain the defence.

It was also urged that the plaintiff was not in the employment of the defendants at the time the injury was received, or that he might properly be considered as a passenger, and the defendants, as respects him, were carriers for hire. But as it seems to us, in no view of the case can this action be maintained. If the plaintiff was by the contract of service to be carried by the defendants to the place for his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service, and is equally connected with it, and the relation of master and servant, and therefore furnishes no ground for maintaining this action.

How does the case differ from that suggested at the argument by the counsel for the defendants, who supposed a case where the business for which the party is employed, is that of cutting timber, or standing wood, and the servant receives an injury in his person on the way to the timber-lot, by the overturning of the vehicle in which he is carried, by the negligence or careless driving of another servant? There is no liability on the part of the master in such a case.

It seems to the court, that upon the evidence offered in the present case, the plaintiff was not entitled to a verdict, and the nonsuit should stand. *Plaintiff nonsuit.*[1]

ASHWORTH *v.* STANWIX AND WALKER.

QUEEN'S BENCH. 1861.

[3 *E. & E.* 701.]

DECLARATION. That defendants were possessed of a certain coal pit, wherein there was a shaft; and that plaintiff was lawfully employed in the said pit at the bottom of the said shaft; and in which said pit a certain corf was used by defendants for the purpose of raising coal from the said pit to the mouth of the said shaft; yet defendants so negligently guarded the mouth of the said shaft, and so carelessly used and managed the said corf, and took so little care of a certain plate or rail of defendants at the mouth of the said shaft, that, by reason of the carelessness, &c., of defendants the said plate or rail fell down the said shaft, and struck plaintiff on the head with great force and violence, and fractured his skull; whereby plaintiff became, was and is permanently injured, &c.

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[1] *Acc.:* Tunney *v.* Midland Railway Co., L. R. 1 C. P. 291 (1861); Vick *v.* N. Y. C. & H. R. Railroad Co., 95 N. Y. 267 (1884); McGuirck *v.* Shattuck, 160 Mass. 45 (1893).

Contra: O'Donnell *v.* Allegheny Valley Railroad Co., 59 Pa. 239 (1868). — ED.

Pleas. 1. Not guilty. 2. Not possessed. Issue thereon.

At the trial before BLACKBURN, J., at the Durham Spring Assizes, 1860, it appeared that the two defendants were lessees of a coal pit, and were, in that respect, in partnership together. The plaintiff was a pitman employed in the pit by them. On the day when the accident happened he was so employed, and the defendant Walker was acting as banksman at the mouth of the shaft. For the purpose of emptying the corves as they came up full of coal from the pit, there was a short tramway made of the usual rails or plates. The banksman's duty was to receive the full corf as it came up, to place it on a tram which travelled upon the tramway, and to hook on the corf which was to go down empty. There was evidence that one of the tramplates was loose, and it appeared that while the defendant Walker was acting as banksman, and after he had been told of the insecure state of this tramplate, it fell down the pit and caused severe injury to the plaintiff, who was standing at the bottom of the shaft. The defendant Walker was clearly guilty of negligence; but it was not shown that Stanwix, who was absent at the time of the accident, knew that the tramplate was loose.

The jury found a verdict for the plaintiff as against Walker, and by the direction of the learned Judge a verdict for the defendant Stanwix; leave being reserved to the plaintiff to move to enter a verdict against both defendants.

Manisty had obtained a rule calling on the defendant Stanwix to show cause why a verdict should not be entered for the plaintiff against both the defendants, on the ground that there was evidence to go to the jury upon which they might reasonably have found a verdict for the plaintiff against Stanwix, as well as against Walker.

Overend showed cause.[1]

Manisty and *Davison, contra.* *Cur. adv. vult.*

CROMPTON, J., now delivered the judgment of the Court. The question to be determined in this case is, whether the defendant Stanwix, being co-proprietor with the other defendant, Walker, of a mine, is jointly liable with him for an injury sustained by the plaintiff, a workman in their common employ, through the negligence of the defendant Walker. The facts are such that, if the defendant Walker had been simply the fellow-workman of the plaintiff, the case would have come within the principle that a servant sustaining injury from the negligence of a fellow-servant engaged in the same employment, cannot recover against the common master. The present case would then have been quite analogous to that of Bartonshill Coal Company *v.* Reid, 3 McQ. Sc. App. Ca. 266. But the present case is distinguishable from the class of cases which have been referred to, in the important particular that the defendant Walker, although in fact engaged jointly with the plaintiff in the work of the mine, was also a co-proprietor, and, as such, one of the plaintiff's masters; and the question is, whether this circumstance takes the case out of the before-mentioned rule, and calls for the application of a different principle. We are of opinion that it does, and that the plaintiff is entitled to hold the defendant Stanwix responsible for the negligence of his co-proprietor and partner. The doctrine that a servant, on entering the service of an employer, takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow-servants engaged in the common employment, has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow-servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him in their common work, enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less subsist because, by some arrangement between the joint masters, one of them takes on himself the functions of a workman. It is a fallacy to suppose that on that account the character of master is converted into that of a fellow laborer. Though engaged with the plaintiff in a common employment, Walker did not the less remain the master of the plaintiff, and the partner of the defendant Stanwix. This being so, it follows that Stanwix must be liable in respect of the negligence through which injury has arisen to the plaintiff, as the relation of partner subsisted between Walker and Stanwix; and as the negligence was a matter within the scope of a common undertaking we think that Stanwix is equally liable with Walker. That a partner is liable for the negligence of his copartner when engaged in the business of the partnership is not only clear in principle, but is established by the case of Moreton *v.* Hordern, 4 B. & C. 223 (E. C. L. R. vol. 10), in this Court, where two proprietors of a stage-coach were held liable with a third for the negligence of the latter, by whom the coach had been driven. Now it has never been doubted that for personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable. Personal negligence is clearly established against Walker; and, it being admitted that the defendant Stanwix was his coproprietor and partner, the latter must be held to be jointly responsible in respect of such negligence, and is therefore liable in this action. The rule must be made absolute to enter the verdict against him, as well as the other defendant.

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[1] In the course of this argument, COCKBURN, C. J., asked: "Can a servant be supposed to contemplate the peculiar risk of an injury caused by the negligence of his master while acting as a fellow-servant?" — ED.

Rule absolute.

MORGAN *v.* THE VALE OF NEATH RAILWAY COMPANY.

EXCHEQUER CHAMBER. 1865.

[*L. R.* 1 *Q. B.* 149.]

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to set aside a nonsuit and enter a verdict for the plaintiff.

The declaration stated that the plaintiff was lawfully employed doing repairs to an engine-shed of the defendants, and that the defendants, by their servants, so negligently, improperly, and unskilfully managed an engine of the defendants, which was being turned on a turn-table close to the shed, that the steam-engine was driven against and struck a ladder, by which the scaffolding on which the plaintiff was standing was in part supported, and caused the scaffolding to fall, and the plaintiff to be thrown to the ground, whereby, &c.

Plea, not guilty.

On the trial, before WILDE, B., at the Glamorganshire Summer Assizes, 1863, it appeared that the plaintiff was a carpenter, and in December, 1862, was in the employment of the railway company at weekly wages. The duties of the carpenters in the employment of the company are to perform all carpenter's work they may be directed to do by the inspector of the line for the general purposes of the company. On the 23rd of December the plaintiff was employed by the defendants to do certain carpenter's work on the roof of an engine-shed situate at the Neath Station of the defendants' railway, for which purpose it was necessary that a scaffold should be erected near a turn-table, on and by means of which the defendants' engines and carriages were moved and turned by their porters and servants. The scaffold was erected in the proper position to enable the plaintiff to do the work, and was in all respects proper and sufficient as regards materials and construction for the purposes for which it was required. The plaintiff had mounted the scaffold, and was standing on it doing his work as a carpenter on the roof of the shed, when some porters employed by the defendants, who were engaged in shifting a locomotive engine by means of the turn-table, allowed the engine to project so far beyond the table that, in turning the engine, the end of it struck against and displaced a ladder which was one of the supports of the scaffold. The scaffold gave way, and the plaintiff was thrown from it to the ground, and received severe bodily injuries. The occurrence was caused solely by the negligence and carelessness of the defendants' servants in the management of the engine and turn-table, and was not in any way attributable to contributory negligence on the part of the plaintiff or of any other persons.

It was objected on the part of the defendants that the plaintiff and the persons through whose negligence the injury was caused being alike the servants of the company, and the injury having occurred when they were severally engaged in doing the company's work, the defendants were not liable. On behalf of the plaintiff it was contended that he and the servants who caused the injury were engaged in different operations and distinct departments of work, and that there was no such community of employment between him and those servants as to exempt the defendants from liability for the negligent act which caused the injury.

The learned judge nonsuited the plaintiff, giving him leave to move to enter a verdict for the agreed sum of £250.

A rule having been afterwards obtained accordingly, on the ground that there was no such common employment as to exempt the defendants from liability, cause was shown in Easter Term, 1864, and after time taken to consider, the Court of Queen's Bench discharged the rule.[1]

Macnamara (*G. B. Hughes* with him), for the appellant, the plaintiff.[2]

H. S. Giffard, Q. C. (*Langon* with him), was not heard for the defendants.

Erle, C. J. I am of opinion that the judgment should be affirmed. The plaintiff was employed by the railway company to do carpenter's work, and he was so employed on the line of railway, and the wrongdoers were the porters also in the employment of the company, who, in shifting a steam engine on a turn-table close to the shed on which the plaintiff was working, managed the business so negligently that the engine struck against the ladder which partly supported the plaintiff's scaffolding, and threw the plaintiff violently to the ground. The plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for traffic. On a suggestion put by my brother Pigott, Mr. Macnamara was driven to an answer, which (if it did not admit that it was the same thing) showed that he had difficulty in establishing any distinction whether the plaintiff were working close by, or whether he were employed on the turn-table itself. I think it can make no difference; and the rule which exempts the master from liability to a servant for injury caused by the negligence of a fellow-servant applies. The principle on which this rule was established, as applicable to the present case, is very clearly put by Blackburn, J., in the judgment to which Mellor, J. agreed in the court below:[3] "There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule." The cases on this subject are extremely numerous, and have been closely examined, both here and in the court below, and I could not make the matter clearer by going through them. It is sufficient to say that I entirely agree with the judgment of the court below, that the facts of the case bring it within the rule exempting the master from liability.

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[1] See the case reported in the court below, 33 L. J. (Q. B.) 260; 5 B. & S. 570. — Rep.

[2] In the course of this argument Pigott, B., asked, "Would it have made any difference if the plaintiff had been engaged at work on the turn-table?" Counsel answered, "Possibly it might not." In the course of the same argument Pollock, C. B., said, "It may be observed that the Chief Justice's judgment in the court below seems to make no distinction between a carpenter regularly employed to do work on the railway, and one employed only for a casual job." — Ed.

[3] See 5 B. & S. 580; 33 L. J. (Q. B.) 265. — Rep.

POLLOCK, C. B. I only wish to add a single sentence. It appears to me that we should be letting in a flood of litigation, were we to decide the present case in favor of the plaintiff. For, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employees in every large establishment into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master; yet it might be said, with truth, that no two had a common immediate object. This shows that we must not over refine, but look at the common object, and not at the common immediate object.

WILLES, BYLES, and KEATING, JJ., and BRAMWELL, CHANNELL, and PIGOTT, BB., concurred. *Judgment affirmed.*

RYAN *v.* THE CHICAGO AND NORTHWESTERN RAILWAY CO.

SUPREME COURT OF ILLINOIS. 1871.

[60 *Ill.* 171.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH GARY, Judge, presiding.

Messrs. Fuller & Smith, for the appellant.

Mr. B. C. Cook, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court: —

This was an action on the case, brought by appellant, in the Superior Court of Chicago, against appellees, to recover for injuries received by being struck by one of the engines of the company. Appellant was employed by the company as a common laborer at their carpenter shop in Chicago. And on the 22d day of February, 1868, after the six-o'clock whistle had sounded to release the hands from labor, appellant started for his home. He, in going there, crossed appellees' railway tracks, and in doing so was struck by one of their engines and severely injured. Appellant testifies that on approaching the track, he looked along in both directions, and no engine was in sight, and the engine which struck him came upon him from the opposite side of the tank-house on a curve on the main track; that no bell was ringing or whistle sounding, and the engine ran at an unusual rate of speed.

On the other side, witnesses swore that the bell was ringing, the engine was moving at a rate of speed not exceeding five miles an hour, and that the track was straight, and the engine could be seen at least two hundred feet in the direction from which it came. Each party prepared and asked instructions, which the court refused to give, but, on his own motion, gave this: —

"If the plaintiff was in the service of defendants, and his route to and from his work was over the tracks of the defendants' railway, then the law is established in this State that he took upon himself the risk of being hurt by passing engines on such tracks, and the defendants are not liable to him for any injury that he received from such an engine, whether it was run negligently or not, and the verdict should be for the defendants."

The giving of which is assigned for error.

This instruction took from the jury all question of negligence, and only left to their consideration the fact whether or not he was in the employment of the railroad company.

In Chicago & Alton Railroad Co. *v.* Keefe, 47 Ill. 110, we said, "That the duties of an employee of a railway company may be so entirely distinct from all occupation upon its trains as to leave him at liberty to pursue the same legal remedies for injuries received while a passenger, may very probably be true. If, for example, a bookkeeper in a railway office should be injured, while travelling as a passenger, through the carelessness of the engineer, the reasons upon which the rule above referred to are founded, might well be held to have no application. But the employment of the person injured cannot be considered distinct, in any sense, leading to this result, *if of a character* to make him a part of the force employed upon the train. If his duties attach him to the train as a part of its personal equipment, then his branch of service is not independent, in any such sense, as to exempt him from the general rule in regard to co-employees, in case he should be injured through the carelessness of the engineer. . . . In the case before us, the plaintiff was a part of the working force of a construction train, and had been for some weeks passing with it to and fro, and, although his duties were distinct from those of the engineer, yet they were fellow-servants of the company, and both engaged *in the same general duty*, to wit: the operating a construction train, though each worked in his own department."

In the case of the Chicago & Northwestern Railroad Co. *v.* Swett, 45 Ill. 197, we held that the doctrine that an action would not lie by a servant against a railroad company for an injury sustained through the default of another servant, applies only to cases where the injury complained of occurs without the fault of the company, either in the act which caused the injury or the employment of the person who caused it. Again, in the case of The Schooner Norway *v.* Jensen, 52 Ill. 373, it was held that a master is responsible to his servant for an injury received from defects in the structure or machinery about which his services are rendered, which the master knew or should have known. And the Illinois Central Railroad Co. *v.* Welch, 52 Ill. 183, announces the same rule. In this last case it was said that a person engaging in such a service assumes the ordinary perils of railroad life, and the special dangers peculiar to the condition of the road, so far as he is aware of their existence, and his exposure to them would be his voluntary act.

In the case of Illinois Central Railroad Co. *v.* Jewell, 46 Ill. 99, it was said, where the engine driver was a reckless and wild runner, which was known to the company, that the company were liable for injuries resulting therefrom to a fellow-servant. From these decisions it will be seen that the rule that a servant cannot recover against a railroad company, for injuries, has its exceptions. And those exceptions depend upon the negligence of the master in furnishing insufficient structures or machinery with which the servant is required to perform his duties, or in employing incompetent servants with whom the servant is associated in the discharge of his duties. Or where a servant is employed in a different department of the general service from that of those whose negligence produced the injury, as was said in the case of The Chicago & Alton Railroad Co. *v.* Keefe, *supra.* And the same principle is announced in the case of Lalor *v.* Chicago, Burlington, & Quincy Railroad Co., 52 Ill. 401. Thus, it is seen, the rule is not inflexible and without exception.

No employee of the road could have been farther removed from those who produced the injury than appellant. He was in no wise connected with those who had control of the engine. He was engaged in a different department of the business of the company; as wholly disconnected with the business of operating the engines and trains as was any mechanic or laborer in the city. It is true he was employed and paid by the same company, but otherwise a stranger to the engineers' department. The reason of the rule, when it is applicable, is, that each servant engaged in the same department of business, for the safety of all, shall be interested in securing a faithful and prudent discharge of duty by his fellow-servants, or that they shall report to the master any delinquencies of those engaged with them in the performance of duty. But the reason does not, nor can it, apply where one servant is employed in a separate and disconnected branch of the business from that of another servant. A person employed in the carpenter shop cannot be required to know of the negligence of those entrusted with running trains or handling engines on the road. And hence the reason of the rule fails.

The employment of the engine driver, and appellant as a laborer in the carpenter shop, is so dissimilar and separate from each other, that appellant should not be held responsible for the negligence of the former. In such a case, the company should be held liable for gross negligence of the servant who causes the injury. But the instruction in this case took that question entirely from the jury, and should not have been given. It entirely ignored the exception to the rule.

There was evidence which was conflicting on the question of gross negligence, and it was the province of the jury, and not of the court, to pass upon it and say which position should be regarded.

For this error, the judgment of the court below must be reversed, and the cause remanded. *Judgment reversed.*[1]

EDMUND GANNON *v.* HOUSATONIC RAILROAD COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[112 *Mass.* 234.]

TORT. Trial in the Superior Court before ALLEN, J., who after a verdict for the plaintiff allowed the defendant's bill of exceptions as follows: —

"This is an action brought by the plaintiff to recover damages for the loss of the services of his wife, for the loss of her society, and for money paid for medical attendance upon her, in consequence of an injury which she sustained while a passenger on the defendant's cars, by the running of the cars from the track by reason of a switch which was misplaced by the negligence of the employee of the company, who had it in charge.

"It was in evidence that the plaintiff was at the time of the injury to his wife an employee and servant of the defendant company, in the capacity of a laborer on the track of the road, and so actually employed at the time of the injury to his wife. The defendant requested the court to rule as follows: 'If the wife of the plaintiff was injured in consequence of the cars running off the track by reason of the switch being misplaced through the negligence of the employee and servant of the company in charge of the switch, the plaintiff being at the same time an employee and servant of the company, and in its actual employment as a laborer on the track at the time of said injury, he can recover no damages for the loss of the society and services of his wife, nor for any damages sustained by him growing out of and consequent upon the injury to his wife.'

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[1] *Acc.:* Chicago & Northwestern Railroad Co. *v.* Moranda, 93 Ill. 302 (1879); Chicago & Alton Railroad Co. *v.* O'Brien, 155 Ill. 630 (1895). But see Waller *v.* South-Eastern Ry. Co., 2 H. & C 102 (1863). — ED.

"The Court declined to rule as requested, and instructed the jury that the plaintiff in such a case as this stood as if not an employee of the road, and might maintain the action."

M. Wilcox, for the defendant.

A. J. Waterman, for the plaintiff.

COLT, J. We are referred to no case where the rule which exempts the master from liability for injuries received through the negligence of a fellow-servant has been held to defeat the plaintiff's right to recover consequential damages for an injury to his wife. In the opinion of the court the rule is not to be so extended. The implied contract on the part of the servant by which he assumes the risk of the negligence of others, has reference to those direct injuries to which he is exposed in the course of his employment. Those injuries which are incident to the nature of his employment, he is presumed to have contemplated, and with reference to his exposure to them to have fixed the compensation agreed on. In other respects his relations to his employer remain unchanged. He may insist on the performance of all other duties, whether they are such as are imposed by him or such as arise from independent contracts express or implied.

It is said that the general rule which exempts the master from liability to his servant, has a tendency to insure the safety of the public by increasing his care and fidelity, and that the public policy of the rule is equally applicable here. But if it be conceded that this is the true foundation of the rule, its bearing is too remote to influence the result to which we come in this case.

The plaintiff's wife was a passenger, and the defendant corporation was bound to discharge the duties which as a passenger carrier it had assumed towards her. The injury she received was occasioned by no fault of the plaintiff, who was employed upon the track, for all that appears at a remote point on the road, and the injury was from a misplaced switch.

The husband has a right to the services of his wife, and is bound to sustain her in sickness and in health. Any injury inflicted on her which diminishes the value of this right, or increases the burden of this duty, is a pecuniary loss to him. It is indemnity for this loss which he here claims. And the fact that he was at the time of the wife's injury in the employment of the corporation cannot be permitted to defeat his claim. *Exceptions overruled.*

PACKET COMPANY *v.* McCUE.

SUPREME COURT OF THE UNITED STATES. 1873.

[17 *Wall.* 508.]

ERROR to the Circuit Court for the Eastern District of Wisconsin. The case was thus: —

Patrick McCue was a common laboring man, living in Prairie du Chien, Wisconsin, and employed in the railroad warehouse in that place. On the evening of the 11th of July, 1868, the steamer War Eagle, owned by the Northwestern Packet Company, arrived at the landing in Prairie du Chien for the purpose of taking freight from the warehouse. Being short of hands, the mate of the boat went to the warehouse, and there employed McCue and four or five other persons to assist in carrying freight from the warehouse and putting it on board the boat. This employment continued about two hours and a half, at the end of which time McCue and the rest were told to go to "the office" upon the boat (the packet company having no office on shore for the purpose of making such payments) and receive their pay.

They proceeded there accordingly, were paid, and then started to go ashore. As McCue was going ashore, the men on board the boat pulled in the gangway plank while he was on it. He was thus thrown down against the dock and injured, and a few days afterwards died from the injury thus received.

Hereupon Mary McCue, his widow and administratrix, brought suit in the court below, under a statute of Wisconsin, to recover damages for the injuries which he had sustained.

The narr. alleged that McCue had never before been, either generally or at intervals, a servant of the packet company, and that at the time when the injuries occurred and the cause of action accrued he was not so; but that contrariwise he had been employed by the company to work for it on this occasion alone, and "for a short space of time, to wit, for the space of one hour;" that this time had elapsed: that the work had been done, and that McCue had been paid for it, and that after all this, and after the relation of master and servant had thus ceased, and McCue was attempting to get off the boat, and using due care, &c., "the defendant and its agents then and there," regardless of their duty, recklessly and without any reasonable cause, pulled in and from under his feet, &c., the gangway plank, &c., by which he fell and was injured, &c.

The defendant pleaded not guilty.

There was no doubt from the evidence that McCue was without fault, and that the injuries which caused his death were owing to the reckless carelessness of the servants of the packet company.

On the trial it appeared that McCue had before been occasionally employed by the packet company in the same way in which he had now been; but there did not seem to be any evidence that he was in their general employment; and this was the first time in the year 1868 in which he had been employed in this sort of work by the company.

The counsel of the packet company insisted, as the hiring was in the warehouse, as McCue had proceeded thence, as the freight was to be carried thence, and as the packet company had no office on shore or anywhere else than the office upon the boat, where McCue could be paid, that his relationship to his employers had not terminated by the simple fact of his getting his money at the office on the boat, but, on the contrary, continued until he got back to the warehouse, or at least and rather until he had got off the boat; that until such latter time he was the servant of the company, and that the injuries done to him having been done to him by his fellow-servants of the company he could not recover from their common master, the packet company.

The counsel of the company therefore requested the court to charge according to this view, and as matter of law upon the conceded facts that the plaintiff could not recover.

The court declined so to charge, and charged thus: —

"McCue had been occasionally employed by the defendants' boats in the way in which he was in this instance; but there does not seem to be any evidence to show that he was in their general employment, and in this particular year it would appear that this was the first time he had been employed in this way, so that he was employed for a special purpose, which being accomplished, the agreement or contract ceased.

"The contract was made in the warehouse, the freight was there, the execution of the contract began there, and as soon as the last portion of the freight was carried on board of the boat, the contract terminated, unless, indeed, it continued because he was to be paid off and had the right to go ashore from the boat, and to be provided with the proper means of going ashore, so that in one sense it is true, I suppose, that the contract began on shore and was terminated by the act of going on shore by McCue.

["At the same time it may also be said that as soon as he did the last work he was required to do, and was paid off, that he was after that his own master with respect to the contract made between them; that then it was optional with him to do just as he chose.

"Therefore it will be left to the jury to say whether there was the relation of servant and principal or master, as between the deceased McCue and the defendant, at the time of the injury. And I am not now prepared to say, even if it were true that the relation of servant and master did subsist, that then the action could not be maintained, and I would like to have you find, gentlemen (inasmuch as it may be a material point, and of service hereafter), whether, as a matter of fact, there was or not a termination of the employment between the company and the deceased prior to or at the time of the injury. The counsel for the defendant insists that this is a question of law under the conceded facts; that, inasmuch as soon as McCue was paid off he immediately proceeded to go on shore and was in the act of going on shore, that constituted a part of the service. But as the court thinks, for the reason that as soon as paid off, McCue was his own master, and had the entire control and disposition of himself, to remain on board or go ashore, just as he pleased, in one aspect it may be said that the service was terminated. That question, however, the court leaves to the jury, and asks them to find what the fact is, from the evidence, on this point.

"Then, gentlemen, leaving the questions of fact to the jury, it will be for the jury to say under the evidence whether the plaintiff has made out his case as stated in the declaration. If the service was terminated and this injury was the result of the negligence of the servants of the defendant, then the plaintiff may recover."]

The jury having found a verdict of $2,800 for the plaintiff, and judgment having gone accordingly, the packet company brought the case here on exceptions to the refusal to charge as requested, and to those parts of the charge within brackets, as given.

Mr. J. P. C. Cottrill, for the plaintiff in error (a brief of *Mr. J. W. Cary* being filed on the same side).

Messrs. Matthew Hale Carpenter and *G. W. Lakin*, *contra.*

Mr. Justice DAVIS delivered the opinion of the court.

It is insisted on the part of the plaintiff in error that a master is not responsible to a servant for injuries caused by the negligence or misconduct of a fellow-servant engaged in the same general business. Whether this general proposition be true or not, it is not necessary to determine in the state of this record. It is conceded, if the employment of McCue by the company terminated before the injury complained of was suffered, that the company is liable, and this the jury have found to be the fact.

But it is said it was the province of the court, and not the jury, to determine the point of time at which the service was ended; that as the facts were undisputed, it was a question of law, and the court should have told the jury the relation of master and servant subsisted when the accident happened.

We do not think so. One of the theories on which the suit was prosecuted was that McCue's special employment had ceased when he was injured. This theory was resisted by the defence, and the court, not taking upon itself to determine as an absolute proposition when the employment terminated, left it to the jury to find how the fact was. This ruling, in our opinion, was correct. It was for the jury to say, from the nature of the employment, the manner of engaging the hands, the usual mode of transacting such a business, and the other circumstances of the case, whether the service had or had not ceased at the time of the accident. The point was submitted fairly to the jury, with no more comments than the evidence justified. It was argued by the plaintiff in error that the employment of necessity terminated on the land, because it was there McCue was engaged to do the work, and he had the right to be provided with the proper means of reaching it from the boat. On the contrary, the defendant in error contended the special service ceased when McCue had finished his work and was paid off; that after this he was not subject to the control or direction of the officers of the boat, but at liberty to stay on the boat or go off as he pleased. The jury took this latter view of the relation of the parties, and we cannot say that they did not decide correctly. At any rate, their decision on a question of fact is not subject to review in this court. The defence at the best was a narrow one, and in our opinion more technical than just. *Judgment affirmed.*

SMITH, EXECUTRIX OF J. G. SMITH, *v.* STEELE AND OTHERS.

QUEEN'S BENCH. 1875.

[*L. R.* 10 *Q. B.* 125.]

AT the trial before LUSH, J., at the Sussex spring assizes, 1874, the facts stated in the judgment of the court were proved, and the jury found a verdict for the plaintiff, with leave to move to enter a verdict for the defendants, or a nonsuit.[1]

BLACKBURN, J. This was an action under Lord Campbell's Act to recover damages in respect of the death of the plaintiff's testator, who was her husband.

At the trial before my Brother LUSH the following facts were proved: The defendants were the owners of a vessel lying in dock, about to proceed on a voyage in which the employment of a pilot was compulsory. The testator was a pilot who was engaged for that voyage. He (in compliance with what it was proved was always the practice of pilots) went on board the vessel in dock to give directions to the crew when getting the vessel out of dock. Whilst doing so a boat, which had been negligently slung, fell on him and killed him. The defendants did not personally interfere in the matter. From the way the case comes before us on a point reserved, we must take it as a fact that the accident was occasioned by the negligence of the servants of the defendants in slinging the boat, without contributory negligence on the part of the deceased. Leave was reserved to enter the verdict for the defendants or a nonsuit on the ground that the defendants were not responsible for the negligence of their servants under the circumstances proved in evidence. A rule *nisi* was obtained accordingly, against which cause was shown in this term before my LORD CHIEF JUSTICE, my Brothers MELLOR, LUSH, and myself, when the case was very ably argued by *Mr. Willis* for the plaintiff, and by *Mr. Thesiger* and *Mr. Wood Hill* in support of the rule, and the court took time to consider its judgment.

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[1] The reporter's statement of the pleadings has been omitted. — ED.

The law is, to a certain extent, determined by the case of Indermaur *v.* Dames.[1] There is an obligation on the part of the occupier of property, whether fixed or movable, to those who, at his invitation, express or implied, come on that property, to take, by himself and servants, reasonable care that the person so coming shall not be exposed to unusual danger. And that obligation extends to the workmen sent by a tradesman to repair part of the machinery. Mr. Justice Willes, in delivering judgment in that case, after referring to the undisputed law that there was such an obligation on the part of a shopkeeper to his customer, and that there was no such obligation to a servant, proceeds to give the reason of the judgment in these terms: "The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation express or implied."[2] . . .

In the present case the accident happened before the actual commencement of the voyage; but it is clear that the deceased was on board only because he was going on that voyage as a pilot, and under the same terms as to risk as if the voyage had begun. We think, therefore, that the question in the present case is reduced to this, whether there is between the owners of a ship and the pilot whom they are compelled to employ an implied contract that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants. Indermaur *v.* Dames decides that there is no such implied contract between the owner of machinery and those who are sent by their masters to repair it. And we think that there is no such implied contract in the case of a pilot. The law as to pilots is now regulated by the Merchant Shipping Acts. The pilot is, by 17 & 18 Vict. c. 104, s. 365, subject to a penalty if he refuses to take charge of the ship. The master is, by s. 353, bound under a penalty to employ the pilot. The rate of remuneration is, by s. 358, neither to be more nor less than the fixed rate, though both parties should agree. And by s. 388 the owner is not to be liable for the pilot as his servant. By a subsequent enactment, 35 & 36 Vict. c. 73, s. 9, power is given by by-laws to modify s. 358 so far as to allow any pilot or class of pilots any rate less than the rate for the time being demandable by law; but no power is given to enable a pilot to demand more. He cannot, therefore, make any special bargain to receive larger pay in consideration of his taking this risk upon him. An ordinary servant has, as Lord Cairns points out (at least theoretically), the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business, or as an alternative to be responsible for the negligence of those he employs. The pilot has no such choice; he must conduct the ship on the terms fixed by the statutes which regulate pilotage; and we can find nothing in those statutes to justify the conclusion that the pilot is to take upon himself the risk.

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[1] L. R. 1 C. P. 274; affirmed in error, L. R. 2 C. P. 311. — REP.

[2] Here were cited Morgan *v.* Vale of Neath Ry. Co., *ante*, p. 798, and Wilson *v.* Merry, *post*, p. 842. — ED.

We therefore think that the rule should be discharged.

Rule discharged.[1]

LOVELL *v.* HOWELL.

COMMON PLEAS DIVISION. 1876.

[1 *C. P. D.* 161.]

THE declaration stated that the defendant by his servants so negligently hoisted up certain sacks from a wagon into the defendant's warehouse that one of the sacks fell upon the plaintiff, whereby he was thrown down and hurt.

Second plea. That the injury was committed by servants of the defendant, and solely by their negligence, and not by the negligence of the defendant personally, and without the authority, knowledge, sanction, or consent of the defendant; that such servants were reasonably fit and competent to be employed; that the plaintiff was also the servant of the defendant and was then acting with the first-mentioned servants in one common employment; and that the defendant was not personally guilty of any negligence. Issue thereon.

The cause was tried before LINDLEY, J., at the sittings in London after Trinity Term, 1875. The facts were as follows: The plaintiff is a licensed waterman and lighterman. The defendant is a corn-merchant, miller, warehouseman, and wharfinger, carrying on business at Sufferance Wharf and Providence Wharf, College Street, Belvedere Road, Lambeth. He is also the owner of several barges. The plaintiff had been for about three months in the employ of the defendant when the accident complained of took place; his duty being to attend to the mooring and unmooring of the barges when they were brought to the premises to be laden or unladen, and which usually occupied him for about an hour and a half before and after each high tide, and for which he received wages of 24*s.* per week.

About 6 o'clock in the evening of the 21st of October, 1874, when it was quite dark, the plaintiff was on the barges preparing for his night's duty, which would not commence for some hours, when he was told that the defendant's manager, Barker, wanted him at the office, which was in the street at the other side of the warehouse, and to which he was in the habit of going to receive orders. There were two ways of going to the office from the river side, viz., by passing by means of a wherry to stairs at the river end of College Street, or by stepping from the barges into a door-way, and thence through the warehouse to the street; the latter being the way which the plaintiff usually adopted. In passing from the warehouse into the street on the occasion in question, the plaintiff was knocked down by a sack of peas which were being hoisted from a wagon by means of a crane to one of the upper floors of the warehouse, the rope by which the sack was being hauled up having through the carelessness of the defendant's men who were performing the work been left too slack.

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[1] See Bowcher *v.* Noidstrom, 1 Taunt. 568 (1809); General Steam Navigation Co. *v.* British and Colonial Steam Navigation Co., L. R. 4 Ex. 238 (Ex. Ch. 1869). — ED.

Upon this state of facts it was insisted on the part of the defendant, that, inasmuch as the injury complained of was the result of carelessness on the part of persons engaged with the plaintiff in one common employment, the master was not responsible.

The learned judge, yielding to the objection, directed a verdict to be entered for the defendant, with leave to the plaintiff to move to enter a verdict for him for £150, agreed damages, if the court should be of opinion that the objection was untenable.

J. Brown, Q. C., and *W. G. Harrison*, showed cause against a motion for judgment pursuant to the leave reserved.

Harris, in support of the rule.

BRETT, J. We must take the facts which were proved in this case to be these: The plaintiff was in the service of the defendant, who carries on the conjoined business of a corn-merchant, miller, warehouseman, and wharfinger, upon premises abutting on one side on the river Thames, but which premises did not constitute a wharf in the ordinary sense. The plaintiff's duty was for certain wages to attend for about an hour and a half before and an hour an a half after high-water at each tide, for the purpose of mooring and unmooring the barges which came to the warehouse to be loaded or unloaded. I cannot gather from the evidence that he had anything to do with assisting in the general business of the warehouse, or even with the loading or unloading of the barges. But it seems to me that it was proved that the going from the barges to the office for orders was an habitual part of his service, and that the only way to get there (unless by water) was to go into and through the warehouse and thence to the public street through a door over which was a crane by means of which sacks of flour and grain were loaded and unloaded into and from wagons. It does not appear whether or not he was bound by the terms of his original hiring to go to the office for orders; it is enough to say that it had become his usual course to go there by stepping from the barges and passing through the warehouse. That being so, and an accident having happened to him by the negligence of other servants in his master's employ, whilst he was so passing through the warehouse to the office, the question is whether he can recover damages for it against his master. Now, I decline to say, because I feel a difficulty in understanding or defining it, what is the precise principle on which the immunity of the master in these cases rests. But I am bound by law and by the authority of decided cases to say that such immunity does exist.

If, under circumstances substantially similar to those of the present case, the courts have held that the plaintiff cannot recover, it is impossible for me to break from those decisions. Inasmuch, therefore, as I am unable to distinguish from this the cases of Morgan *v.* Vale of Neath Ry. Co., L. R. 1 Q. B. 149, and Tunney *v.* Midland Ry. Co., L. R. 1 C. P. 291, I feel obliged, however much I regret it, to decide against the plaintiff upon the present occasion.

ARCHIBALD, J. I must confess I do not feel so much difficulty as my Brother BRETT does in deducing from the authorities the principle upon which the immunity of the master from the consequences of the negligent acts of his servants in these cases rests. I think it may be expressed in this way: When a man enters into the service of a master, he tacitly agrees to take upon himself to bear all ordinary risks which are incident to his employment, and, amongst others, the possibility of injury happening to him from the negligent acts of his fellow-servants or fellow-workmen. The question is, whether the injury to the plaintiff in this case did not in some sense arise from one of those ordinary risks of the service he was engaged in which must or ought to have been in his contemplation when he entered into it. It appears upon the evidence, that, though it was no part of the plaintiff's duty to assist in the general work of the warehouse, as, for example, in the raising or lowering sacks to or from the upper floors, but that his duty was confined to the care and management of the craft coming to the premises, yet it seems to have been also a part of his duty to go to the office for orders, and that in the course of this duty he would have to pass through the warehouse and out into the street by the door at which the process of lifting the sacks from the wagon was carried on, where he would necessarily have to encounter the risk of injury from negligence of others in the same employ, — one of the contemplated risks of the service. This seems to me to bring the present case within the principle laid down in Priestley *v.* Fowler, 3 M. & W. 1, and the other cases to which our attention has been drawn, and I think we shall do much mischief by over-refining upon it. I entirely agree in the remarks made by Pollock, C. B., in Morgan *v.* Vale of Neath Ry. Co.[1] . . . I think the evidence here shows that this plaintiff brought himself as clearly within one of the contemplated risks of his service as the plaintiff did in that case. For these reasons, I think that the verdict for the defendant ought to stand.

LINDLEY, J. I am of the same opinion. Looking at the nature of the plaintiff's employment, as stated by himself, it seems that that included the going through the warehouse and out by the door over which the sacks were being hoisted. It is true there was another way of going from the barges to the office, viz., by water; but that was not the way the plaintiff was in the habit of going. Having regard to the rule laid down by numerous authorities, I think the risk in question was one to which the plaintiff tacitly agreed to expose himself when he entered the defendant's service. The only doubt I entertained at the trial was whether the plaintiff was at the time of the accident in the employ of the defendant at all. His duty did not call him to the premises at that time. But he was in the habit of going occasionally to see what he would have to do in the course of the night, and to prepare for it. And, being there, he was called by the manager to the office. The accident therefore happened whilst he was employed about his master's business. *Rule discharged.*

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[1] Here was quoted a passage from Morgan *v.* Vale of Neath Ry. Co., *ante*, p. 798. — ED.

SWAINSON *v.* THE NORTH-EASTERN RAILWAY COMPANY.

EXCHEQUER DIVISION. 1877.

COURT OF APPEAL. 1878.

[3 *Ex. D.* 341.]

THE plaintiff sued to recover damages for the death of her husband, who was killed by the negligence of the driver of one of the defendants' engines.

Waddy, Q. C., for the plaintiff.

C. Russell, Q. C., and *C. Crompton*, for the defendants.

Cur. adv. vult.

The judgment of the court (POLLOCK and HUDDLESTON, BB.) was delivered by

POLLOCK, B.[1] Adjoining Wellington Street, Leeds, are two railway stations, the one belonging to the Great Northern Railway Company, and the other to the North-Eastern Railway Company. These abut upon each other, and are approached from the south by lines of rails, two of which belong to each of these companies, the entrance to or exit from the station being governed by signals and points, which are worked by signalmen whose duty is common to both stations.

The deceased man, Swainson, was one of these signalmen, and he had acted for four years in the same position. He was engaged and paid by the Great Northern Railway Company, and wore their uniform, and was not made aware at the time of his appointment that he was a joint servant, but in fact his duty was to attend to the North-Eastern trains as well as the Great Northern as to points and signals, when any engines or trucks had to be transferred from the rails of one company to those of the other; as between the two companies, Swainson was one of what was called the "joint station staff," all of whom were engaged and paid by the Great Northern Railway Company; the cost of their salaries was treated as a joint charge, and borne equally by the two companies, and when Swainson received his wages at the end of each week, he signed a pay sheet, which was headed, "Great Northern Railway Traffic Department Pay Bill," "Joint Station Staff."

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[1] After stating the nature of the action. — ED.

On the 7th of May, 1875, Swainson, in the discharge of his duty, was standing on the six-foot space between the Great Northern arrival and the North-Eastern departure lines. A North-Eastern engine came towards the station on the Great Northern arrival rails with some Great Northern coal trucks, and Swainson signalled to the driver to go on to the North-Eastern departure line. The driver obeyed, and went on to that line until he passed some points, when he reversed his engine and backed out again, having a van before the engine, which obscured his view of the line. Swainson was then looking in the other direction, watching a train coming from the south, and failing to observe the engine and van coming out, he was struck by the step of the van, knocked down, and killed.

Evidence was given on the part of the plaintiff that the engine-driver had not turned on his whistle when he backed out, and also that it was unsafe to back out with the van before the engine.

At the close of the case my Brother QUAIN left two questions to the jury: 1st, was there negligence on the part of the driver of the defendants' engine? and, 2d, was there contributory negligence on the part of the deceased man, Swainson?

The jury answered the first of these questions in the affirmative, and the second in the negative. We see no grounds for disturbing this verdict as being against the weight of evidence upon either question. The counsel for the defendants raised, however, a further point, viz., that the driver of the engine and Swainson were engaged in a common employment, and that the risk which resulted in his death was incidental to that employment, the consequences of which he had undertaken. The learned judge ruled against the defendants upon this point, but reserved leave to move, the court having power to draw inferences of fact.

The case was fully and ably argued before us, and upon the facts and finding of the jury it is clear that an action would well lie against the driver of the engine, by whose negligent act the death of Swainson was occasioned. Whether the relation of Swainson to the defendants was such that this action can be maintained against the defendants is a question the solution of which is more difficult, and requires a careful consideration both of the facts proved and of the law properly applicable to them.

It will be well, in the first place, to see what is the principle affecting this case, which can be gathered from authority. Up to a certain point this is clear: wherever the person injured and he by whose negligent act the injury is occasioned are engaged in a common employment in the service of the same master, no action will lie against the master if he be innocent of any personal negligence. The negligence of a fellow-servant is taken to be one of the risks which a servant, as between himself and his master, undertakes when he enters into the service.[1] . . .

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[1] Citing Priestley *v.* Fowler, *ante*, p. 773; Hutchinson *v.* The York, Newcastle, & Berwick Ry. Co., 5 Ex. 343; Wiggett *v.* Fox, 11 Ex. 832; Wilson *v.* Merry, *post*,

Dicta are to be found, however, in some of the cases, which tend to suggest that the principle ought to be applied to cases in which the element of common service may be wanting. There is great difficulty in so holding, because when it is said that the servant undertakes the risk of the negligent acts of his fellow-servant, the question arises, "Undertakes to whom?" and the proposition must, we think, be limited by confining the undertaking to the master of the servant who is supposed to give it, and that it cannot reasonably be extended to strangers, or those who, though having some interest in a joint operation, are not in some sort the master of the person injured. It is not necessary, in the view which we take of this case, to pursue this further.[1] . . .

The deceased man, Swainson, though engaged by the Great Northern Company and wearing their uniform, was one of a joint staff, and for four years had received his weekly wages as such; he was therefore practically in the service of two companies, who *quoad* his service and employment were partners. But further than this, as was said by Lord Colonsay in Wilson *v.* Merry, L. R. 1 H. L. Sc. 345, "we must look to the functions the party discharges, and his position in the organization of the force employed, and of which he forms a constituent part." Referring, then, to the duties of Swainson, and the very acts on which he was engaged at the time of his death, the evidence shows that they were not performed as servant of, or for the benefit of, one company only, but were essentially necessary for the common business of both, namely, the interchange of the traffic between the two stations.

The case, therefore, falls within, and is governed by, the principle that where there is common employment in common service, the master is not liable, and our decision must be for the defendants, for whom judgment must be entered. *Judgment for the defendants.*

The plaintiff appealed.

Benjamin, Q. C., and *Willis*, Q. C. (*T. L. Wilkinson* with them), for the plaintiff.

C. Russell, Q. C., and *C. Crompton*, for the defendants.

Willis, Q. C., replied. *Cur. adv. vult.*

BRAMWELL, L. J. I think that the reasoning of the judgment in the Exchequer Division shows that this appeal must be allowed; and I am inclined to surmise that the facts were misconceived. The principle governing the liability of a master may be stated in the following manner: he is liable for an injury done to a stranger by his servant acting within the scope of the latter's authority, because the stranger has had no hand in the choice of the servant. This seems a sound rule of law;

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p. 842; Morgan *v.* Vale of Neath Ry. Co., *ante*, p. 798; Lovell *v.* Howell, *ante*, p. 810. — ED.

[1] Here were stated Voss *v.* Lancashire & Yorkshire Ry. Co., 2 H. & N. 728; and Warburton *v.* Great Western Ry. Co., L. R. 2 Ex. 30. — ED.

but where a person is injured by the negligence of a fellow-servant, a different rule prevails. This latter rule is not limited to the case of servants; it extends to guests, who cannot sue the master of the house for an injury done by his servants. We must consider what obligations a servant takes upon himself; it is sometimes said that he contracts to take upon himself the risks of his service. But the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow-servant. The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury; and this, I think, was the view of the law adopted in the Exchequer Division. But I differ from them in the view taken of the facts. The defendants were not in any manner the masters of Swainson; it is true that he was one of the joint station staff, and he was bound to discharge some duties for their benefit, but they could give him orders only by permission of the Great Northern Railway Company. Again, could the defendants have sustained an action against Swainson for incompetence in the discharge of his duties whereby they suffered damage? It is plain they could not. It may seem strange that if there had been a partnership between the defendants and the Great Northern Railway Company as to the business carried on at the joint station, neither company would have been liable for the injury done to their servants; and it may be argued that the only difference between a partnership and the mode of conducting the business in the present case is one of form. But the answer is that in the case of a partnership Swainson would have been entitled to a remedy against the defendants in the event of the non-payment of his wages; and though in point of fact this may not have been a great advantage, yet the principle remains the same. It may be said that in working the signals for the defendants' engine he was a volunteer working for both companies, and was in a common employment with the driver; but I do not think that that contention would be well-founded. It would resemble the case where a carman receiving cotton was injured by the negligence of the servants of the brokers employed in delivering it, and it was held that the brokers were liable,[1] for the carman and the servants of the brokers were not under the same control, and were not members of a common establishment; the work was joint, but the employment was different. Moreover, in the present case, Swainson at the moment when the accident happened was no longer engaged in a common employment with the driver of the defendants' engine.

I am of opinion that the judgment must be reversed.

Brett, L. J. I am of the same opinion. We are not entitled to consider the origin of the rule which exempts a master from liability when his servant is injured by the negligence of a fellow-servant; but it has been said that the exemption depends upon an implied contract entered into between the master and servant. I think, however, that the plaintiff in the present case is entitled to recover, because at the time of the accident the deceased was not in a common service, nor engaged in a common employment with the driver of the engine, nor engaged in a joint operation. I think that the authorities bear out the proposition laid down in the Exchequer Division, that in order to give rise to the exemption there must be a common employment and a common master. It is not necessary that there should be a common service for a definite time, or at fixed wages; for the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment. A volunteer puts himself under the control of another person, and in respect of that other person he is for the time being in the position of a servant. For the defendants it was not denied that this doctrine is well established; but it was contended that the driver of the engine and the deceased were collaborators. To a certain extent I should agree with the argument; but the question is, did the deceased adopt such terms of service as placed him under the orders of the defendants? If he did, I think that would be sufficient to exempt them from liability. That Swainson became their servant pursuant to contract could not be maintained: the only circumstance giving color to such an argument was his signature to certain pay-sheets; but that is clearly insufficient to constitute him the defendants' servant. It was contended that as regards the use of the station the two railway companies were practically partners. I cannot come to the conclusion that they were: therefore no contract existed between Swainson and the North-Eastern Railway Company, and he was servant to the Great Northern Company alone. Then did he adopt such terms of service as placed him under the orders of the defendants? If the question had been properly raised, it might have become necessary to consider whether in signalling the defendants' engine to move from the Great Northern rails he did adopt the terms of such a service; but, at all events, he ceased to be under the orders of the defendants when he had finished with the operation of signalling, and I doubt whether he was under their orders even whilst he was engaged in that operation. What was the state of affairs when the accident happened? The train had been changed from the Great Northern line on to the North-Eastern line. Swainson then had nothing further to do with the North-Eastern line: he was acting solely on behalf of the Great Northern Railway Company, and was not assuming to act upon behalf of the North-Eastern Railway Company. Upon the other hand, the driver of the engine was solely under the control of the defendants. It seems to me that the two men were strangers to one another, and not fellow-servants.

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[1] See Abraham v. Reynolds, 5 H. & N. 143. — Rep.

COTTON, L. J. I am of opinion that the judgment of the Exchequer Division must be reversed. The driver of the engine was the servant of the North-Eastern Railway Company, and the act of a servant is the act of his employer, therefore the defendants are *prima facie* liable; but it is a rule that where one member of an establishment is injured by the negligence of another member of it, the master is not answerable. It is unnecessary to consider how the rule arises; but it is clear that if a person takes upon himself to act as a member of an establishment, he cannot maintain an action against the head of it for an injury occasioned by the negligence of any person belonging to it. A volunteer is in the same position as a servant: Degg *v.* Midland Ry. Co., 1 H. & N. 773. It must be shown that in some sense the deceased was the servant of the defendants; but he and the driver of the engine were not acting together at the moment of the accident; they were doing nothing whatever in common. For the reasons assigned by BRETT, L. J., which I need not go through, I think that the shunting was over, and that the driver of the engine had again become solely the servant of the defendants; he had passed the bit of line which led from the Great Northern Company's rails to those of the defendants, and had nothing more to do with the former company. Then the circumstance of Swainson's signing the pay-sheet did not constitute him the servant of the defendants. It is true that he was a member of the "joint station staff," but the Great Northern Railway Company had no power to pledge the defendants' credit to Swainson, who was under the orders of that company alone; during the shunting operations he might attend to any suggestions which might be made to him on behalf of the defendants, but that did not make him a servant of the defendants. It may be said that the defendants paid him a portion of his wages, and that this created the relation of master and servant between them; but, in truth, the Great Northern Company paid the whole of his wages, and one-half of them was repaid by the defendants. And upon the facts, I come to the conclusion that all those employed by the Great Northern Railway Company were paid by them alone.

Judgment reversed.[1]

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[1] And see Wood *v.* Cobb, *ante*, p. 190; Murray *v.* Currie, *ante*, p. 206; Johnson *v.* City of Boston, 118 Mass. 114 (1875); Rourke *v.* White Moss Colliery Co., *ante*, p. 229; Johnson *v.* Lindsay, [1891] A. C. 371; Brow *v.* Boston & Albany Railroad Co., 157 Mass. 399 (1892); Morgan *v.* Smith, 159 Mass. 570 (1893); Reagan *v.* Casey, 160 Mass. 374 (1894).

As to volunteers, see Degg *v.* Midland Railway Co., 1 H. & N. 773 (1857); Potter *v.* Faulkner, 1 B. & S. 800 (Ex. Ch. 1861); Holmes *v.* North-Eastern Railway Co., L. R. 4 Ex. 254 (1869), s. c. L. R. 6 Ex. 123 (Ex. Ch. 1871); Flower *v.* Pennsylvania Railroad Co., 69 Pa. 211 (1871); Wright *v.* London & North-Western Railway Co., 1 Q. B. D. 252 (C. A. 1876); Street Railway Co. *v.* Bolton, 43 Ohio St 224 (1885). — ED.

HOUSTON AND GREAT NORTHERN RAILROAD CO. *v.* MILLER.

SUPREME COURT OF TEXAS. 1879.

[51 *Tex.* 270.]

ERROR from Harris. Tried before the Hon. JAMES MASTERSON.

Baker & Botts, for plaintiff in error.

John T. Harcourt, for defendant in error.

BONNER, J. This suit involves the question of the liability of the master at the suit of an employee, who was a minor, for damages sustained by reason of the alleged negligence of a fellow-servant; the liability of the master to the father of the minor, who was employed without the consent of the father, having been considered by this court in a branch of this same case. (Railroad Co. *v.* Miller, 49 Tex. 322.)

Since the trial of the cause below, it has become the settled law of this court, in accordance with the well-established line of decisions in Great Britain and in this country, that the master is not liable for injuries sustained by his servant through the negligence or default of a fellow-servant. Price *v.* Navigation Co., 46 Tex. 535; Robinson *v.* Railway Co., 46 Tex. 540.

The plaintiff was the employee of the defendant company, and his injuries are alleged to have been caused by the negligence of the engineer, who was a fellow-servant. Tested by the rule announced in the above cases, so much of the first subdivision of the charge of the court as authorized the jury to find for the plaintiff by reason of the alleged negligence of the engineer, was error, unless the fact that the plaintiff was a minor made his case an exception to this general rule.

The contract of a minor, made without the consent of his father, for necessaries, or for employment in a legitimate business by means of which necessaries could be obtained, is not void, but in many cases commendable. If fair and made in good faith, in the usual course of business, it would be valid until avoided by the minor himself, or by act of the parent in the exercise of his superior right to demand his services. To require that in such cases parties employing minors should be held thereby to be insurers against the risks usually incident to such employment would virtually result, in many instances, in an undue restraint upon this important class of our citizens in obtaining the means of a legitimate livelihood, and would tend to promote idleness and consequent demoralization. We do not believe that, upon sound principles of public policy or authority, the mere fact that an employee is under the age of twenty-one years should shield him from the usual responsibility incident to an honest employment voluntarily assumed by himself. This rule, however, should not be enforced against a child of tender years, who evidently would not have the requisite discretion and experience to be a suitable employee in a dangerous business. Railway Co. *v.* Elliott,

1 Cold. (Tenn.) 619; Gartland *v.* Railway Co., 67 Ill. 498; King *v.* Railroad Corp., 9 Cush. 112; Railway Co. *v.* Harney, 28 Ind. 28; Railroad Co. *v.* Gladmon, 15 Wall. 401; Shear. & Red. on Neg. secs. 50, 97.

We are of opinion, then, that the error assigned upon this part of the first subdivision of the charge of the court was well taken.[1] . . .

Reversed and remanded.[2]

BRODEUR *v.* THE VALLEY FALLS COMPANY.

SUPREME COURT OF RHODE ISLAND. 1889.

[16 *R. I.* 448.]

TRESPASS on the case. On demurrer to the declaration.

This action was brought to recover damages for the death of the plaintiff's husband, caused by the alleged negligence of the defendant. The deceased was killed by a barrel which was thrown out of a door by one of the defendant's employees.

The defendant is a corporation engaged in the manufacture of cotton goods in the town of Lincoln, State of Rhode Island, where it has its manufactory and a large number of employees. It has, under the officers of the corporation, a general superintendent, who has immediate control and direction of all the employees. It has also overseers of the different rooms or departments, such as the slashing room, weave room, spinning room, machine shop, blacksmith shop, boiler room, &c., all under the direction and control of the general superintendent, who takes his direction from the officers of the corporation. The deceased was employed as second hand, that is, second foreman, under the regular foreman of the machine shop, in the machine shop department, and took his orders from his immediate foreman or the general superintendent. His duties were, in common with others employed in the machine shop department, to assist in keeping defendant's machinery in the several rooms or departments in proper repair or condition, and, in case of any breakage of machinery, to oversee and assist in its repair, under the direction of his immediate foreman or the general superintendent. In the performance of these duties he was brought at different times into all the different rooms or departments of defendant's mills. On the second day of April, 1884, the deceased was crossing an open court or yard, from the machine shop to the cast-iron room, so called, he being then and there engaged about his work in the machine shop at defendant's mill, and while passing across said yard was struck upon his head by an empty barrel which was thrown by the overseer of the slashing and dressing room from the fourth story of the building in which the machine shop is situated, and thereby fatally injured. Said deceased was not subject to the orders of the overseer of said slashing room, but it was his duty, in case said overseer should report to him that any of the machinery in his department was out of repair or broken, to oversee the repair of the same, subject to the orders of his immediate foreman and general superintendent aforesaid.

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[1] The remainder of the opinion pointed out two other errors. — ED.

[2] See King *v.* Boston & Worcester Railroad Corporation, 9 Cush. 112 (1851); Fisk *v.* Central Pacific Railroad Co., 72 Cal. 38 (1887).

Compare H. & G. N. Railroad Co. *v.* Miller, 49 Tex. 322 (1878); Railroad Co. *v.* Fort, 17 Wall. 553 (1873). — ED.

On the said second day of April, 1884, the deceased was not employed or at work in said slashing room or department, but was employed and at work in the machine shop, which is situated on the ground floor and   feet under the slashing room aforesaid. The said overseer of said slashing room was not, on said day, at work in the machine shop or with the deceased. The barrel was thrown without proper precautions.

February 9, 1889. STINESS, J. The question raised by this demurrer is, whether the deceased and the foreman of the slashing room were fellow-servants, within the meaning of the rule which exempts the master from liability to his servant for an injury received through the negligence of a fellow-servant in the course of their common service. The plaintiff contends that they were not, because they were not employed in the same department. The cases cited by the plaintiff, excepting those in Illinois, are plainly distinguishable from the case at bar. Thus in Chicago & Milwaukee Railroad *v.* Ross, 112 U. S. 377, it was held that an engineer was not a fellow-servant with a conductor in charge, and to whom the company had given the right to command the movements of the train and to control the persons employed on it, upon the ground that the conductor should be treated, being so in fact, as the personal representative of the corporation, for whose negligence it was responsible to subordinate servants. In Moon's Adm'r *v.* R. & A. R. R., 78 Va. 745, the company was building a new road, and the construction, at the place of injury, was in charge of a section master, who was held not to be a fellow-servant with a train hand, the company having delegated to an agent a duty incumbent upon it. It was also held that a conductor, having control and direction, was not a fellow-servant with the train hand, but his superior. In Ford *v.* Fitchburg Railroad Co., 110 Mass. 240, the company was held liable for not providing a proper engine, and in Davis *v.* Railroad Co., 55 Vt. 84, for a defective road-bed. These cases stand upon very different considerations from the one before us. The duty of the master to furnish suitable machinery and appliances, and to keep the same in repair, is unquestioned. It is also well settled that, when a master delegates to a servant duties which belong to himself, the servant will occupy the place of the master, not that of fellow-servant with other employees, and the master will remain as responsible for the negligence of this servant as if he were personally guilty of it himself. Mulvey *v.* R. I. Locomotive Works, 14 R. I. 204. In the present case the deceased was not under the overseer of the slashing room, nor did the latter stand in the place of the principal with reference to the deceased. But the decisive question in this case is, whether the circumstances set forth amount to fellow-service, as the term is used in law. The cases in Illinois are directly in favor of the plaintiff's contention. They proceed upon the distinct ground that, to constitute workmen under the same master fellow-servants, they must directly co-operate with each other, or, by their usual duties, be brought into such habitual association as to have the power of influencing each other to the exercise of constant caution, by example, advice, encouragement, and by reporting delinquencies. In the case of Chicago & N. W. R. R. *v.* Moranda, 93 Ill. 302, the court reviews and affirms its position at length. It remarks, however: "Although the distinction taken by this court between these two classes of co-servants," *i. e.*, those employed in the same department and those employed in separate and disconnected branches of the business, "has not the sanction of the courts of England, nor that of most of the courts of last resort in this country, we think, on principle, it is a distinction that ought to be taken."

But this distinction has not been overlooked in the adjudications upon this subject. In the early case of Farwell *v.* Boston & Worcester R. R. Corp., 4 Met. 49, the consideration of a distinction between those two classes of cases was pressed upon the court.[1] . . . The reasons here set forth are a strong answer to the position taken in the Illinois cases. They show an obvious impracticability in trying to gauge the liability of an employer, in a complex business, by the independence of its different branches, or by the intercommunication of those employed. Not only would it be almost impossible, in many cases, to separate the work into distinct departments and to discern their dividing lines, but incidental duties, changing the relations of workmen to each other, would vary also the master's liability. He would thus be liable for the negligence of a servant at one time or place and not at another. Without a personal supervision of all his help in all their work, he could not know when he was responsible and when he was not. Moreover, such a rule would govern the liability of a master when the groundwork upon which the rule is founded did not exist. For if the test of liability be that of the separate and independent duties of the servants, they may, nevertheless, be so near each other as to be able to exert a mutual influence to caution; or, if it be that of association, they may still be in the same department, but unable, from their duties or position, to exert such influence. But, aside from these considerations, we do not think the rule is correct in principle. The principle upon which the determination of Farwell *v.* Boston & Worcester R. R. Corp. proceeded is the same that has been generally followed in England and in this country, namely, that the rights and liabilities of both master and servant are those which grow out of their contract relation. The master impliedly agrees to use due care for the safety of his servant, in providing suitable places and appliances for work; and, as is universally conceded, the servant agrees to assume the ordinary risks of his employment. The most common risks of service spring from the negligence of fellow-servants. When one works with others, he knows that his safety depends on the exercise of care by those around him, as their safety depends also upon his own caution. No man can enter into an employment without a thought of this. Negligence, therefore, among workmen is a breach of the duty which each owes to the others, and not a breach of the master's duty, if he has exercised the care that is required of him. For his own negligence the master must answer; but for that of others, which is a risk incident to every employment, he has not agreed to be responsible, but on the contrary the servant has impliedly agreed to assume it upon himself. The contract relation, therefore, puts them outside of the rule which makes a master liable to a stranger for the negligence of his agent; for *respondeat superior* is based upon considerations of public policy which are not called for in the relation between master and servant. The cases cited by the defendant abundantly illustrate and support the generally recognized doctrine that servants under the same master, in a common service, are fellow-servants, although they may be engaged in different departments of labor.

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[1] Here was quoted a passage from Farwell *v.* Boston & Worcester Railroad Corporation, *ante*, p. 786. — ED.

But the plaintiff further contends, even in this view of the case, it is only the ordinary risks, which can be reasonably foreseen and taken into account, that the servant assumes; and, consequently, since the deceased could not foresee such an act of carelessness as the throwing of the barrel, it is not within the risks assumed. We have already said that the ordinary risks include the carelessness of others. This rule is distinctly recognized in Railroad Company *v.* Fort, 17 Wall. 553, one of the cases cited by the plaintiff upon this point. The court say: "The employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which is to be counted the negligence of fellow-servants." In that case a boy of tender years was sent by a superior, whose orders he was required to obey, to adjust a belt in a dangerous place, outside of his regular duties, in ignorance of the danger. There is a wide difference in the application of the rule in such a case and in the case at bar. The argument of the plaintiff here, if followed, would abrogate the rule; for the careless acts of another are just the ones that cannot be foreseen. If they could be, it would be because they were a part of the ordinary way of doing things, and, therefore, presumably not negligent. They are, nevertheless, a part of the ordinary risks. We think the plaintiff's claim that the deceased and the overseer of the slashing room are not to be regarded as fellow-servants is untenable, and that the demurrer to the declaration must be sustained. *Demurrer sustained.*[1]

Patrick J. McCarthy, for plaintiff.

James M. Ripley, for defendant.

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[1] *Acc.:* Gormley *v.* Ohio & Mississippi Ry. Co., 72 Ind. 31 (1880). — **Ed.**

SECTION II. (*continued*).

(*B*) SUITABLE APPLIANCES, AGENTS, PREMISES, AND REGULATIONS. AND HEREIN OF THE VICE-PRINCIPAL DOCTRINE.

THE LITTLE MIAMI RAILROAD COMPANY *v.* STEVENS.

SUPREME COURT OF OHIO. 1851.

[20 *Ohio*, 415.][1]

ERROR to the Common Pleas of Hamilton County.[2]

Charles Fox and *French,* for plaintiff in error.

George E. Pugh, *Peter Zinn*, *George H. Pendleton,* and *D. T. Wright*, for defendant in error.

CALDWELL, J. Stevens was the engineer on one of the trains of cars of the Little Miami Railroad Company. The upward and downward trains of cars had, previous to August 13, 1846, passed each other at Plainville, about nine miles from Cincinnati. A change of the place of passing had been determined on, namely, that the cars should pass at Columbia, instead of Plainville, the two places being about three miles apart. This change was to take place on the 13th of August, 1846, the day on which the collision occurred. It is the universal custom of the company, when a change of this kind takes place, to give the engineers a printed card, setting forth the times of starting, places where the cars are to pass, time of running, &c., containing the change that has been made. On the day on which the collision took place, the plaintiff, Stevens, was the engineer on the upward train from Cincinnati to Springfield, and Geo. Smith was the conductor. On the route the conductor, according to the rules of the company, is the commanding officer, so far as determining when the cars shall start and stop, &c. The upward train came in collision with the downward train about seven miles from Cincinnati, between Columbia and Plainville, and Stevens was very much injured by scalding; his recovery was doubtful for some time; he was confined for months, and has been injured for life. The engineer and conductor of the downward train had received their cards, stating the change, and they were running in accordance with it, expecting to pass the upward train at Columbia. There is no evidence that Stevens had received a card stating the change; indeed, it is clearly inferable, from the evidence, that he had not. Paul Hueston, who was the baggage-master on the train, states that, at the time of the collision, he had heard nothing about the change; he also states, that, at the time the collision took place, A. H. Lewis, who was an officer of the company (in what capacity does not appear), took out of his pocket two cards, and handed them to him, and told him to give one of them to Stevens, the engineer, and the other to Smith, the conductor. N. Morrill, the chief clerk, testifies that, on the morning of the day on which the collision took place, Thomas L. Cole, an assistant in the engineering department, handed to Smith, the conductor, a time card, and that Smith showed it to him, witness, after he had received it; he says he knows of no card being delivered to Stevens. Isaac West states that, when the cars reached Columbia, Stevens stopped; that Smith, the conductor, went forward through the cars and asked him why he stopped; that Stevens inquired of him whether the change did not take place that day, and the cars pass there; that Smith replied that the change did not take place on that day, but named a subsequent day on which it was to take place; Smith then told Stevens to go on, and the cars immediately proceeded.

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[1] The case in the court below is reported in 7 Western Law Journal, 369 (1850). — ED.

[2] The reporter's statement is omitted. — ED.

Other witnesses speak of the stoppage of the cars at Columbia, and also of seeing Smith in the attitude of conversation with Stevens, but they did not hear what, if anything, was said. One witness states that he saw Smith give the motion of the hand to Stevens to proceed.

The cause was submitted to the jury, who found a verdict for the plaintiff. The defendant moved for a new trial, and also an arrest of judgment, which motions were overruled, and judgment entered on the verdict. The defendant took a bill of exceptions, in which the evidence is set forth, as well as a number of charges, which were asked to be given by the court to the jury by the defendant, which were refused by the court.

The main question arises on the refusal of the court to charge, on a single point, and on the charge affirmatively given on the same point; and although this question is presented in different forms by the charges asked, yet we think it is fully presented by the second charge asked and refused, which reads as follows: "That where two or more persons are employed by one individual or company, and, in doing the work they are employed to do, one of them, by his negligence and inattention to his duties, causes an injury to the other, no action can be sustained against the employer, whether he be an individual or a company."

The proposition here stated, and contended for on the part of the company, is, that whilst it is admitted that the company would be liable to the fullest extent for an injury done to a person having no connection with the company, by the negligence of one of their agents, yet that Smith and Stevens, both being in the employ of the company, the company would not be liable for an injury done to Stevens, through the negligence of Smith and the other agents of the company.

It is a general rule that a person, in the management of his business, whether he does it himself or acts through agents, must so conduct that business as not to interfere with the rights of, or produce injury to others. This devolves on the party care and prudence in the management of his business, and renders him civilly responsible for any injury that may result to others from the want of such care and prudence, whether the injury may be done under his own immediate supervision, or under the control of agents. This doctrine is founded in reason. What can be more reasonable than that he who puts any power in motion for his own benefit, which, from its nature, may be destructive to the property and life of others, if not carefully managed, should be accountable for such injury as may be caused by the careless management of such power. An injury has been done; it has fallen on a party who is guilty of no wrong, no carelessness; it has been done by a force put in motion by a party who has caused the injury by his careless management. On whom shall the loss fall? On the innocent person who had no control or management of the thing that produced it? Or shall it not rather fall on the person who put the power in motion, for whose benefit it moves, who is in duty bound to provide for its proper management, who selects his agents, controls their movements, and who gives them their authority to act?

Indeed, the rule is not only a reasonable one, that the employer should make good the injuries thus done by the carelessness of his agents; but it is necessary as a preventive of mischief, and a protection to the community, that it should be strictly adhered to. The rule is founded on the principles of justice between man and man, and, abstractly considered, is of universal application. There must be some good reason for taking any case without its application.

It is said, however, that when a party contracts to perform services, he takes into account the dangers and perils incident to the employment, and receives wages accordingly. Take this for granted; and we think it falls far short of sustaining the main proposition. If the party does contract in reference to the perils incident to the business, he will only be presumed to contract in reference to such as necessarily attend it when conducted with ordinary care and prudence. So far as an implied contract, in reference to the business, will be presumed, it will be on the hypothesis that the business is to be properly managed. He cannot be presumed to have contracted in reference to injuries inflicted on him by negligence — by wrongful acts. An express stipulation would at least be necessary to make it a part of the contract. The employer has paid him no money for the right to break his legs, or, as in this case, to empty on him the contents of a boiler of scalding water. It was not the expectation, when the company hired Stevens, that the two trains should run by different cards and thus come in collision.

When a man employs another to do work for him, each incur their obligations. The person hired is bound to perform the labor according to the agreement, and the employer is bound to pay; besides that, neither party has parted with any of his rights. The employer has no more control over the person he has employed, outside of the service to be rendered, than he has over the person of any other individual; and is equally accountable for an injury to it.

In this case the evidence leads the mind irresistibly to the conclusion that Stevens had not received a card, or any certain information that the change was to take place on the day of the collision. The effects of a collision are so dangerous that it was certainly the duty of the company to furnish him with that information; without such information he, as a matter of course, would run by the card that he had formerly been running by, which would place the trains in danger of a collision. It would appear from the evidence that he had heard something of it, but he was told by Smith, the conductor, that the change was not to take place on that day, and to proceed. He obeyed, and suffered the injury in consequence.

It is said that Stevens was guilty of negligence himself in not stopping at Columbia. And further, that he was negligent in running as fast as he did, and not keeping a man on ahead to give notice of the approach of a train, he, Stevens, having reason, as is alleged, to believe that they were in danger of meeting the other train. And several charges were asked as to what would constitute negligence on his part; some of these charges the court overruled, and which ruling of the court is assigned for error.

When we take into account the fact that Stevens had not received the ordinary notice of the change, and the fact that he was told that the change did not take place until a subsequent day, by the person who had the control of the cars, and the right to give him his orders as to running and stopping, we do not think that there was evidence showing negligence on his part; and that charge, from the state of evidence, was immaterial. Stevens had engaged to labor for the company in a subordinate capacity; he has received the injury from the negligence of those placed over him by the company, as the jury have found, and we do not see why the company are not liable to him for the amount of the damage he has sustained.

It is contended, however, on the part of the company, that public policy forbids the right of a party to bring suit against his employer for an injury by another in the same employ, because it is supposed that it will lead to carelessness on the part of those employed, when they know that they can recover for any damage that they may receive. In answer to this, it may be remarked, that it is only where the person has been careful himself, that any right of action accrues in any case. Besides, we do not think it likely that persons would be careless of their lives and persons or property, merely because they might have a right of action to recover for what damage they might prove they had sustained. If men are influenced by such remote considerations to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation, that in any extensive business, where many persons are employed, the care and prudence of the employer is the surest guaranty against mismanagement of any kind. The employer would, we think, be much more likely to be careless of the persons of those in his employ, since his own safety is not endangered by any accident, when he would understand that he was not pecuniarily liable for the careless conduct of his agents. Indeed, we think that those who have others in their employ are under peculiar obligations to them to provide for their safety and comfort, and we think they should at least be held legally responsible to them as much as to a stranger.

We could easily suppose a case where two persons employed by the same individual, and standing on a perfect equality, where the business was managed as much by one as the other, — where they would stand on the same footing as men in the community generally do, — in which the employer would not be liable for an injury done to one by the negligence of the other. But we regard this case as standing on entirely a different footing.

Amongst other cases, we have been referred to those of Farwell *v.* The Boston and Worcester Railroad Corporation, 4 Metc. 49; and Murray *v.* South Carolina Railroad Company. The case in 4 Metcalf denies the right of recovering principally on two grounds, namely, that the person employed contracts with reference to the perils of the employment; and that he receives a compensation, in the way of wages, for such perils, and therefore he cannot recover; and that it would be contrary to public policy to permit a recovery, as the tendency would be to produce carelessness on the part of persons thus employed. The decision in 1 McMullan appears to be based principally on the first of these two propositions. We have noticed both of these propositions in our previous remarks. In both cases, much stress is laid upon the fact that no precedent, of a recovery under such circumstances, is to be found. It is to be noticed that in both of these cases the facts differ in some particulars from the present; we must admit, however, that the reasoning in those cases would cover the one now before us. So far as those cases decide that a recovery cannot be had in a case like the one now before the court, we think they are contrary to the general principles of law and justice, and we cannot follow them as precedents. The court, then, are of the opinion that there was no error in the charge of the court, and that the evidence warranted a recovery on the part of Stevens.

The judgment will, therefore, be affirmed.[1]

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[1] In Hutchinson *v.* York, Newcastle & Berwick Ry. Co., 5 Exch. 343, 353 (1850), ALDERSON, B., for the court, said: "Though we have said that a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care."

In Paterson *v.* Wallace, 1 Macq. 748, 751 (1854), Lord CRANWORTH said: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is stanch and secure

HITCHCOCK, C. J. I concur in the opinion of the Court affirming the judgment of the Court of Common Pleas; and it seems to me that this

when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arise, the master is responsible."

The principal case was followed in Cleveland, Columbus & Cincinnati Railroad Co. *v.* Keary, 3 Ohio St. 201 (1854), wherein, at pp. 210–211, 218, RANNEY, J., for the court, said: —

"As corporations can act only through their agents and officers, authorized to exercise the functions conferred by their charters, there is much force in the view of the late C. J. Hitchcock, that the superintendent (and conductor when running a train) of a railroad, ought to be regarded as the proper representatives of the company, and their acts considered as those of the company. But I do not think it necessary to insist upon this position. Let the company be liable only upon the maxim *respondeat superior*, or upon the obligations arising out of the contract of service, and in either view, their liability for injuries to their subordinates, caused by the carelessness of the conductor they have placed over them, in charge of the train, is, in our opinion, sufficiently apparent. This conclusion rests wholly upon the idea that the company, from the very nature of the contract of service, is under obligations to them, as well as they to the company; and that among these obligations is that of superintending and controlling, with skill and care, the dangerous force employed, upon which their safety so essentially depends. For this purpose the conductor is employed, and in this, he directly represents the company. They contract for, and engage his care and skill. They commission him to exercise that dominion over the operations of the train, which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him, and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation; and no servants are fellow-servants, when one is placed in control over the other. . . .

"As between the company and those employed to labor in subordinate situations under the control of a superior, two distinct classes of obligations arise — the one resting upon the company, and the other upon the servants — and both founded upon what each, either expressly or impliedly, has agreed to do in execution of the contract. It is the duty of the company to furnish suitable machinery and apparatus, and, as they reserve the government and control of the train to themselves, and intrust no part of it to *these* servants, to control it and them, with prudence and care. As the necessity for this prudence and care is constant and continuing, the obligation is performed only when it is constantly exercised, and they cannot rid themselves of it by devolving this power upon the conductor. If they intrust him with its exercise, in the language of Judge Story, they 'in effect warrant his fidelity and good conduct.'

"It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. If they fail to do this, and injure each other, they violate their engagements to the company, and are alone answerable for the wrongs they may do. In such case there is no failure of the company to do what, as between them and these servants, it was understood they should do, when the servants entered the service. But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences."

In Railway Co. *v.* Ranney, 37 Ohio St. 665, 669 (1882), MCILVAINE, J., for the court, said: "The respective rights and duties of employer and employee sound in may be done without conflicting at all with the authorities which have been cited by the plaintiffs in Error. If this case were, in its principal features, like any one of those reported and referred to, I should hesitate long before I would consent to disregard those decisions. They were decisions made by highly respectable tribunals, and by men whose opinions are entitled to the highest consideration. But in each case referred to as being decided in the United States, the action was commenced for an injury received by one employee or servant of the Company, in consequence of the neglect or default of another employee or servant of the same Company, both at the time being engaged in the running of the cars.

This case, as it appears from the bill of exceptions, is entirely different. The neglect complained of, is not the neglect of an employee, or servant of the Company upon the road, but the neglect of the Company itself; so far as an incorporated company can be chargeable with neglect.[1] . . .

Had cards been delivered to the conductor and engineer on the up train, as they should have been, there is no probability that there would have been any collision.

Here was negligence, in consequence of which, an injury resulted to the defendant in error. It was not the negligence of any employee of the Company, assisting in running the cars; unless, by possibility, the conductor of the train had been notified of the change, of which there is no satisfactory proof. But it was the negligence of the Company itself, or of its immediate agent, the superintendent of the road.

Now suppose an individual had been placed in the situation of the Railroad Company, and a similar injury had resulted, in consequence of a like neglect on his part, can there be a doubt that he must have been liable to respond in damages for that injury? If under such circumstances an individual would be liable, surely there can be no sound reason why a corporation should not be. In this respect, I should be disposed to put corporations and individuals upon the same footing.

But it is said a corporation acts by agents, and if it employs faithful and competent agents, this is all that can be required. True, a railroad company must act by agents, but I apprehend it must be responsi-

contract. The employer implicitly engages to use reasonable care and diligence to secure the safety of the employee, and among other things, to exercise reasonable care in the selection of prudent fellow-servants. He also engages that every one placed in authority over the servant, with power to control and direct him in the performance of his duties, will exercise reasonable care in providing for his safety, whether such superior be a fellow-servant or not, in the ordinary sense. The superior, in his relation to the subordinate servant, is, in the language of Judge Day, in Railroad Co. *v.* Lewis, 33 Ohio St. 196, the *alter ego* of the master. The doctrine, which imputes to the master the negligence of a servant to whom he has delegated authority over other servants, has been firmly ingrafted in the jurisprudence of this state ever since the case of Little Miami R. R. Co. *v.* Stevens."

And see Louisville & Nashville Railroad Co. *v.* Collins, 2 Duvall (Ky.), 114 (1865); Chicago, Milwaukee & St. Paul Ry. Co. *v.* Ross, 112 U. S. 377 (1884). — Ed.

[1] The opinion has been abbreviated. — Ed.

ble for the acts or neglects of those agents, so long as the agents are acting within the scope of their authority. The superintendent is a proper representative of the Company, and perhaps to a certain extent the conductor of a train may be. But the employees or servants of the Company, engaged in making or repairing their road, or in running their cars, cannot be held to be their agents.

It is because this injury resulted from the negligence of the Company itself, or of an agent whose duty it was to give the notice before referred to, that I hold the judgment should be affirmed; and it seems to me the case is entirely different from those referred to in the books. . . .

SPALDING, J., dissenting.[1]

SKIPP *v.* THE EASTERN COUNTIES RAILWAY COMPANY.

EXCHEQUER. 1853.

[9 *Exch.* 223.]

THE declaration stated, that before and at the time of the plaintiff's entering into the service and employ of the defendants, and of the committing of the grievance hereinafter mentioned, the defendants were the proprietors of a certain railway, and used and accustomed to carry passengers and goods as common carriers for hire upon the said railway, in and by and with certain trains of carriages and trucks drawn by locomotive engines upon the said railway; and certain servants of the defendants called guards were then used and accustomed, amongst other duties, to aid and assist in preparing trains to be started upon the said railway; of all which premises the defendants then had notice. And thereupon the plaintiff entered into the service and employ of the defendants, and the defendants retained and employed the plaintiff, and he then became their servant in the capacity of such guard as aforesaid, upon the term and condition (amongst others), that the defendants should take all due and reasonable means and precautions in order to prevent unreasonable and unnecessary danger being caused to the plaintiff in the performance of his duty as such guard as aforesaid. Yet the plaintiff in fact saith that, although he continued in the said service and employ of the defendants in the capacity and upon the terms and conditions aforesaid for a long time, and the plaintiff during all that time did all things; and all things then occurred and happened necessary to entitle him to have the said term and condition performed by the defendants; yet the defendants did not, during the said last-mentioned time or any part thereof, take such due or reasonable means or precautions as aforesaid, but altogether omitted so to do; and a certain train, which the plaintiff in the performance of his duties as such guard as aforesaid had to aid and assist in preparing to be started on the said railway, and whilst the plaintiff was so aiding and assisting as last aforesaid, for the want of the defendants taking such due or reasonable means or precautions as aforesaid in that behalf, and on no other account, cast and threw the plaintiff, whilst he was performing his said duty as such guard as aforesaid, down to and upon the said railway and under the said train, and the wheels of the same then, by means of the premises, crushed the arm of the plaintiff, whereby the plaintiff was forced and obliged to and did have his arm amputated, and was hindered and prevented from performing or transacting any affairs or business; and the plaintiff, by reason of the said amputation, will never again be able to obtain his livelihood. Plea, not guilty, and issue thereon.

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[1] This opinion contained an extended review of the authorities as to fellow-servants. — ED.

At the trial, before MARTIN, B., at the London Sittings in the present Term, it appeared that the action was brought by the plaintiff to recover compensation for an injury he had received whilst in the service of the Company. The plaintiff had for many years acted as a guard, and had for three months prior to the accident been on duty at Lea Bridge station upon the line. It was his duty at that station to attach the trucks of the goods train which were to proceed to Norwich. The time allowed for the duty was limited, as the next passenger train followed in about a quarter of an hour. In attaching the trucks the plaintiff was knocked down, and his arm was so severely injured that it became necessary to amputate it. Evidence was given to show that the work was too much for the number of servants employed by the Company; but it did not appear that the plaintiff had ever made any complaint upon the subject to the Company.

Upon this state of facts, the learned Judge was of opinion that the Company was not liable. The plaintiff's counsel requested that the case might be submitted to the jury, but this his Lordship declined to do; and the plaintiff was nonsuited.

James now moved for a rule *nisi* for a new trial, on the ground of misdirection. The plaintiff does not dispute the general principle which has been recognized and acted upon in the cases of Hutchinson *v.* York, Newcastle, and Berwick Railway Company, 5 Exch. 343, Wigmore *v.* Jay, Id. 354, and Priestley *v.* Fowler, 3 M. & W. 1, that a master is not in general liable to one servant for damage resulting from the negligence of another; but he rests his present cause of action upon a different ground. The plaintiff complains that the misfortune occurred by reason of the defendants' omission to provide a sufficient number of servants to perform the work in which he was engaged. The only plea being not guilty, the first question is, what are the allegations in the declaration which are admitted. The allegation of the duty which the defendants have imposed upon themselves, and upon which undertaking the plaintiff entered their service, is not traversed. [PARKE, B. The defendants were bound to use all due and reasonable care only. Here the plaintiff was engaged in the same work for several months, and made no complaint whatever as to the inadequacy of the means employed. If he felt that he was in danger, by reason of the want of a sufficient number of fellow-servants, he should not have accepted the service.] The time allowed for the work, in the performance of which the accident occurred, was very limited. [PLATT, B. The case falls within the maxim, *volenti non fit injuria.* MARTIN, B. I acted upon that principle at the trial, being of opinion that the Company was not liable, as the plaintiff had done the same work for several months, without any intimation on his part that he was unable to carry it on; and I therefore considered him a voluntary agent.] It was a question for the jury, whether the Company had in their employment a sufficient number of servants for the performance of this work. If they had not, they did not use due and reasonable care to prevent danger.

PARKE, B. There ought to be no rule. This is an attempt to cast upon the jury the duty of fixing the number of servants which a Railway Company ought to have; but in a case like the present, the Company are themselves the proper judges of the number they require for carrying on the business of the line; and the question proposed was not a proper one for the jury.

ALDERSON, B. As between the public and the Company, the former may be the proper judges of the number of servants required; but that is not so as between the Company and their own servants.

PLATT, B., concurred.

MARTIN, B. I think that if the case had gone to the jury, they must have found a verdict for the defendants. But as I entertained a very strong opinion upon the matter, I thought it clearly to be my duty not to leave the case to them, upon the chance of their finding a verdict for the plaintiff from motives of commiseration. The plaintiff brought the accident upon himself, for, if he found that he could not do the work which was set him, he ought to have declined it in the first instance. He, however, carried it on for several months, and never made the least complaint upon the matter.

Rule refused.[1]

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[1] "XXVII. Scienti et consentienti non fit injuria neque dolus." Sexti Decretalium, lib. v. tit. xii., De regulis juris. See *ante*, p. 1, n. 1.

In Dynen *v.* Leach, 26 L. J. N. S. Ex. 221 (1857), POLLOCK, C. B., said: "A master is not bound to use the safest method. A pair of steps is safer than a ladder, but business could not go on if ladders were discarded." And BRAMWELL, B., said: "There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion when, as in this case, the workman has known all the facts and is as well acquainted as the master with the nature of the machinery and voluntarily uses it."

In Woodley *v.* Metropolitan District Ry. Co., 2 Ex. D. 384, 388–389 (C. A., 1877), COCKBURN, C. J., said: "A man who enters on a necessarily dangerous employment with his eyes open takes it with its accompanying dangers. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it,

TARRANT *v.* WEBB.

COMMON PLEAS. 1856.

[18 *C. B.* 797.]

THIS was an action brought by the plaintiff, a workman, to recover damages for an injury sustained by him from the falling of a scaffolding on which he was working in the employ of the defendant, a house decorator.

The declaration stated that the plaintiff was employed by the defendant to do certain work for the defendant on a scaffolding erected by the defendant for that purpose; yet that the defendant so carelessly, negligently, and improperly erected the said scaffolding, and employed the plaintiff to work thereon, that, by reason of the negligence, carelessness, and improper conduct of the defendant, the plaintiff was exposed to unreasonable risk in his said work, and the said scaffolding gave way, and the said plaintiff was thrown therefrom and seriously injured, and became and was, and still continued, unable to follow his trade as a painter, and had been and was otherwise damnified, and the plaintiff claimed £200.

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before CROWDER, J., at the second sitting at Westminster in Trinity Term last. The facts were as follows: The defendant was employed to decorate the Carlton Club-house. In order to paint the entrance hall, a scaffolding was erected about thirty feet

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or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or in the alternative to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible. . . . The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of injury." — ED.

high, upon which the plaintiff and four other journeymen were at work. This scaffolding having been insecurely built, one of the upper poles broke, and the plaintiff was precipitated to the pavement below, and severely injured.

The scaffolding was erected by one Martin, who was employed for that purpose by the defendant, — the defendant himself not interfering with it, except, that, when Martin told him that the painters said it wanted an additional upright in the centre to make it secure, the defendant observed, that, if he (Martin) hearkened to the painters, he would have nothing else to do.

It appeared that the accident was mainly attributable to the want of that additional upright; but one of the witnesses ascribed it partly to an undue accumulation of boards which had been placed on the scaffolding by the workmen themselves.

On the part of the defendant it was submitted, on the authority of Wigmore *v.* Jay, 5 Exch. 355, that the defendant was not responsible for the failure of the scaffolding, if he neither personally interfered with its erection, nor knowingly employed an unskilful and incompetent person to erect it.

The learned judge, in leaving the case to the jury, told them, that, if they were of opinion that the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or that the person employed by the defendant for the purpose of erecting it was an incompetent person, the plaintiff was entitled to recover.

The jury returned a verdict for the plaintiff, damages £25, observing that they thought Martin was not a proper person to erect the scaffolding.

M. Smith, in the course of the term, moved for a new trial, on the grounds, — first, of misdirection on the part of the learned judge, in telling the jury that the defendant would be liable if he employed incompetent persons to erect the scaffolding; for that the employment of incompetent persons simply would not render the defendant liable, and at all events would not do so unless the defendant knew of their incompetency, of which there was no evidence; secondly, that the verdict was against evidence. He also moved in arrest of judgment, on the ground that the declaration did not show the breach of any duty for which the defendant was liable to the plaintiff; that no scienter of the defendant was alleged; and that it was consistent with the declaration that the plaintiff knew that the scaffolding was unsound, and voluntarily undertook the risk.

Udall now showed cause.

JERVIS, C. J. I am of opinion that the rule must be made absolute for a new trial, the case having miscarried in the way pointed out by Mr. Smith on moving. It is unnecessary to consider the question as to the liability of a master for an injury done to a workman through the negligence of a fellow-workman. The rule is now well established, that no action lies against the master for the consequences to a servant of the mere negligence of his fellow. That, however, does not negative liability in every case. The master may be responsible where he is personally guilty of negligence; but certainly not where he does his best to get competent persons. He is not bound to warrant their competency. The summing up, I apprehend, fails in this, that the jury might have been of opinion that the defendant used every possible care to employ a competent person to erect the scaffolding, and yet that he was liable because it turned out that Martin was incompetent.

Cresswell, J. I am of the same opinion. The question was discussed the other day in the Court of Exchequer in a case of Degg *v.* The Midland Railway Company, 1 H. & N. 773.

Williams, J. The cases expressly lay it down that a master is not generally responsible for an injury to a servant from the negligence of a fellow-servant. But that rule is subject to this qualification, that the master is guilty of no want of care in the selection of proper servants. Unless the master is guilty of negligence in that respect, the case is not taken out of the general rule. *Rule absolute accordingly.*

CLARKE, Appellant, *v.* HOLMES, Respondent.

Exchequer Chamber. 1862.

[7 *H. & N.* 937.]

This was an appeal from the decision of the Court of Exchequer in discharging a rule to enter a nonsuit or grant a new trial. The pleadings and facts fully appear in the report of the case, 6 H. & N. 349.[1]

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[1] In 6 H. & N. 349, 351–352, the facts are thus stated: —

"The defendant was a cotton-spinner at Manchester, and the plaintiff was employed by him in his factory as 'under over-looker,' at weekly wages. It was the plaintiff's duty to oil the machinery whenever it was required, which was several times a day. This machinery was worked by steam-power, the motion being communicated to wheels through the medium of shafts. On the 5th of July, 1857, the plaintiff was engaged in oiling a 'scutching machine' (for cleaning and tearing the cotton), and in order to reach the spot where the oil was poured into the machinery through small holes, he placed his left arm on the machine near the wheels to support himself, and with his right hand he held the vessel containing the oil, which he poured into the machinery. His left arm was drawn into the machine and torn off. When the plaintiff first entered the service the machine was fenced with an iron guard, but it was broken by accident, and the machine remained unfenced for above a year. The plaintiff had frequently complained to the superintendent of the danger, and he promised that the guard should be mended. On one occasion the defendant had looked at the machine and said that the guard should be mended. In some factories it was the practice to stop the machines whilst they were being oiled, but not in the defendant's, the superintendent having directed the plaintiff, when he was first employed, not to do so. There were two other scutching machines and six other machines (three 'breaks' and three 'finishing' machines) in the same room, and several women worked in it feeding the scutching machines with cotton. There was a passage between the

T. Jones argued for the defendant (the appellant).[1]

Bliss (*Aspland* with him), for the plaintiff (the respondent).

Cur. adv. vult.

COCKBURN, C. J.[2] Independently of any statutory duty or obligation, there was negligence in the defendant in not fencing the machinery on which the plaintiff was employed. And although the declaration in this action is based on the alleged statutory duty of the defendant to fence the machinery, the leave to move was reserved on the question of negligence, and there is full power to amend the pleadings; and we can therefore so mould the declaration as to make it applicable to the grounds on which we think the case should be decided.

I consider the doctrine laid down by the House of Lords, in the case of The Bartonshill Coal Company *v.* Reid, as the law of Scotland with reference to the duty of a master, as applicable to the law of England also, namely, that where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur. No doubt, when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks inci-

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machines, but none of the workmen had any business to pass the spot where the plaintiff met with the accident, although there was nothing to prevent them, and many were accustomed to do so.

"It was submitted, on behalf of the defendant: first, that this machinery was not 'mill-gearing' which was required to be fenced by the 7 & 8 Vict. c. 15. Secondly, that the plaintiff had caused the injury by his own negligence. Thirdly, that the defendant was not liable, inasmuch as the plaintiff was the servant of the defendant and did the work voluntarily and of his own accord, and with full knowledge of the danger. The learned judge reserved the points, the pleadings to be amended, if necessary, and his lordship left it to the jury to say, first, whether the injury was caused by the want of proper caution on the part of the defendant; secondly, whether the plaintiff was guilty of negligence, either in the manner in which he oiled the machinery, or in continuing in the defendant's service after the fencing was removed. The jury found the first question in the affirmative, and the second in the negative; and they gave a verdict for the plaintiff, with £200 damages.

"*T. Jones*, in last Michaelmas Term, obtained a rule nisi to enter a nonsuit, or for a new trial." — ED.

[1] In the course of this argument counsel said: "There was no accession of danger beyond that originally accepted." Thereupon COCKBURN, C. J., said: "The reason why no action will lie, under ordinary circumstances, is because the servant knows that he has undertaken a dangerous service; here, there was extraordinary danger, and was only submitted to on a promise by the master that it should be remedied." Counsel then said: "Priestley *v.* Fowler shows that whenever a servant accepts a dangerous occupation he must bear the risk." Thereupon COCKBURN, C. J., said: "That is, whatever is fairly within the scope of the occupation, including the negligence of fellow-servants; here it is the negligence of the master." And CROMPTON, J., added: "It cannot be made part of the contract, that the master shall not be liable for his own negligence." — ED.

[2] Passages declining to pass upon the applicability of 7 & 8 Vict. c. 15, and 19 & 20 Vict. c. 38 are omitted from the opinions of COCKBURN, C. J., and CROMPTON, J. — ED

dental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract, shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept.

In the present case, at the time the plaintiff entered on the employment, the machinery was properly fenced; on its ceasing to be so, the manager of the works, on the remonstrance of the plaintiff, promised in the presence of the defendant, the master, that the defect should be made good. It must be taken, therefore, that at the time the contract between the plaintiff and defendant was entered into, it was contemplated by the parties that the machinery should be fenced. It follows that, through the negligence of the master in omitting to keep the machinery fenced, the servant has been exposed to danger to which he ought not to have been subjected; and, the injury of which the plaintiff complains having thus arisen, the defendant is justly and properly liable.

It was, indeed, strongly urged upon us, on the part of the defendant, that, as the plaintiff, upon becoming aware that the machinery was no longer properly fenced, instead of refusing to go on, as he might have done, continued to perform his service with a knowledge of the increased risk to which he was exposed, he must be taken to have voluntarily incurred the danger, and is, therefore, in the same position as if he had originally accepted the service as one to be performed on unfenced machinery. I am, however, of opinion, that there is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one, who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied. In the latter case it seems to me, that the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation.

No doubt, a defect thus arising in machinery, may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that a party complaining had materially contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff who has materially contributed to his own injury, by his own negligence, cannot recover, although he may show negligence in the opposite party. But, the question whether the injury of which a plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff has had any share in bringing it about, is one wholly for the jury. In the present case, the jury have determined this question in favor of the plaintiff, and we are bound by their decision. It is, indeed, put to us that, notwithstanding this finding of the jury, the knowledge of the plaintiff that the machinery was unfenced, is, in point of law, sufficient to prevent the plaintiff from recovering. But I am of opinion that it is only a fact in the case, to be taken into consideration by the jury, with all the other facts and circumstances, in determining the question whether the plaintiff has himself helped to bring about the accident in respect of which he seeks to charge the defendant. In this sense, and in this sense only, such knowledge might afford an answer to the action. It does not do so in point of law. And, in the present case, on the finding of the jury, it does not do so in point of fact. I am, therefore, of opinion, that the Court of Exchequer were right in refusing to disturb the verdict for the plaintiff.

Wightman, J. I concur in the judgment of the Lord Chief Justice, but not in the reasons on which it is founded.

Crompton, J., said. I have arrived at the same conclusion. It seems to me that the only question reserved to us is whether the mere knowledge of the plaintiff, when he did the act, of the dangerous state of the machinery, is a bar to his recovery, notwithstanding the negligence of the defendant. I think it must be taken to have been found by the jury that there was negligence on the part of the defendant for which he is responsible. . . . I found my judgment on two propositions, namely, that there is no defence under the principle of law laid down in Priestley *v.* Fowler, 3 M. & W. 1, and the plaintiff has not contributed to his injury by his own negligence. Where a party enters upon a service he must be supposed to have contemplated dangers arising within the scope of his employment, including the negligence of his fellow-servants, and therefore for ordinary risks he cannot expect to be indemnified. Here we need not consider what personal knowledge the plaintiff had of the danger, because there was a neglect of duty on the part of the defendant in not keeping the machinery fenced, for which he is responsible. It is said that mere knowledge is a defence; I cannot think so. The party cannot recover if he has contributed to the accident; and I agree with the observation of my lord, that knowledge is only a part of negligence, and it is still a question whether there was negligence or not. I am confirmed in that view by what Lord Campbell said in Senior *v.* Ward, 1 E. & E. 385. Upon these grounds I am of opinion that the judgment of the Court below ought to be affirmed.

Willes, J. I agree with the opinion of my brother Wightman.

Byles, J. I am of opinion that the judgment of the Court of Exchequer must be affirmed.

This is a case of very great importance, and I am anxious that its decision should repose on what seems to me the true ground.

I do not rest the right of the plaintiff to recover on the statutable obligation incumbent on the master to fence the machinery, nor yet on the personal knowledge of the master that the machinery was improperly left unfenced, though I do not presume to intimate any disagreement with the Court of Exchequer.

But I think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition.

The case of Priestley *v.* Fowler introduced a new chapter into the law, but that case has since been recognized by all the courts, including the Court of Error and the House of Lords. So that the doctrine there laid down, with all the consequences fairly deducible from it, are part of the law of the land. But the principles laid down in Priestley *v.* Fowler, and all the examples there given of their application, relate to the conveniences and casualties of ordinary or domestic life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery.

It is, in most cases, impossible that a workman can judge of the condition of a complex and dangerous machine, wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both. The master again is a volunteer, the workman ordinarily has no choice. To hold that the master is responsible to his workman for no absence of care, however flagrant, seems to me in the highest degree both unjust and inconvenient.

On the other hand, to hold that the master warrants the safety and proper condition of the machine, is equally unjust to the master, for no degree of care can insure perfect safety; and it is equally inconvenient to the public, for who would employ such machines if he were an insurer?

It seems to me that the true rule lies midway between these extremes, and I therefore agree in the conclusion arrived at by the Lord Chief Justice. The master is neither, on the one hand, at liberty to neglect all care, nor, on the other, is he to insure safety, but he is to use due and reasonable care. The degree and nature of that care are to be estimated on a consideration of the facts of each particular case. I do not say that the degree of care is, in all cases, the same as the master must observe towards strangers.

This rule seems to me the only rule consistent with justice and public convenience. But I do not rest it on those considerations alone. It reposes on very high authority. Lord Cranworth, in delivering the judgment of the House of Lords in The Bartonshill Coal Company *v.* Reid, 3 Macqueen, 266, states that, in the case of dangerous machinery, the master is bound to exercise due care. It is true that this was a Scotch case, but in that very case the law of Scotland and the law of England were held to be the same in this branch of the law of master and servant.

It may be true that some of the cases cited at the bar are not quite consistent with this rule, particularly those which seem to make the personal misconduct or personal knowledge of the master a necessary ingredient in his responsibility. But we are a court of error, at liberty to decide on principle, and fortified by higher authority. Why may not the master be guilty of negligence by his manager, or agent, whose employment may be so distinct from that of the injured servant, that they cannot with propriety be deemed fellow-servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable.

It is said that the verdict exempting the servant from the charge of negligence is inconsistent with the fact that he knew the machinery to be unfenced. But knowledge is only an ingredient in negligence. It may be, that the knowledge of the servant induced him to use extraordinary care, which care was yet insufficient to preserve him from accident. Besides, a servant knowing the facts may be utterly ignorant of the risks.

Lastly, the original contract of the servant was to work with fenced machinery, and it was his master, and not he, that violated the condition; and in so doing exercised a species of compulsion over the servant.

For these reasons I think the plaintiff below is entitled to our judgment. *Judgment for the plaintiff below.*[1]

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[1] In Gibson *v.* Erie Railway Co., 63 N. Y. 449, 452 (1875), ALLEN, J., for the court, commenting on the rule laid down by COCKBURN, C. J., said: "It is not necessary to hold that this rule should be applied in all its rigor to casualties arising from the use of complex and dangerous machinery, the condition of which, or the risks involved in different conditions of it, an ordinary workman might be incapable of judging."

In Hough *v.* Railway Co., 100 U. S. 213, 224, 225 (1879), HARLAN, J., for the court, said: "But he did have knowledge of the defective condition of the cow-catcher or pilot, and complained thereof to both the master-mechanic and the foreman of the round-house. They promised that it should be promptly remedied, and it may be that he continued to use the engine in the belief that the defect would be removed. The court below seem to attach no consequence to the complaint made by the engineer, followed, as it was, by explicit assurances that the defect should be remedied. According to the instructions, if the engineer used the engine with knowledge of the defect, the jury should find for the company, although he may have been justified in relying upon those assurances. If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition. But 'there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.' Shearman & Redf. Negligence, sect. 96. . . . 'If the servant,' says Mr. Cooley, in his

WILSON, APPELLANT *v.* MERRY AND CUNNINGHAM, RESPONDENTS.

HOUSE OF LORDS. 1868.

[*L. R.* 1 *H. L. Sc.* 326.]

AFTER a trial which lasted four days in January, 1867, Mrs. Wilson recovered a verdict against Messrs. Merry & Cunningham for the loss of her son, who was killed when engaged as a miner in their employment; — the jury assessing the damages at £100.

The counsel of Messrs. Merry & Cunningham took exceptions to the judge's charge. One of these was allowed by the Court of Session, whose judgment of allowance, setting aside the verdict, and granting a new trial, formed the subject of Mrs. Wilson's appeal to the House.

The question, in a word, was whether her son's death had not been caused by the fault or negligence of a fellow-workman, so as to free Messrs. Merry & Cunningham from responsibility.

Mr. Quain, Q. C., *Mr. Strachan* and *Mr. Junner*, appeared for the appellant.

Sir Roundell Palmer, Q. C., *Mr. Young*, and *Mr. A. B. Shand*, for the respondents.

THE LORD CHANCELLOR (CAIRNS). — My Lords, the respondents in this case are coal and iron masters, owning the Haughhead coal-pit, near Hamilton, in the county of Lanark. This pit had, prior to the 21st of November, 1863, been sunk to the depth of ninety-five fathoms and contained four seams of coal. The upper seam, called the Ell coal, had been worked out, and the respondents determined to work the next underlying seam, called the Pyotshaw coal. In order to open this seam from the side of the pit a scaffold was erected in the pit, from and by means of which to drive the level in the Pyotshaw seam. This scaffold was completed on Saturday, the 21st of November, 1863. On the following Monday, the 23d of November, 1863, Robert Wilson

work on Torts, 559, 'having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks.' . . . We may add, that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part."

See the discussion in Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155 (1891). — ED.

and Henry Wilson, sons of the appellant, were engaged by the respondents to assist in driving this level; and on the 24th of November they went to work. The system of ventilation in the pit, before the scaffold was placed there, was of the usual kind, by downcast and upcast, and it is not suggested that before the platform was erected the system of ventilation was defective in any particular. The platform, however, interrupted the free current or circulation of air in the pit; and although it is stated that apertures were left in the platform on the upcast side for the return of the air from the shaft below, yet an accumulation of fire-damp appears to have taken place underneath the platform; and on the 25th of November, 1863, while Henry Wilson was searching on the scaffold with a light for a wedge which was missing, the light came in contact with the fire-damp coming from beneath the scaffold, and an explosion took place, by which the scaffold was blown up and Henry Wilson killed on the spot.

The present action was raised by the appellant, as the mother of Henry Wilson, for damages in consequence of his death, and an issue was appointed by the Lord Ordinary for the trial of the cause in the following terms: "Whether, on or about the 25th day of November, 1863, the deceased Henry Wilson, miner, Haughhead, the son of the pursuer, while engaged in the employment of the defenders as a miner in said pit, was killed by an explosion of fire-damp through the fault of the defenders, to the loss, injury, and damage of the pursuer."

It was not suggested that the respondents themselves took any part in the erection of the platform, nor was any personal fault or negligence of any kind imputed to them. The general manager of their works in Lanarkshire was Mr. Jack. The manager of the Haughhead coal pit underneath Jack was John Neish; and subordinate to Neish was a man named Bryce, who attended to the underground operations. One Neil Robson, formerly a mining engineer, was a partner with the respondents, and it was under the general direction of the respondents and of Robson and Jack that the working of the Pyotshaw seam was commenced. The charge of sinking the pit, and making arrangements underground for working it, was given to Neish. It was proved at the trial, and, indeed, not controverted, that Jack and Neish were competent persons for the work on which they were engaged; selected by the respondents with due care; and furnished by the respondents with all necessary materials and resources for working in the best manner.

The cause was tried on the 2d of January, 1867, and the three following days, before Lord Ormidale, and a verdict found for the appellant, assessing damages at £100. Two exceptions were taken to Lord Ormidale's directions to the jury; the second of which was allowed by the Court of Session, and a new trial granted. It is on this exception alone that your Lordships are now called to express an opinion, the appellant having appealed against the interlocutor of the Court of Session allowing the exception, which runs thus: —

"Lord Ormidale charged the jury; and, after explaining that in law the defenders were not answerable for the consequences of an accident which could not have been foreseen, and by reasonable care and caution prevented, or for the consequences of an accident caused by deceased's own fault, or the fault of a fellow-workman, as Bryce must be held to have been in the present instance, engaged with him in the same common employment; and after also explaining the nature of the obligation under which employers lay of providing all apparatus and machinery necessary and proper for the safety of their workmen, proceeded to bring under their consideration the circumstances relating to the ventilation arrangement or system of the pit in question, distinguishing betwixt the keeping clear and in good working order the ventilation arrangement or system when completed, and after the deceased came to be engaged in the pit, and defect or fault in said arrangement or system itself. And in reference to the latter Lord Ormidale, in the course of his charge, directed the jury, that 'if they were satisfied on the evidence that the arrangement or system of ventilation in the Haughhead pit at the time of the accident in question had been designed and completed by Neish before the deceased Henry Wilson was engaged to work in the pit, and that the defenders had delegated to Neish their whole power, authority, and duty in regard to that matter, and also in regard generally to all the underground operations, without control or interference on their part, the deceased Henry Wilson and Neish did not stand in the relation of fellow-workmen engaged in the same common employment, and the defenders were not on that ground relieved from liability to the pursuer for the consequences of fault, if any there was, on the part of Neish in designing and completing said arrangement or system of ventilation.'"

The law applicable to cases of this kind has of late years come frequently under consideration, both in this House and in various courts of law in England and Scotland. The cases up to the year 1858 are all reviewed in the case of the Bartonshill Coal Company *v.* Reid, decided by your Lordships.[1] . . .

I do not think the liability, or non-liability, of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow-workman, or *collaborateur*, of the sufferer. In the majority of cases in which accidents have occurred the negligence has, no doubt, been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader grounds. As is said by a distinguished jurist: "*Exempla non restringunt regulam, sed loquuntur de casibus crebrioribus (Donellus de Jure Civ.* L. 9, c. 2, *n*). The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in the case of Tarrant *v.* Webb, negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants.

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[1] Here were read quotations from Lord CRANWORTH's opinion in Bartonshill Coal Company *v.* Reid, 3 Macq. 266, 282–284. — ED.

Applying these observations to the direction of the learned judge to the jury in this case, I think the first error in that direction is, that it is pregnant with the suggestion to the jury that if they found the scaffold to have been finished by Neish before the deceased was engaged to work in the pit, a liability for the accident was thrown upon the respondents, which would not have existed if the deceased had been engaged before the scaffold was finished. This, my Lords, was calculated, as I think, to mislead, and appears to have misled the jury.

But, my Lords, I think there is another objection to the charge of the learned judge. He asks the jury to consider whether the respondents had delegated to Neish their whole power, authority, and duty in regard to the arrangement or system of ventilation, and also in regard generally to all the underground operations, without control or interference on their part.

My Lords, I think there is nothing in the evidence which would warrant a question being left to the jury in these terms. The respondents had delegated no power, authority, or duty to Neish, except in the sense in which a master who employs a skilled workman to superintend a portion of his business delegates power, authority, and duty to the workman for that purpose. It was admitted that the respondents gave no specific directions to Neish as to the manner or form in which the scaffold was to be arranged. They told him that the Pyotshaw seam was to be opened, and they left to him the arrangements underground for opening and working it. And the learned judge ought not, as I think, to have suggested to the jury that this could be viewed in any other light than as the ordinary employment by the respondents of a sub-manager or foreman. I think the learned judge ought to have told the jury that if they were of opinion that the respondents exercised due care in selecting proper and competent persons for the work, and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the appellant for the consequences of the accident.[1] . . .

Lord CRANWORTH. My Lords, the direction of the learned judge complained of has been so fully stated by my noble and learned friend that I need not repeat it at length. The substance of it was, that if the system of ventilation had been completed by Neish before Wilson was engaged to work in the pit, and if the owners had delegated to him all their power and authority as to the underground operations, then he and Wilson were not fellow-workmen. This was clearly wrong. Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. A gang of laborers employed in making an excavation and their captain, whose directions the laborers are bound to follow, are all fellow-laborers under a common master, as has been more than once decided in England, and on this subject there is no difference between the laws of England and Scotland. Nor does it make any difference that the scaffolding, the imperfection of which is assumed to have caused the accident, had been all set up by Neish before Wilson began to be employed. In order effectually to carry on the work, it was necessary that a scaffolding should be fixed under the superintendence of an underground manager, and when so fixed it was necessary that workmen should be employed at it in excavating the mine under similar superintendence. That Neish was a person competent to perform the duties of such underground manager was not a matter in dispute. He caused the scaffold to be prepared and fixed, and when that had been done Wilson began to work under him as manager. They thus clearly became fellow-workmen, and the circumstance that a part of the duties of Neish had been completed before Wilson began to work cannot be material. If, indeed, the owners had failed to take reasonable care in causing the scaffold to be erected, the case would have been different, but of this there is no evidence. It certainly was not incumbent on them personally to fix the scaffold. They discharged their duty when they procured the services of a competent underground manager; and whether Wilson began to work with, or under, Neish before or after he had prepared the scaffold was a matter of no importance. From the time when he began to work he was a fellow-workman with him. The direction given by the learned judge at the trial was certainly wrong, and the interlocutor granting a new trial was therefore right.

It is not necessary that we should say what direction the learned judge ought to have given, but I have no difficulty in saying that he ought to have charged the jury to the effect that Neish and the deceased were, according to the evidence, fellow-workmen, and that the defenders were not liable if they, the jury, were of opinion that Neish was a properly skilled workman to act as underground manager, even if there were defects in the scaffolding which caused the accident.[1] . . .

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[1] Here followed a passage pointing out that no question had been presented, under 23 & 24 Vict. c. 151, "An Act for the Regulation and Inspection of Mines." —ED.

Lord CHELMSFORD.[2] Although the learned judge, in the course of his summing up, distinguished "between keeping clear and in good working order the ventilation arrangement or system when completed, and a defect or fault in the arrangement or system itself," yet he does not appear to have left it to the jury to decide whether the accident occurred through faulty ventilation or through casual obstruction in the ventilation, the latter of which appears from the evidence to be more likely to have been the case. But, supposing it to have been quite clear that the ventilation itself was defective, yet, if it occurred in the course of the operations in the pit, it ought to have been distinguished from that "system of ventilation and putting the mine into a safe and proper condition for working," which, according to the opinion of the Lord Justice Clerk, in Dixon *v.* Ranken, 14 Dunlop, 420, "it was the duty of the master for whose benefit the work is being carried on to provide." In the course of working the Haughhead pit it became necessary to arrange a system of what, for distinction's sake, I may call local ventilation. This must be considered as part of the mining operations, and, therefore, even if the accident happened in consequence of the scaffold in the Pyotshaw seam having, under Neish's orders, been constructed so as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine; and if Neish and the deceased were fellow-workmen, it would have been one of the risks incident to the employment in which the deceased was engaged.[3] . . .

Lord COLONSAY.[4] I hold it to be quite clear that the liability of a master for injury done by the fault or negligence of his servant falls to be dealt with on different principles where the sufferer is a stranger, and where the sufferer is a fellow-servant engaged in the same common employment. The distinction was fully recognized by Lord Cranworth, and effect was given to it by this House, in the case of the Bartonshill Company. Whether the present case does or does not belong to the latter class, it certainly does not belong to the former class. The deceased was not a stranger; he was, at the time he received the injury, a workman in the employment of the defenders, in their coal mine. Neish was also in their employment there. If it is not alleged that there was any personal fault or neglect on the part of the master, on what principle does liability attach to him? Does such liability flow from the nature of the contract of service under which the deceased was working? I think that there are duties incumbent on masters with reference to the safety of laborers in mines and factories, on the fulfilment of which the laborers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself; — or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty, — or the failure to provide or supply the means of providing proper machinery or materials; — may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein, if the master fails, he may be responsible. But, on the other hand, there are risks incident to occupations more or less hazardous, and of which the laborer who engages in any such occupation takes his chance. It is eminently so in regard to mining operations. There are perils of the pit as well as of the other deep, and one of those perils is the risk of the consequences that may, even in the best regulated pits, result from the carelessness or recklessness, or other fault, of one or more of those persons composing the organized body engaged in working the mine. The master does not impliedly insure the workmen against such perils.

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[1] Here followed a passage declining to discuss 23 & 24 Vict. 151. — ED.

[2] After explaining that the only question was as to the second exception. — ED.

[3] Here followed a discussion of the charge and of 23 & 24 Vict. c. 151. — ED.

[4] After stating the facts and the question. — ED.

Is the fault attributed to Neish one of this last character? I think it must be so regarded, unless there was something in the relation of Neish to the defenders, or to the deceased, which deprives it of that character. It is not alleged that the general system of ventilation of the pit, as it had existed anterior to the erection of the scaffold, was not good, or that Neish was not a fit man to be placed in the position he occupied. In neither of the respects was there any fault or negligence on the part of the defenders; nor is it alleged that in any other respect there was personal fault on their part. But it is said that Neish was not a fellow-workman of the deceased — that he was in some sense and to some effect a representative of the defenders, holding delegated powers from them, and that they are therefore liable.

Now I agree with what has been said as to the terms "fellow-workman" and "*collaborateur.*" They are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organization that now exist. And these expressions, if taken in a strict or limited sense, are calculated to mislead. The same may be said of such words as "foreman" or "manager." We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part. Nor is it of any consequence that the position he occupies in such organism implies some special authority, or duty, or charge, for that is of the essence of such organizations, as, for instance, in this case, Bryce is admitted to have been within the principle of a fellow-workman, although he was foreman and underground manager, and had the immediate charge of constructing the scaffold, and was primarily to blame for its defects, if any; Neish was one step higher, and may have been in fault for not detecting Bryce's error; but yet Neish was subordinate to a still higher servant, Jack. They were all links in the same chain. If the master was responsible for injury done to Wilson through the fault of Neish, on the ground that, strictly speaking, they were not fellow-laborers, he would, on the same ground, have been liable to Neish for injury done to him through the fault of Wilson.

Now the direction of the learned Judge with reference to the circumstances of this case appears to me to have been objectionable for these reasons: First, It deals, apparently, with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of the pit, for which in certain views the defenders might be regarded as liable, whereas it was a defect in the construction of a temporary structure erected by order of Neish for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defenders for the fault of Neish. But the distinction does not appear to have been adverted to. Secondly, It suggests to the jury that if the faulty scaffold was completed before Wilson entered into the employ of the defenders, a liability was imposed on the defenders which would not otherwise have existed, inasmuch as in that case Wilson and Neish could in no view have been fellow-workmen at the time when the fault was committed by Neish. But if it was the duty of Neish to provide for the passage of air upwards in the shaft, that duty did not cease with the erection of the scaffold, but continued while the scaffold remained, and he was in fault so long as that duty was not performed. It was not merely the erection of the scaffold on Saturday, but the maintenance of it in a defective state until Tuesday morning, that caused the injury, if it was really caused by the defective construction of the scaffold; and consequently there was no room for the suggested disconnection of Wilson and Neish as fellow-workmen. Thirdly, The direction points the attention of the jury to the question, whether Wilson and Neish stood in the relation of fellow-workmen engaged in the same common employment, as the test of non-liability, without sufficient explanation of what constituted that relation; and, in particular, without explaining that diversity of duties and gradation of authority are not inconsistent with that relation, and without referring to the effect which might be produced on the liability of the master by a careful selection of proper persons to take charge of different departments in the working of the mine.[1] . . .

Interlocutor affirmed, and appeal dismissed with costs.[2]

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[1] Here followed a passage declining to express an opinion as to 23 & 24 Vict. c. 151. — Ed.

[2] For *dicta* suggesting a distinction based on the relative rank of servants, see Bartonshill Coal Co. *v.* Reid, 3 Macq. 266, 295 (1858), *per* Lord Cranworth; Clarke *v.*

FORD *v.* FITCHBURG RAILROAD COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1872.

[110 *Mass.* 240.]

TORT to recover for personal injuries occasioned by the explosion of the boiler of a locomotive engine belonging to the defendants. Trial in the Superior Court, before SCUDDER, J.[1] . . .

The judge instructed the jury as follows: "A person entering into the service of another takes upon himself, in consideration of the compensation to be paid him, the ordinary risks of the employment, including the negligence of his fellow-laborers." "The general rule is, that he who engages in the employment of another, for the performance of specific duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, embracing perils arising from the negligence of those in the same employ as incident to the service." "When a master uses due diligence in the selection of competent and trustworthy servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service." "A corporation is required to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which it requires of its servants, and is liable for damages occasioned by neglect or omission to fulfil this obligation, whether it arises from its own want of care, or that of its agents intrusted with the duty. But the law does not hold it responsible for the negligence of its servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient." "The rules of law are well settled, that a servant, by entering into his master's service, assumes all the risks of that service, which the master, exercising due care, cannot control, including those arising from the negligence of his fellow-servants; but that the master is bound to use ordinary care in providing suitable structures and engines and proper servants, to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keeping and maintaining such servants, structures, and engines. If he knows, or in the exercise of

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Holmes, *ante*, pp. 836, 841, *per* BYLES, J.; Gallagher *v.* Piper, 16 C. B. N. S. 669, 697 (1864), *per* BYLES, J., dissenting; and Murphy *v.* Smith, 19 C. B. N. S. 361, 366–368 (1865), *per* ERLE, C. J., and KEATING, J.

See Devlin *v.* Smith, 89 N. Y. 470 (1882); Butler *v.* Locke, 126 N. Y. 105 (1891). — ED.

[1] The report has been abbreviated by omitting the evidence, the instructions requested by the defendant corporation, and so much of the opinion as dealt with those instructions. — ED.

due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty. For the management of his machinery and the conduct of his servants, he is not responsible to their fellow-servants; but he cannot avail himself of this exemption from responsibility, when his own negligence in not having suitable instruments, whether persons or things, to do his work, causes injury to those in his employ. He cannot divest himself of his duty, to have suitable instruments of any kind, by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his and not merely theirs, and for negligence of his duty in this respect he is responsible. To hold otherwise would be to exempt a master, who selected all his machinery and servants through agents or superintendents, from all liability whatever to their fellow-servants, although he had been grossly negligent in the selection or keeping of proper persons and means for conducting his business."

"The obligation of a corporation, so far as respects those in its employment, does not extend beyond the use of ordinary care and diligence. By ordinary care and diligence is meant such as men of ordinary sense, prudence, and capacity, under like circumstances, take in the conduct and management of their own affairs. This varies according to circumstances as the risk is greater or less, and must be measured by the character and risks and exposures of the business."

Applying the law as stated to the present case, the judge instructed the jury that "the exercise of ordinary diligence and care was required on the part of the defendants, and their proper officers and agents, in providing a suitable engine to be used by the plaintiff upon their road, and in keeping the engine in proper condition for such use; that the plaintiff was also required to exercise ordinary diligence and care in the use of the engine and in avoiding danger therefrom; that if neither party was in fault the plaintiff could not recover; that if the injury complained of was occasioned by the fault or negligence of both parties, the plaintiff was not entitled to recover; that if the defendants, acting by their proper officers and servants, exercised ordinary diligence and care in providing a suitable engine and in keeping the same in proper condition and repair, for the use to which it was appropriated, they were not responsible for the injury complained of; but that if they failed so to do, and the injury complained of resulted from their neglect in this respect, then the defendants were responsible therefor, unless it appeared that the plaintiff himself was also wanting in the exercise of ordinary vigilance and care, either in the management of the engine or in improperly exposing himself to danger therefrom, thereby rendering himself guilty of contributory negligence, in which latter case he was not entitled to recover; that the burden was upon the plaintiff to show, not only that the defendants were guilty of negligence in not exercising ordinary diligence and care in providing a suitable engine and keeping it in proper condition, thereby causing the injury complained of, but that he was himself free from any negligence contributing to the injury; that Rule 28 did not, as a matter of law, release the defendants from their legal responsibility in this case, if any such existed, for the internal and invisible defects in the boiler, by which it was claimed the explosion was occasioned; and that the violation of Rule 42, so far as it stated it to be the duty of the plaintiff to be sure that the engine was in good working order before it was taken from the engine-house, did not, as matter of law, necessarily preclude him from recovering in this case, if otherwise entitled, unless the accident or injury complained of was occasioned in whole or in part by such violation."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

H. B. Staples and *F. P. Goulding*, for the defendants.

G. A. Torrey, for the plaintiff.

COLT, J. This action is founded on the alleged negligence of the defendant corporation in failing to provide and keep in repair a safe and suitable engine to be run by the plaintiff in his employment as locomotive engineer upon its road. The law applicable to cases of this description, and which defines the rights and duties that belong to the relation of master and servant, is plainly stated in the recent decisions of this court. The principles are discussed and the cases sufficiently reviewed in Coombs *v.* New Bedford Cordage Co. 102 Mass. 572, and in Gilman *v.* Eastern Railroad Co. 10 Allen, 233, and 13 Allen, 433, and Huddleston *v.* Lowell Machine Shop, 106 Mass. 282.

Upon a careful consideration of the evidence and the instructions given, we find no error in law for which this verdict should be set aside. The legal principles which govern the case were accurately stated. They were well adapted to the whole evidence in its different aspects, and they were all that the case required. The jury, who are presumed to have been controlled by these instructions and the evidence before them, must have found, in arriving at their verdict, that the defendant corporation, by its agents, intrusted with that duty, did not exercise ordinary care and diligence, in supplying and maintaining an engine, safe to be used for motive power upon their road, in the performance of that part of the plaintiff's work in which he was engaged at the time; that this neglect was the cause of the injury; and that the plaintiff was himself in the exercise of ordinary care and diligence, in the use of the engine, and in avoiding danger therefrom. They must have further found, that the plaintiff did not know, or have reasonable cause to believe, that the engine was unsafe at the time of the explosion, and also that the injury was not, in whole or in part, caused by any violation of the terms of his contract of employment, as expressed in the rules of the road assented to by him.

This establishes the defendant's liability. It is enough that there was evidence in support of these several findings, sufficient to justify each. It is not a question of the weight of evidence, or whether the verdict ought not to be set aside on a motion for a new trial. When the question is raised by exceptions, the only inquiry is, whether there is any evidence proper to submit to the jury as having a tendency to support the legal propositions which charge the defendant with liability. Forsyth *v.* Hooper, 11 Allen, 419.

The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence ; if the servant is injured in the other he may. . . . *Exceptions overruled.*

FLIKE, ADMINISTRATOR, RESPONDENT, *v.* THE BOSTON AND ALBANY RAILROAD CO., APPELLANT.

COURT OF APPEALS OF NEW YORK. 1873.

[53 *N. Y.* 549.]

APPEAL from order of the General Term of the Supreme Court in the third judicial department, denying a motion for a new trial and ordering judgment for plaintiff on a verdict.

This action was brought to recover damages for the death of Henry Sipperly, plaintiff's intestate, alleged to have been caused by defendant's negligence. Sipperly was killed on the 3d of February, 1870. The circumstances of his death are sufficiently stated in the opinion.

A verdict was rendered in favor of plaintiff.

Exceptions were ordered to be heard at first instance at General Term.

Geo. W. Miller for the appellant.

Matthew Hale for the respondent.

CHURCH, C. J. The plaintiff's intestate was a fireman upon a freight train upon defendant's road, which left Albany at an early hour on a cold day. Some miles east of Albany eleven cars of another freight train, a short distance in advance, became accidentally detached and ran back and collided with the train on which the deceased was employed, by means of which he was killed. The evidence tended to show that the forward train was deficient in brakemen; that but two were aboard, when there should have been three, which was the usual number; and that if a third brakeman had been there he would have been stationed upon the eleven runaway cars, and with the brakeman on them could have controlled their impetus and prevented the accident. The company had at Albany an agent, called a head conductor, whose business it was to make up the morning trains, hire and station the brakemen, and generally to prepare and despatch these trains.

The general rule that the employer is not liable to one servant or laborer for an injury resulting from the carelessness or negligence of another servant or co-laborer, has been recently so fully considered by this court in the two cases of *Laning* v. *N. Y. C. R. R. Co.* (49 N. Y. 521) and *Brickner* v. *The Same* (49 id. 672), that discussion is unnecessary except as far as may be pertinent to determine its application to the facts of this case. This doctrine was first promulgated in England in 1837 (3 M. & W. 1), in South Carolina in 1841 (1 McMullan, 385), and in Massachusetts in 1842 (4 Met. 49), and has been adopted in this and most of the other States in the Union. There has been a diversity of reasons given for its adoption, which have led to some confusion in its application. The reasons for the rule are well stated by Pratt, J., in the first case in which it was applied in this State (6 Barb. 231), and were in substance that the rule *respondeat superior* does not itself spring directly from principles of natural justice and equity, but has been established upon principles of expediency and public policy for the protection of the community; and that, in view of the unjust consequences which may ensue from its application for injuries by co-servants, the same principles of public policy demand its limitation, and that while the general rule was demanded for the protection of the community, the exception is demanded for the protection of the employer, especially in view of the manner in which the principal business of the country is now transacted. This view evinces the flexibility of the principles of the common law, which are capable of adaptation to new or changed circumstances, and enables courts to adjust the application of the principle not in obedience to a supposed arbitrary rule, but with such limitations and qualifications as best accord with reason and justice. In applying the rule we should be cautious not to violate the very principles upon which it is founded. While shielding the employer from unjust and burdensome liabilities, we should not withhold all redress from the employed for remissness and carelessness in respect to duties which fairly devolve upon the former as the principal, and over which the latter have no control.[1] . . .

The master is liable if his own negligence or want of care produces the injury, and this may be manifested by employing unfit servants or agents, or furnishing improper or unsafe machinery, implements, facilities, or materials for the use of the servant (25 N. Y. 562; 39 id. 468). It was at first doubted by this court whether the exemption should not be limited to injuries by servants whose employment was the same (1 Seld. 492, per GARDINER, J.); but it has since been repeatedly held that injuries by servants or agents, engaged in the same general business or enterprise, are within the exemption (Id.). Hence the difficulty of applying the rule in actions against corporations whose whole business can only be transacted by agents who are in some sense co-servants. In 39 N. Y., *supra*, the court decided that a corporation was liable if negligence causing an injury to a subordinate servant could be imputed to the directors, but did not establish any definite rule on the subject. The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed. If an agent employs unfit servants, his fault is that of the corporation, because it occurred in the performance of the principal's duty, although only an agent himself. So in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal.

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[1] Here was quoted the passage from Hutchinson *v.* York, Newcastle, & Berwick Ry Co., *ante*, p. 828, n. (1). — ED.

In the case before us it was clearly the duty of the corporation, in making up and despatching the advance train, to supply it with suitable machinery and sufficient help for the business and journey which it was about to undertake; and if there was any want of care in these respects, which caused the injury, it is liable. Rockefeller had the general charge of this business, and, within the principle decided in the Laning case, represented the corporation itself.

It is claimed, by the counsel for the appellant, that the company are not liable, because the agent had, in fact, employed a third brakeman to go upon this train, who, by reason of oversleeping, failed to get aboard in time, and hence, that the injury must be attributed to his negligence, or, if attributable to the negligence of the general agent in not supplying his place with another man, such negligence must be regarded as committed while acting in the capacity of a mere co-servant, within the doctrine of irresponsibility. Neither of these positions is tenable. The hiring of a third brakeman was only one of the steps proper to be taken to discharge the principal's duty, which was to supply with sufficient help and machinery, and properly despatch the train in question, and this duty remained to be performed, although the hired brakeman failed to wake up in time, or was sick, or failed to appear for any other reason. It was negligent for the company to start the train without sufficient help. The acts of Rockefeller cannot be divided up, and a part of them regarded as those of the company, and the other part as those of a co-servant merely, for the obvious reason that all his acts constituted but a single duty. His acts are indivisible, and the attempt to create a distinction in their character would involve a refinement in favor of corporate immunity not warranted by reason or authority. As well might the company be relieved if the train was started without an engineer, or without brakes, or with a defective engine. The same duty rested upon the company, though every man employed had died or run away during the night, and if negligent in discharging it, either by acts of commission or omission, whether in employing improper help, or not enough of it, or in not requiring their presence upon the train, it is, upon every just principle, responsible for the consequences. Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. The only effect of that circumstance would be to make the negligence contributory with the brakeman, but would not affect the liability of the company. It is unnecessary, therefore, to inquire whether the sleeping brakeman was so engaged in the common service as that the defendants could be exempted from liability if the injury was solely attributable to his neglect.

Assuming that the facts are, as the jury must have found, the liability of the company is clear. These heavy freight trains were despatched only five minutes apart, and traversed a very heavy grade, and were liable, especially in cold weather, to precisely such accidents as did occur, in which event collisions, with fatal results, were almost certain to ensue. The principal protection in such cases is the prompt and efficient application of the brakes, and the utmost care should be exercised in providing a sufficient number of reliable men to perform this duty. If we were called upon to spell out a contract between the parties, it would be implied that the company agreed to use proper care not to expose the deceased to risks of this character. He was engaged upon another train in the discharge of his duty, and was not only in no way connected with the broken train, but he could neither know of nor provide against the defect.

No authority has been cited which would justify us in relieving the defendant from this liability, nor have I been able to find any. In 3 Cush. 270, the Supreme Court of Massachusetts intimate, although it was unnecessary to decide, that a railroad company is liable for an injury to an employe, caused by a deficiency of help upon another train.

Mr. Redfield, in a note in a recent edition of his work on Railways, expresses the opinion that corporations should be regarded as constructively present in all acts performed by their general agents, within the range of their employment; and the tendency of judicial opinion, while it adheres to the general rule of irresponsibility, is against extending it.

The judgment must be affirmed.

PECKHAM, ANDREWS, and RAPALLO, JJ., concur.

ALLEN, GROVER, and FOLGER, JJ., dissent.

Judgment affirmed.[1]

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[1] Compare Michigan Central Railroad Co. *v.* Dolan, 32 Mich. 510 (1875). — ED.

CORCORAN, APPELLANT, *v.* HOLBROOK ET AL., RESPONDENTS.

COURT OF APPEALS OF NEW YORK. 1875.

[59 *N. Y.* 517.]

APPEAL from an order of the General Term of the Supreme Court, in the third judicial department, reversing a judgment in favor of plaintiff. entered upon the report of a referee, and granting a new trial.

This action was brought to recover damages. for injuries sustained by plaintiff in consequence of the fall of an elevator in defendants' mill, in which plaintiff was an employee.

The referee found the following facts: That defendants were copartners in the business of operating a cotton mill, located in the city of Troy; they were also doing business as merchants in New York city, where they resided; they gave no personal attention to the conducting of the mill, but it was managed by a general agent, having general charge thereof, its machinery and operations, with power to purchase supplies, etc. In the mill was an elevator, elevated and lowered by a chain passing over a drum in the garret. The elevator was designed for elevating goods, but for many years the superintendents, bosses, and employees had been accustomed to ride thereon, from one floor to another, while engaged in their work, to the knowledge of the superiors and bosses. Plaintiff was an employee in the mill, and had been accustomed so to ride. Some of the links of the chain had worn thin, and thereby rendered the elevator dangerous and unsafe. This had been known by the agent for three weeks prior to the accident in question, and he was notified that, if the chain was not repaired, some of the employees would get hurt. Plaintiff had no knowledge of the defect. On the 17th of February, 1870, and while at work in the mill. plaintiff was sent to a room above that where she worked. She took the elevator, and while ascending the chain broke, the elevator fell, and she was injured.

As conclusions of law, the referee found that notice to the general agent was notice to the defendants. who were chargeable with his negligence; that plaintiff was not guilty of any contributory negligence, and that defendants were liable for the damages sustained by plaintiff.

R. A. Parmenter, for the appellant.

Irving Browne, for the respondents.

RAPALLO, J. The reversal of the judgment entered upon the report of the referee was upon questions of law only. The facts found by the referee must therefore be taken as established. From these findings it appears that for upward of thirty years the elevator in question had been customarily used by the superintendents, bosses, and employees of the mill for the purpose of riding from one floor to another of the mill while engaged in work there, and this to the knowledge of their superiors and bosses, and that the plaintiff had been accustomed so to ride. The right of the plaintiff to use the elevator to pass to the upper floor is conceded in the opinion of the Supreme Court, and the conclusion of the referee that she was not guilty of any negligence in so doing is undisturbed. The sole ground of reversal was that the defendants were not liable for the negligence of their general agent in omitting to repair the broken chain, after notice to him that it was unsafe, and that unless repaired some of the employees would get hurt.

The defendants, who operated the mill at the time of the injury, gave no personal attention to conducting the mill, but it was managed by a general agent, who had general charge of the mill, machinery, and operatives, with power to purchase all supplies and hire and discharge operatives.

It is evident that this general agent was not a mere fellow-servant of the plaintiff, who was a common hand in the mill, but that he was charged with the performance of the duties which the defendants owed to the hands employed in the mill. There was no other person to discharge those duties, and the defendants could not, by absenting themselves from the mill and refraining from giving any personal attention to its conduct, but committing the entire charge of it to an agent, exonerate themselves from those duties, or from the consequences of a failure to perform them.

It was the duty of the defendants toward their employees to keep the elevator in a safe condition, and to repair any injury to it which would endanger the lives or limbs of their employees who were lawfully and properly and in the performance of their functions in the habit of using it. That duty they delegated to their general agent. As to acts which a master or principal is bound as such to perform toward his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and liable for the manner in which they are performed. (Flike *v.* Boston & Albany R. R. Co., 53 N. Y. 549.) This rule is as applicable to individuals as to corporations, and requires us to sustain the conclusion of the referee, that the defendants were responsible for the neglect of their general agent, he having the means and power, to keep the elevator in repair, and that notice to such general agent was notice to the defendants that the elevator was out of repair, and the defendants were consequently guilty of gross negligence in omitting to repair it.

The order of the General Term should be reversed, and the judgment entered upon the report of the referee affirmed with costs.

All concur.

Order reversed and judgment accordingly.

CRISPIN, RESPONDENT, v. BABBITT, APPELLANT.

COURT OF APPEALS OF NEW YORK. 1880.

[81 *N.Y.* 516.]

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been sustained by defendant's negligence.

At the time of the accident, plaintiff was working as a laborer in the iron works of the defendant, at Whitesboro, Oneida County. Plaintiff had assisted to draw a boat into a dry dock connected with the works; after the boat was in the dry dock, it became necessary to pump out the water; this was done by means of a pump, worked by an engine While plaintiff, with others, was engaged in lifting the fly wheel of the engine off its centre, one John L. Babbitt carelessly let the steam on and started the wheel, throwing the plaintiff on to the gearing wheels, and thus occasioning the injuries complained of. Defendant lived in the city of New York, coming about once a month, for a day or two, to the iron works, of which, as the evidence tended to show, said Babbitt had general charge; being at one time the general superintendent and manager, at another time styled the "business and financial man." The substance of the evidence, as to the position occupied by Babbitt, and the particulars as to the accident, are fully set forth in the dissenting opinion of EARL, J. The defendant's counsel requested the court to charge, among other things, as follows: —

"13th. That although John L. Babbitt may, as financial agent or superintendent, or overseer or manager, have represented defendant and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer, or manager."

The court so charged.

"14th. That as to any other acts or duties performed by him in or about the defendant's works at Whitesboro, or in or about the defendant's business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and as a fellow-servant of the plaintiff."

The court refused so to charge, saying: "I will leave that as a question of fact for the jury."

"17th. That if John L. Babbitt did let on the steam while plaintiff was engaged at the wheel, he was not, in so doing, acting in the defendant's place, but his act in so doing was his own act, and not the act of the defendant."

The court refused so to charge, leaving this also for the jury.

To the refusals to charge, defendant's counsel duly excepted.

A. J. Vanderpool, for appellant.

N. E. Kernan, for respondent.

Rapallo, J. The liability of a master to his servant for injuries sustained while in his employ, by the wrongful or negligent act of another employee of the same master, does not depend upon the doctrine of *respondeat superior*.

If the employee whose negligence causes the injury is a fellow-servant of the one injured, the doctrine does not apply. (Conway *v.* Belfast, etc. Ry. Co., 11 Irish, C. L. 353.)

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or of the duty of the master to his servant, viz.: to employ competent fellow-servants, safe machinery, etc. But for the mere negligence of one employee, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. (Albro *v.* Agawam Canal Co., 6 Cush. 75; Conway *v.* Belfast Ry. Co., *supra;* Wood's Master and Servant, § 438. See, also, §§ 431, 436, 437.) On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employee. On this principle the Flike case (53 N. Y. 549) was decided. Church, C. J., says, at page 553: "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance. (Wood's Master and Servant, § 438.) The citation which the court read to the jury, from 21 Am. Rep. 2, does not conflict with, but sustains this proposition; it says: "Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master is liable." These were masters' duties. In so far as the case from which the citation is made goes beyond this, I cannot reconcile it with established principles. In England, by a late act of Parliament, the rules touching the point now under consideration have been modified in some respects, but in this State no such legislation has been had.

The point is sharply presented in the present case, by the 13th, 14th, and 17th requests to charge. 13th. That although John L. Babbitt may, as financial agent or superintendent, overseer or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer, or manager.

This the court charged.

14th. That as to any other acts or duties performed by him in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and a fellow-servant of the plaintiff.

This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge that in letting on the steam John L. Babbitt was not acting in defendant's place. This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employee. As between master and servant it was servant's, and not master's duty to operate the machinery.

The judgment should be reversed.

EARL, J., dissenting.[1] On the one hand, it is claimed that, in determining the responsibility of the master in such cases, we must look solely at the duties which were devolved upon the servant whose acts are complained of, and that if we find that the duty which he was engaged in discharging when he committed the negligent act or wrong was one of those absolute duties which the master owed to his servants, then the master is responsible, no matter what was the grade or position of the servant. On the other hand, I claim the rule to be, that, in determining the responsibility of the master for the negligent acts of his servant, we must look solely at the position of such servant, and we must consider the duties devolved upon him, solely for the purpose of determining such position, and if we find that he was the representative of the master, within the rules above stated, then the master must be held responsible for all his acts of negligence committed within the scope of the business intrusted to his hands, as well to co-servants as to strangers.

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[1] The greater part of this opinion is omitted. — ED.

It cannot be claimed that what John L. Babbitt did was an idle thing, having no pertinency to the business in hand. If he was there in defendant's works, as we have assumed the jury found, standing in his place and having the general charge of his business, then he was empowered to do whatever he saw fit in and about that business and in furtherance of its objects. Whatever he could order or employ another to do, he could do himself. Did he represent the defendant when he ordered the laborers to put the boat into the dry dock, and not represent him a few minutes later when he put his hands to the engine to further the same work? If he had ordered another servant to do this careless act, the defendant would have been liable, and does the defendant escape liability because John did the act himself? I say, no. . . .

FOLGER, C. J., ANDREWS and MILLER, JJ., concur with RAPALLO, J. DANFORTH and FINCH, JJ., concur with EARL, J.

Judgment reversed.[1]

JOHNSON *v.* BOSTON TOW-BOAT COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[135 *Mass.* 209.]

W. ALLEN, J. The defendant is a corporation engaged in the business of moving cargoes and merchandise by means of lighters furnished with hoisting apparatus. The lighter on which the plaintiff was employed was equipped with a steam-engine and derrick for hoisting merchandise, and, at the time the plaintiff was injured, was taking on a load of iron rails. There were six men employed upon it. — Moore, the captain, Burns, who had charge of the engine, and four laborers, of whom the plaintiff was one. The plaintiff was injured by the falling of a rail upon him in consequence of the giving way of a rope called a fall, part of the hoisting apparatus. The only negligence charged was in respect of the rope. The plaintiff contended that the defendant was negligent in not providing and maintaining a sufficient rope; and there was evidence tending to show that the rope gave way in consequence of the negligence of Moore, and also that it was in consequence of the negligence of Burns.

The jury were properly instructed that, if the defendant knew, or in the exercise of reasonable care would have known, of the defect in the rope, and did not remedy the same, or take proper means to guard the plaintiff against it, it was negligent. These instructions were not objected to.

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[1] *Acc.*: Hussey *v.* Conger, 112 N. Y. 614 (1889). — ED.

The jury were also instructed that the defendant, without any negligence of its own, might be liable for the negligence of Moore or of Burns, under the rule of *respondeat superior*, and it is to this part of the instructions, and to refusals to instruct in reference to this, that exceptions are taken.

The ground upon which this liability is put in the charge to the jury, and obviously the only ground upon which it could be put, is that Moore and Burns might not, in respect of their negligent acts, have been fellow servants with the plaintiff. The alleged negligence of Burns was in not repairing the rope, as he was ordered to do by Moore. Such negligence would plainly be that of a fellow servant, and the question has been argued, and will be further considered, with respect to Moore alone. The question is not whether Moore was in some respects a fellow servant with the plaintiff: unquestionably he was. The instructions assume that he was, and present the question whether, in the particular act in which he was negligent, he was acting as such servant, or as the representative of the defendant. The question put to the jury was, "When the captain got a new rope in place of a defective one, did he do it as the agent of the defendant in doing its duty of providing a suitable apparatus or machine for its servants to work with, or did he do it simply as a fellow servant?" The instructions were erroneous in leaving this question to the jury. Moore was employed by the defendant to do certain things upon the lighter. Whether in doing them he was a servant engaged with others upon the lighter in a common employment, or was a deputy master or vice-principal, was a question of law and not of fact. What he was employed to do was a question of fact; the capacity in which he did it was an inference of law. Had there been any question as to the facts, they should have been left to the jury, with instructions as to the legal inferences to be drawn from the facts which should be found. As the facts were not disputed, the question left to the jury was one of pure law. If the jury had found the law correctly, this error might have been cured; but it cannot appear that the verdict may not have been found upon an incorrect answer to this question. We think the court should have ruled, in accordance with the prayer of the defendant, that Moore and the plaintiff were fellow servants.

The evidence bearing upon the point in question was not controverted, and the material part of it was, in substance, this: The defendant employed in its business twenty-four boats and one elevator, and had a general manager, who had the general control of its business and the charge of all its employees, boats, and apparatus, and who had under him a superintendent of repairs, who visited and inspected all the lighters and apparatus used in the business. Moore was called the captain of the lighter on which the plaintiff was employed, and his duties were, as he testified, to put the men to work, to see that they did work, to keep their time, and to see to everything generally; if a new fall was needed, he was to give notice to the general manager and get an order for a new one, or to get a new one himself, if it was necessary and he did not find the manager. There was a spare fall on board at the time. The manager's instructions to Moore were to replace the falls with new ones whenever there was any defect. It did not appear how often it was necessary to renew the falls, except by inference from the fact stated, that from April 30th to June 8th was not an improper time for one to remain in use. The alleged negligence of Moore was in allowing a rope to remain in use after he knew that it was unsafe. Moore's duty was that of special superintendence. He was a foreman to superintend the labor of the men and the use and condition of the apparatus upon his boat. It is not disputed that, in superintending the labor of the men and the use of the apparatus and appliances, he was a fellow servant with the plaintiff, but it is contended that, in his supervision of the condition of the appliances, he was acting, not as a servant, but as a deputy master.

The defendant was under obligation to its servants to use reasonable diligence to maintain in suitable condition the appliances furnished for their use. If the defendant exercised that diligence, and provided suitable means for keeping its apparatus in proper condition, and employed competent servants to see that the means were properly used, it had fulfilled its duty. It was incidental to the use of the apparatus — a part of its contemplated use — that the rope should be occasionally renewed; and when the defendant had furnished the means for that renewal, and employed Moore to make the renewal whenever needed, it employed him as a servant, and not as agent or deputy. When a master has furnished suitable structures, means, and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means furnished, including those who use the means directly in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow servants in the general employment and business. One employed in the care, supervision, and keeping in ordinary repair of the means and appliances used in a business, is engaged in the common service. Thus, a person charged with the duty of keeping the track of a railway in repair; Waller *v.* South Eastern Railway, 2 H. & C. 102; the chief engineer on a steam-vessel, whose duty it was to see that the machinery was kept in order; Searle *v.* Lindsay, 11 C. B. (N. S.) 429; an "underlooker" in a mine, whose duty it was to examine the roof of the mine and prop it when dangerous; Hall *v.* Johnson, 3 H. & C. 589; the general foreman and manager of extensive builders and contractors; Gallagher *v.* Piper, 16 C. B. (N. S.) 669; the superintendent having the general charge and management of a large manufacturing establishment, and having the management of lighting the mill and manufacturing gas for that purpose; Albro *v.* Agawam Canal, 6 Cush. 75;

— were all held to be servants. In all the above cases, the persons employed to have the charge and superintendence of structures, machines, or appliances were held to be fellow-servants with those employed in using them.

In King *v.* Boston & Worcester Railroad, 9 Cush. 112, and 129 Mass. 277, n., the plaintiff, a fireman on a locomotive engine, was injured by reason of a defective switch-rod, and the defendant, not being negligent, was held not liable. Mr. Justice Fletcher said: "If a corporation itself should be held responsible to its servants, that the road, when first used, was safe and sufficient, yet keeping the road in proper repair afterwards would seem to be the work of servants and laborers, as much as any other part of the business of the corporation."[1] . . .

The ground upon which the master has been held liable to his servants, for defects in means and appliances arising during their use, has been that there was evidence of negligence in him. In Gilman *v.* Eastern Railroad, 10 Allen, 233, and 13 Allen, 433, the liability of the master to the servant was fully considered. Mr Justice Gray said: "The master is bound to use ordinary care in providing suitable structures and engines and proper servants to carry on his business, and is liable to any of their fellow servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keeping or maintaining such servants, structures, and engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them, or at any subsequent time, he fails in his duty."[2] . . .

The master is liable in all cases for his own negligence, and that may be shown by a defect of such a nature, or so long continued, as to be of itself evidence of negligence in the master, or the negligence of a servant may be of such a character that negligence of the master will be inferred from it.

The instructions in the case at bar allowed the jury to find for the plaintiff without any evidence of negligence of the defendant, and solely on the ground that it was liable for the negligence of Moore. The question under consideration assumes that sufficient tackle was provided by the defendant, and sufficient provision made for renewing it. Having provided sufficient appliances, a part of which required occasional renewal from the wear and tear of the use for which it was intended, and provided sufficient means for such renewal, and employed Moore to have the superintendence of the workmen and the apparatus and appliances, the use of the means provided for keeping the tackle in suitable condition was as truly a part of Moore's duty as servant as was the use of the apparatus for the direct purposes of the business, and, in performing that duty, he was a fellow servant with the plaintiff.

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[1] Here were cited Gilshannon *v.* Stony Brook Railroad, 10 Cush. 228; Seaver *v.* Boston & Maine Railroad, 14 Gray, 466; Killea *v.* Faxon, 125 Mass. 485; Colton *v.* Richards, 123 Mass. 484; Kelley *v.* Norcross, 121 Mass. 508. — ED.

[2] Here were cited Roberts *v.* Marsh, 2 H. & N. 213; Arkerson *v.* Dennison, 117 Mass. 407; Huddleston *v.* Lowell Machine Shop, 106 Mass. 282; Ford *v.* Fitchburg Railroad, *ante*, p. 850; Holden *v.* Fitchburg Railroad, 129 Mass. 268, 273; Harkins *v.* Standard Sugar Refinery, 122 Mass. 400, 405; Cayzer *v.* Taylor, 10 Gray, 274; and Snow *v.* Housatonic Railroad, 8 Allen, 441. — ED.

A majority of the court are of the opinion that the entry must be *Exceptions sustained.*[1]

L. S. Dabney, for the defendant.

I. R. Clark, for the plaintiff.

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[1] *Acc.*: McGee *v.* Boston Cordage Co., 139 Mass. 445 (1885); Cregan *v.* Marston, 126 N. Y. 568 (1891).

Compare Moynahan *v.* Hills Co., 146 Mass. 586 (1888); Daley *v.* Boston & Albany Railroad Co., 147 Mass. 101 (1888); Sweet *v.* Boston & Albany Railroad Co., 156 Mass. 284 (1892).

See Cone *v.* Delaware, Lackawanna, & Western Railroad Co., 81 N. Y. 206 (1880); Baker *v.* Allegheny Valley Railroad Co., 95 Pa. 211 (1880).

In Rogers *v.* Ludlow Manufacturing Co., 144 Mass. 198, 202–205 (1887), FIELD, J., for the court, said: —

"If a master who takes no personal part in the management of his business has any duty to perform towards his servants, it is difficult to say that it is always wholly performed by doing two things, namely, by employing competent servants, and by furnishing ample means. In order that the business may be properly managed, the servants should not only be competent, but they should be numerous enough to do, and they should have the means of doing, whatever ought reasonably to be done, and such regulations should be established as will insure the requisite subordination and control, and the exercise of reasonable intelligence and care in the conduct of the business; and it is almost as difficult to define all the duties of the master in these respects as to define the duties of a person under other relations. If it is not the absolute duty of the master to furnish suitable machinery, and if he is not held to warrant that the servants he employs to furnish machinery, or to keep it in repair, shall always use reasonable care, then the duty of a master who does not personally conduct his business, if he is under any duty, we think, must be to use reasonable care in the management, and that is to exercise, or have exercised, a reasonable supervision over the conduct of his servants, as well as to use reasonable care in seeing that his servants are competent, and are furnished with suitable means for carrying on the business.

"It is settled in this Commonwealth that all servants employed by the same master in a common service are fellow-servants, whatever may be their grade or rank. Albro *v.* Agawam Canal, 6 Cush. 75; O'Connor *v.* Roberts, 120 Mass. 227; Walker *v.* Boston & Maine Railroad, 128 Mass. 8; Holden *v.* Fitchburg Railroad, 129 Mass. 268 McDermott *v.* Boston, 133 Mass. 349; Flynn *v.* Salem, 134 Mass. 351; Mackin *v* Boston & Albany Railroad, 135 Mass. 201.

"It is also settled that the master is only bound to use reasonable care in procuring suitable machines, in keeping them in proper repair, and in hiring and retaining competent servants. The difficult question is what conduct on the part of the master satisfies this obligation. This question was carefully considered in Holden *v.* Fitchburg Railroad, *ubi supra.* It is there said that the master 'is bound to use reasonable care in selecting his servants, and in keeping the engines with which, and the buildings, places, and structures in, upon, or over which, his business is carried on, in a fit and safe condition, and is liable to any of his servants for injuries suffered by them by reason of his negligence in this respect. . . . It is difficult, if not impossible, to lay down a more definite rule applicable to all cases. As to switches or turn-tables upon the line of a railroad, the employment of suitable persons to select, construct, or inspect, has been held to satisfy the obligation of the corporation. . . . On the other hand, where a locomotive engine in actual use is imperfectly constructed, or is worn out, it has been held that the fact that the corporation has employed suitable persons to construct it, or to keep it in repair, does not, as matter of law, afford a conclusive defence; but that the question is whether, under all the circumstances, the corporation, acting by its appropriate officers or agents, has used that diligence, and taken those precautions, which its duty as a master requires.' 129 Mass. 276–278. . . .

"It is the duty of the master to exercise a reasonable supervision over the condition in which the machinery; structures, and other appliances used in his business are kept by his servants, and . . . he cannot wholly escape responsibility by delegating the performance of this duty to servants; . . . the negligence of his servants in repairing, or in failing to repair, machinery, is not necessarily the negligence of the master, but . . . it is also to be determined in each case whether the master has exercised a reasonable supervision over his servants, and reasonable care in seeing that his machinery is kept in proper condition, although he may have employed competent servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair.

"As was said in Johnson *v.* Boston Tow-Boat Co., 135 Mass. 215: 'The master is liable in all cases for his own negligence, and that may be shown by a defect of such a nature, or so long continued, as to be of itself evidence of negligence in the master, or the negligence of a servant may be of such a character that negligence of the master may be inferred from it.'

"We are aware that this rule is somewhat indefinite, and is, perhaps, not precisely that which generally prevails in the United States. Northern Pacific Railroad *v.* Herbert, 116 U. S. 642; Benzing *v.* Steinway, 101 N. Y. 547."

In Wabash Railway Co. *v.* McDaniels, 107 U. S. 454, 459–460 (1882), HARLAN, J., for the court, said: "The discussion in the adjudged cases discloses no serious conflict in the courts as to the general rule, but only as to the words to be used in defining the precise nature and degree of care to be observed by the employer. The decisions, with few exceptions, not important to be mentioned, are to the effect that the corporation must exercise ordinary care. But according to the best considered adjudications, and upon the clearest grounds of necessity and good faith, ordinary care, in the selection and retention of servants and agents, implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered. In substance, though not in words, the jury were so instructed in the present case. That the court did not use the word 'ordinary' in its charge is of no consequence, since the jury were rightly instructed as to the degree of diligence which the company was bound to exercise in the employment of telegraphic night-operators. The court correctly said that that was a position of great responsibility, and, in view of the consequences which might result to employees from the carelessness of telegraphic operators, upon whose reports depended the movement of trains, the defendant was under a duty to exercise 'proper and great care' to select competent persons for that branch of its service. But that there might be no misapprehension as to what was in law such care, as applicable to this case, the court proceeded, in the same connection, to say that the law presumed the exercise by the company of proper diligence, and unless it was affirmatively shown that the incapacity of McHenry when employed, or after his employment and before the collision, was known to it, or by reasonable diligence could have been ascertained, the plaintiff was not entitled to recover. Ordinary care, then, — and the jury were, in effect, so informed, — implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employee, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise.

"These observations meet, in part, the suggestion made by counsel, that ordinary care in the employment and retention of railroad employees means only that degree of diligence which is customary, or is sanctioned by the general practice and usage which obtains among those intrusted with the management and control of railroad property and railroad employees. To this view we cannot give our assent. There are general expressions in adjudged cases which apparently sustain the position taken by counsel. But the reasoning upon which those cases are based is not satisfactory, nor, as we think, consistent with that good faith which, at all times, should characterize the in-

ELDRIDGE, RESPONDENT *v.* THE ATLAS STEAMSHIP COMPANY, APPELLANT.

COURT OF APPEALS OF NEW YORK, SECOND DIVISION. 1892.

[134 *N. Y.* 187.]

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 28, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action for negligence, in that plaintiff, a sailor in the employ of defendant upon its ship, while in obedience to orders he was operating its winch — an alleged unsafe machine — had his hand caught in the cog-wheels thereof, and the ends of four fingers taken off.

November 9, 1886, plaintiff at New York engaged as an able-bodied seaman to serve on board defendant's ship, the Alvena. The defendant is a British corporation, but it was not shown under what flag the ship sailed. The plaintiff had not served upon that ship before. The ship had three winches, two horizontal — one, No. 3, diagonal. The cog-wheels of the horizontal winches were covered; those of the diagonal No. 3 were without cover. No. 3 was an old-fashioned winch; the other two of modern construction. Plaintiff did not observe No. 3 before he went to duty November tenth, on which day the ship sailed from New York for Kingston, Jamaica. From Kingston the ship proceeded to Aspinwall, and there was hauled alongside defendant's ship Athos; some of the cargo of the Athos was then transferred to the Alvena. Plaintiff was ordered to operate winch No. 3 in transferring the cargo. He had to stand between the winch and the house of the

tercourse between officers of railroad corporations and their employees. It should not be presumed that the employees sought or accepted service upon the implied understanding that they would exercise less care than that which prudent and humane managers of railroads ought to observe. To charge a brakeman, when entering the service of a railroad company, with knowledge of the degree of care generally or usually observed by agents of railroad corporations in the selection and retention of telegraphic operators along the line traversed by trains of cars — a branch of the company's service of which he can have little knowledge, and with the employees specially engaged therein he can ordinarily have little intercourse — is unwarranted by common experience. And to say, as matter of law, that a railroad corporation discharged its obligation to an employee — in respect of the fitness of co-employees whose negligence has caused him to be injured — by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law." — ED.

ship — a space eighteen inches wide. He had to operate a valve with his right hand so as to let the steam on or shut it off as ordered by his superior, and to operate a lever with his left hand so as to revolve the drum forward or backward as ordered. There was so much noise that these orders were given by signals by the officer. Thus the officer raised his hand as the order to go forward, moved it down to go backward, opened it wide to stop, and twirled it round fast to go fast, etc. The officer was on the right of the front of the plaintiff. The valve to be moved by plaintiff's left hand was as high as his knee and was at the end of the winch near its middle. The lever to be moved by his left hand was on the outside of the side of the winch. The plaintiff's testimony was to the effect that he had to reach over the big and small cog-wheels to take hold of the lever. The defendant's testimony was to the effect that he might have reached around the winch and seized the lever without passing his hand over the cog-wheels. The size of the winch is not given.

While watching for orders and at the same time obeying them, the plaintiff's fingers, in grasping for the lever, came in contact with the cog-wheels and were crushed. His contention is, if these wheels had been covered as the wheels of the other winches were, his fingers would have been protected. Defendant gave testimony tending to show that the winch was safe enough if plaintiff had been reasonably careful. The trial court charged the jury that if plaintiff entered defendant's service, knowing that this winch had no cover, he could not recover upon that ground, and if his own negligence in any way contributed to his injury he could not recover.

The court also charged that plaintiff was bound `to obey all lawful orders of the defendant's officers and for a refusal would have forfeited his wages or been punished. Testimony was given to this effect.

The court also charged that if this accident had happened on land, plaintiff not working as a sailor, he could not recover, but left it for the jury to say whether in view of the plaintiff's duty as a sailor he was guilty of negligence.

Everett P. Wheeler for appellant.

Jacob Fromme for respondent.

LANDON, J. In view of the verdict and the instructions of the trial court we assume that the plaintiff knew that the winch could not be operated without risk of danger to himself, but was constrained to obey the order given him by his superior to operate it, because he knew that disobedience would result in his punishment, that he, therefore, did operate it and because of its known defects of construction was injured, notwithstanding his exercise of reasonable care to avoid injury.

The defendant insists that the command to operate this dangerous winch was not lawful, and, therefore, plaintiff might rightfully have refused obedience. If it be conceded that the command was unlawful, it does not necessarily follow that plaintiff's obedience was negligence. For whether the command was lawful or unlawful, the evidence is to the effect that his disobedience would have resulted in his punishment. The boatswain, under whose orders plaintiff was operating the winch, testified that the plaintiff "was bound to obey the order that I gave him; if he did not obey the order he would have been put in irons and fined." Grant that the plaintiff had been so learned in the law as to know that the courts would ultimately decide that the command was unlawful, and disobedience to it lawful, he could know no way of escape from the ship's punishment of his disobedience, for there was none. The jury found in effect that he was coerced through fear of punishment into obedience. If the command was unlawful, the defendant's case is not improved by the fact that the punishment it would visit upon disobedience was also unlawful. In any event the plaintiff was in a dilemma. He had to choose between present punishment with a possible hope of remote justification, and customary obedience to orders with the hope that by care he would escape injury. Grant that he made a mistake in judgment under these difficult conditions, the law does not adjudge it to be negligence, and the jury upon consideration have refused to do so. We cannot hold that their refusal was error.

Except as the case is affected by the dangerous condition of the winch, the order to operate it was lawful and the plaintiff's obedience was the duty of his service. Whatever may be the practical administration of law or of arbitrary power on ship-board, the plaintiff, if amenable to the law of the United States, was also punishable by our courts for wilful disobedience to any lawful command. Section 4596, U. S. R. S. provides, "Whenever any seaman who has been lawfully engaged . . . commits any of the following offences, he shall be punishable as follows: Fourth. For wilful disobedience to any lawful command, by imprisonment for not more than two months, and also, at the discretion of the court, by forfeiture out of his wages of not more than four days' pay."

Thus the plaintiff had to choose whether he would obey the order, or take the hazard of liability under the statute. Whatever may have been the law of the flag of the ship, or of the United States of Columbia, in whose port the injury was received, it was not shown and hence the parties in our forum must accept the law as we administer it. (The Scotland, 105 U. S. 24.)

In this view of the case, if the plaintiff made a mistake in judgment the defendant could rightfully ask no more than that the jury should pass upon the facts.

We find no error of law requiring a reversal.

Haight, J. (dissenting).[1] If, as we have shown, the machine was reasonably safe if operated with care, the master had the right to require the plaintiff to operate it, and it was his duty to observe the care necessary to prevent the injury.

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[1] The greater part of this opinion has been omitted. — Ed.

But assuming that the machine was dangerous, there were no threats made by the master or evidence given to show coercion. The usual order was given to the plaintiff to operate the winch. He made no objection or complaint in reference thereto. He was in port and could have left the vessel and sought the protection of the consul if the orders of the master were unlawful.

Coercion must be established by the evidence. The bare fact that he was told to operate the winch does not establish an intent to unlawfully interfere with him, and we cannot, from that fact alone, assume that he would have been unlawfully punished had he refused to obey the order. . . .

All concur with LANDON, J., except FOLLETT, C. J., HAIGHT and PARKER, JJ., dissenting.

Judgment affirmed.[1]

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[1] In Membery *v.* Great Western Ry. Co., 14 App. Cas. 179, 187–188 (1889), Lord BRAMWELL said: —

"I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies. What is *volens?* willing; and a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said to do a thing unwillingly, with no good will, but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone. He wills to do it. He does not will not to do it. I suppose *nolens* is the opposite of *volens*, its negative. There are two men, one refuses to do work, wills not to do it, and does not do it. The other grumbles, but wills to do it, and does it. Are both men *nolentes*, unwilling? Suppose an extra shilling induced the man who did the work. Is he *nolens*, or has the shilling made him *volens?* There seems to be a strange notion, either that a man who does a thing and grumbles is *nolens*, is unwilling, has not the will to do it, or that there is something intermediate between *nolens* and *volens*, something like a man being without a will, and yet who wills. If the shilling made him *volens*, why does not the desire to continue employed do so? If he would have a right to refuse the work and his discharge would be wrongful, with a remedy to him, why does not his preference of certain to an uncertain law not make him *volens* as much as any other motive? There have been an infinity of profoundly learned and useless discussions as to freedom of the will; but this notion is new.

"This is an important question. Is the maxim to be got rid of? Are we to say *Volenti fit injuria* provided he grumbles, as Mr. Bell contended? To do so would be most unjust and unreasonable. The master says, Here is the work, do it or let it alone. If you do it, I pay you; if not, I do not. If he has engaged him, he says, I discharge you if you do not do it; I think I am right; if wrong, I am liable to an action. The master says this, the servant does the work and earns his wages, and is paid, but is hurt. On what principle of reason or justice should the master be liable to him in respect of that hurt?"

With the principal case compare Benson *v.* Goodwin, 147 Mass. 237 (1888); Hedley *v.* Pinkney & Sons Steamship Co., [1894] A. C. 222.

See Thompson *v.* Hermann, 47 Wis. 602 (1879); Thrussell *v.* Handyside 20 Q. B. D. 359 (1888).

Compare also Leary *v.* Boston & Albany Railroad Co., 139 Mass. 580 (1885) Dougherty *v.* West Superior Iron & Steel Co., 88 Wis. 343 (1894). — ED.

BALTIMORE AND OHIO RAILROAD COMPANY *v.* BAUGH.

SUPREME COURT OF UNITED STATES. 1893.

[149 *U. S.* 368.]

JOHN BAUGH, defendant in error, was employed as a fireman on a locomotive of the plaintiff in error, and while so employed was injured, as is claimed, through the negligence of the engineer in charge thereof. He commenced a suit to recover for these injuries in the Circuit Court of the United States for the Southern District of Ohio.

The circumstances of the injury were these: The locomotive was manned by one Hite, as engineer, and Baugh, as fireman, and was what is called in the testimony a "helper." On May 4, 1885, it left Bellaire, Ohio, attached to a freight train, which it helped to the top of the grade about twenty miles west of that point. At the top of the grade the helper was detached, and then returned alone to Bellaire. There were two ways in which it could return in conformity to the rules of the company, — one on the special orders of the train dispatcher at Newark, and the other by following some regular scheduled train carrying signals to notify trains coming in the opposite direction that the helper was following it. This method was called in the testimony "flagging back." On the day in question, without special orders, and not following any scheduled train, the helper started back for Bellaire, and on the way collided with a regular local train, and in the collision Baugh was injured. Baugh had been in the employ of the railroad company about a year, had been fireman about six months, and had run on the helper, two trips a day, about two months. He knew that the helper had to keep out of the way of the trains, and was familiar with the method of flagging back.

No testimony was offered by the defendant, and at the close of the plaintiff's testimony the defendant asked the court to direct a nonsuit, which motion was overruled, to which ruling an exception was duly taken. In its charge to the jury the court gave this instruction: "If the injury results from negligence or carelessness on the part of one so placed in authority over the employee of the company, who is injured, as to direct and control that employee, then the company is liable." To which instruction an exception was duly taken. The jury returned a verdict for the plaintiff for $6,750, and upon this verdict judgment was entered. To reverse which, the railroad company sued out a writ of error from this court.

Mr. John K. Cowen (with whom was *Mr. Hugh L. Bond, Jr.*, on the brief), for plaintiff in error.

Mr. L. Danford (with whom was *Mr. James C. Tallman* on the brief), for defendant in error.

Mr. Justice BREWER delivered the opinion of the court.

The single question presented for our determination is whether the engineer and fireman of this locomotive, running alone and without any train attached, were fellow-servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former.[1] . . .

Counsel for defendant in error rely principally upon the case of Railroad Co. *v.* Ross, 112 U. S. 377, taken in connection with this portion of rule No. 10 of the company: "Whenever a train or engine is run without a conductor, the engineman thereof will also be regarded as conductor, and will act accordingly." The Ross case, as it is commonly known, decided that "a conductor of a railroad train, who has a right to command the movements of a train and control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employees on the train." The argument is a short one: The conductor of a train represents the company, and is not a fellow-servant with his subordinates on the train. The rule of the company provides that when there is no conductor, the engineer shall be regarded as a conductor. Therefore, in such case he represents the company, and is likewise not a fellow-servant with his subordinates. But this gives a potency to the rule of the company which it does not possess. The inquiry must always be directed to the real powers and duties of the official, and not simply to the name given to the office. The regulations of a company cannot make the conductor a fellow-servant with his subordinates, and thus overrule the law announced in the Ross case. Neither can it, by calling some one else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backwards and forwards by the mere regulations of the company, but applies generally, irrespectively of all such regulations. There is a principle underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts.

What was the Ross case, and what was decided therein? The instruction given on the trial in the Circuit Court, which was made the principal ground of challenge, was in these words: "It is very clear, I think, that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow-servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking." The language of that instruction, it will be perceived, is very like that of the one here complained of; and if this court had approved that instruction as a general rule of law, it might well be said that that was sufficient authority for sustaining this and affirming the judgment. But though the question was fairly before the court, it did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of that case. This is evident from this language, found in the latter part of the opinion (p. 394), and which is used in summing up the conclusions of the court: "We agree with them in holding — and the present case requires no further decision — that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner. If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language in some sentences may be open to verbal criticism, but its purport, touching the liability of the company, is that the conductor and engineer, though both employees, were not fellow-servants in the sense in which that term is used in the decisions." It is also clear from an examination of the reasoning running through the opinion, for there is nowhere an argument to show that the mere fact that one servant is given control over another destroys the relation of fellow-servants. After stating the general rule, that a servant entering into service assumes the ordinary risks of such employment, and, among them, the risk of injuries caused through the negligence of a fellow-servant, and after referring to some cases on the general question, and saying that it was unnecessary to lay down any rule which would determine in all cases what is to be deemed a common employment, it turns to that which was recognized as the controlling fact in the case, to wit, the single and absolute control which the conductor has over the management of a train, as a separate branch of the company's business, and says (p. 390): "There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. . . . We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements; and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow-servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation." And it quotes from Wharton's Law of Negligence, sec. 232 *a*: "The true view is that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." And also from Malone *v.* Hathaway, 64 N. Y. 5, 12: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal."

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[1] The omitted passages held that the question is not one of local law. — ED.

The court, therefore, did not hold that it was universally true that, when one servant has control over another, they cease to be fellow-servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employees of the company acting under him on the same train. The conductor was, in the language of the opinion, "clothed with the control and management of a distinct department;" he was "a superintending officer," as described by Mr. Wharton; he had "the superintendence of a department," as suggested by the New York Court of Appeals.

And this rule is one frequently recognized. Indeed, where the master is a corporation, there can be no negligence on the part of the master, except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. And it is only carrying the same principle a little further and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employees under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the Ross case, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department there is a natural and distinct separation, — one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice-principal or representative of the master. Even the conclusion announced in the Ross case was not reached by a unanimous court, — four of its members being of opinion that it was carrying the thought of a distinct department too far to hold it applicable to the management of a single train.

The truth is, the various employees of one of these large corporations are not graded like steps in a staircase, — those on each step being as to those on the step below in the relation of masters, and not of fellow-servants, and only those on the same steps fellow-servants, because not subject to any control by one over the other. *Prima facie,* all who enter into the employ of a single master are engaged in a common service, and are fellow-servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants. All enter into the service of the same master to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employees, and that risk, which he knows exists, he assumes in entering into the employment. Thus, in the opinion in the Ross case, p. 382, it was said: "Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or, in law, is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid."

But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employee, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this: there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet, if we analyze these matters a little, there will appear less difficulty in the question. Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employee with fit and careful co-workers, and the employee has a right to rely upon his discharge of this duty. If the master is careless in the matter of employing a servant, it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person, the fact that he has an incompetent, and therefore an improper employee, is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to a co-servant, is it not obvious that the master's omission of duty enters directly and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his service, and as the result of such reasonable inquiry is satisfied that the employee is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty, — and this, notwithstanding that after the servant has been employed it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to inquire into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain exigencies will or will not do a negligent act. So it is not possible for the master, take whatsoever pains he may, to secure employees who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken, notwithstanding the reasonable precautions he has taken. Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow-servant, does not of itself prove any omission of care on the part of the master in his employment; and it is only when there is such omission of care that the master can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him responsibility for such employee's negligence.

Again, a master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery; and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place — the tools and the machinery — than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master, who provides the place, the tools, and the machinery, owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution.[1] . . .

It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow-servants, and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employee assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a co-worker. That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department, — the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment, and are fellow-servants. It might as well be said that, where a liveryman has a dozen carriages, the driver of each has charge of a separate branch or department of service, and that if one drives his carriage negligently against another employee, the master is exempt from liability.

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[1] Here were cited Atchison, Topeka, &c. Railroad *v.* Moore, 29 Kans. 632, 644; Hough *v.* Railway Co., 100 U. S. 213; Northern Pacific Railroad *v.* Herbert, 116 U. S. 642; Railroad Co. *v.* Fort, 17 Wall. 553; Randall *v.* B. & O. Railroad, 109 U. S. 478; and Quebec Steamship Co. *v.* Merchant, 133 U. S. 375. — Ed.

It may further be noticed that in this particular case the injury was not in consequence of the fireman's obeying any orders of his superior officer. It did not result from the mere matter of control. It was through negligence on the part of the engineer in running his engine; and the injury would have been the same if the fireman had had nothing to do on the locomotive, and had not been under the engineer's control. In other words, an employee carelessly manages an engine, and another employee, who happens to be near enough, is injured by such carelessness. It would seem, therefore, to be the ordinary case of the injury of one employee through the negligence of another.

Again, this was not simply one of the risks assumed by the employee when entering into the employment, and yet not at the moment fully perceived and understood. On the contrary, the peril was known and voluntarily assumed. The plaintiff admits in his testimony that he knew they had no right to the track without orders, and that there was a local train on the road somewhere between them and Bellaire; and yet, with this knowledge, and without protest, he voluntarily rode on the engine with the engineer. Hammond *v.* Railway Company, 83 Michigan, 334; Railway Company *v.* Leach, 41 Ohio St. 388; Wescott *v.* Railroad Co., 153 Mass. 460.

In the first of these cases the party injured was a section hand, who was injured while riding on a hand-car, in company with a fellow-laborer and the section foreman; and the negligence claimed was in propelling the hand-car along a curved portion of the track, with knowledge of an approaching train, and without sending a lookout ahead to give warning. In respect to this, Mr Justice CAHILL, speaking for the court, says: "But if this conduct was negligent, it was participated in by Hammond. The latter had been going up and down this section of the road daily for three months. Whatever hazard there was in such a position was known to him, and he must be held to have voluntarily assumed it. . . . Where, as in this case, the sole act of negligence relied on is participated in, and voluntarily consented to by the person injured, with full knowledge of the peril, the question of the master's liability does not arise."

So, in this case, Baugh, equally with the engineer, knew the peril, and with this knowledge voluntarily rode with the engineer on the engine. He assumed the risk.

For these reasons we think that the judgment of the Circuit Court was erroneous, and it must be

Reversed and the case remanded for a new trial.

Mr. Justice FIELD dissenting.[1]

Mr. Chief Justice FULLER dissenting.

I dissent because, in my judgment, this case comes within the rule laid down in Chicago, Milwaukee, &c. Railway *v.* Ross, 112 U. S. 377, and the decision unreasonably enlarges the exemption of the master from liability for injury to one of his servants by the fault of another.[2]

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[1] This opinion was to the effect that the law of Ohio ought to govern the case, and that the opinion of the majority of the court limited and denied the doctrine of the Ross case. — ED.

[2] In Great Britain and in some of the United States the rules as to fellow-servants and as to appliances are now largely governed by statutes intended to increase the responsibility of employers.

In some of the States the statutes are applicable to railways only. See Code of Georgia (1882), §§ 2083, 3036 (based on a statute passed in 1856, Acts of 1855–56, p. 155); Iowa Code (1873), § 1307 (based on a statute passed in 1862, 9 G. A. c. 169, § 7, as amended by later statutes).

In other States the statutes, following closely the British Employers Liability Act, 1880 (43 & 44 Vict. c. 42), are applicable to almost all employers. See Code of Alabama (1886), § 2590 (based on a statute passed in 1885, Acts of 1884–5, p. 115); Massachusetts Statutes of 1887, c. 270.

The principal provisions of the British Employers Liability Act, 1880, are: —

"1. Where . . . personal injury is caused to a workman

"(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

"(2) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence; or

"(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

"(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

"(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, —

"The workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman or not in the service of the employer, nor engaged in his work.

"2. A workman shall not be entitled under this Act . . .

"(1) Under sub-section 1 of section 1, unless the defect . . . arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

"(2) Under sub-section 4 of section 1, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions . . .

"(3) In any case where the workman knew of the defect or negligence which caused the injury, and failed within a reasonable time to give . . . information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew. . . .

"8. . . . 'Person who has superintendence intrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor. . . . 'Employer' includes a body of persons corporate or unincorporate. . . . 'Workman' means a railway servant, and any person to whom the Employers and Workmen Act, 1875 [38 & 39 Vict. c. 90], applies."

Cases on the interpretation of the statutes, and particularly on the interpretation of "ways, works, machinery, or plant," are: Howe *v.* Finch, 17 Q. B. D. 187 (1885); Yarmouth *v.* France, 19 Q. B. D. 647 (1887); Ashley *v.* Hart, 147 Mass. 573 (1888); Brannigan *v.* Robinson, [1892] 1 Q. B. 344; Engel *v.* New York, Providence & Boston Railroad Co., 160 Mass. 260 (1893); Bowen *v.* Connecticut River Railroad Co., 162 Mass. 312 (1894).

The liability of the employer is determined not by the law of the place where the contract of service is made, but by the law of the place where the injury is suffered. Alabama Great Southern Railroad Co. *v.* Carroll, 97 Ala. 126 (1892).

By judicial construction the statutes leave open to the employer the defence of contributory negligence, and also, at least in clear cases, the defence that the servant has voluntarily assumed the very risk incurred. Thomas *v.* Quartermaine, 18 Q. B. D. 685 (C. A. 1887); Yarmouth *v.* France, 19 Q. B. D. 647 (1887); Mellor *v.* Merchants Manufacturing Co., 150 Mass. 362 (1890); Lothrop *v.* Fitchburg Railroad Co, 150 Mass. 420 (1890); Cassady *v.* Boston & Albany Railroad Co., 164 Mass. 168 (1895). See Smith *v.* Baker, [1891] A. C. 325.

It is disputed whether a servant is bound by a special contract to the effect that he will not bring an action under the statutes for an injury not yet suffered. To the effect that a servant is bound by such a contract are: Western & Atlantic Railroad Co. *v.* Bishop, 50 Ga. 465 (1873); Griffiths *v.* Earl of Dudley, 9 Q. B. D. 357 (1882) *Contra* are: Kansas Pacific Ry. Co. *v.* Peavey, 29 Kan. 169 (1883); Railway Co. *v.* Spangler, 44 Ohio St. 471 (1886). In some States, statutes expressly provide that such contracts are void. See Public Statutes of Massachusetts (1882), c. 74, § 3 (from Statutes of 1877, c. 101, § 1).

The statutes do not take away the right of action, if any, which the servant would have in case there were no statute. Ryalls *v.* Mechanics' Mills, 150 Mass. 190 (1889).

As to the policy underlying the statutes, see the Reports from the Select Committee on Employers' Liability (Parliamentary Blue Books, 1876 and 1877); and Pollock's Essays in Jurisprudence, 114. As to the history of the statutes, see an article by M. C. Hobbs, 2 Harv. Law Rev. 212. — Ed.

CHAPTER VII.

THE AGENT'S DUTIES TO THE PRINCIPAL.

SECTION I.

Obedience, Diligence, and Skill.

WILKINSON *v.* COVERDALE.

NISI PRIUS. 1793.

[1 *Esp.* 75.]

THIS was a special action on the case against the defendant for negligence.

The declaration stated, That the defendant had undertaken to procure an insurance against fire for certain premises belonging to the plaintiff, and on his account, which insurance he had effected, but that he had conducted himself so negligently in the perfecting such insurance that, the premises having been burned by fire, that the plaintiff had not been able to recover any part thereof against the fire office, whereby he had suffered a total loss.

The case as stated on the part of the plaintiff was, that he had purchased the premises in question from the defendant in the month of August, 1792; the defendant at that time had a subsisting policy from the Phœnix Fire Office from December, 1791, to December, 1792; that the defendant had undertaken to get this policy renewed on account of the plaintiff, and in fact had renewed it and charged a sum of £16 as the premium paid, but that it being necessary where a party who has an insurance standing in the office, assigns or mortgages his interest in the premises insured, that an indorsement should be made on the policy testifying such matter, and allowed at the office by some of the acting members of the company; that the defendant had neglected to have this assignment and allowance made at the office, in consequence of which the plaintiff was precluded from having any remedy on the policy against the office and had sustained a total loss.

It was admitted on the part of the plaintiff, that there was no consideration whatever moving from him to the defendant for this undertaking to get the policy on his account, but that the defendant had undertaken it gratuitously on the plaintiff's account.

On this circumstance being admitted, Lord KENYON expressed a doubt, whether any action could be maintained on such an undertaking.

Erskine for the plaintiff cited a manuscript note of a case decided at *Nisi Prius* before Mr. Justice BULLER, of Wallace *v.* Tellfair, wherein that judge had ruled in an action similar in point of circumstances with the present, that though there was no consideration for one party's undertaking to procure an insurance for another, yet where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so negligently or unskilfully, that the party could derive no benefit from it, that in that case he should be liable to an action; he then contended, that the defendant in the present case had brought himself within the rule so laid down by the learned judge, he having effected the policy, but by his negligence in not procuring the allowance at the Fire Office on the assignment of the premises, that the plaintiff had lost all benefit from it.

Lord KENYON acquiesced in the distinction, and suffered the cause to proceed.

The plaintiff failed in proving any promise of the defendant to procure the insurance as stated in his case, and was nonsuited.

Erskine and *Gibbs* for the plaintiff.

Law, *Chambré*, and *Park* for the defendant.

THORNE AND ANOTHER *v.* DEAS.

SUPREME COURT OF NEW YORK. 1809.

[4 *Johns.* 84.]

THIS was an action on the case for a non-feasance, in not causing insurance to be made on a certain vessel, called the Sea Nymph, on a voyage from New York to Camden, in North Carolina.

The plaintiffs were co-partners in trade, and joint owners of one moiety of a brig called the Sea Nymph, and the defendant was sole owner of the other moiety of the same vessel. The brig sailed in ballast, the 1st December, 1804, on a voyage to Camden, in North Carolina, with William Thorne, one of the plaintiffs, on board, and was to proceed from that place to Europe or the West Indies. The plaintiffs and defendant were interested in the voyage, in proportion to their respective interests in the vessel. On the day the vessel sailed, a conversation took place between William Thorne, one of the plaintiffs, and the defendant, relative to the insurance of the vessel, in which W. Thorne requested the defendant that insurance might be made; to which the defendant replied, "that he (Thorne) might make himself perfectly easy on the subject, for that the same should be done." About ten days after the departure of the vessel on her voyage, the defendant said to Daniel Thorne, one of the plaintiffs, "Well, we have saved the insurance on the brig." D. Thorne asked, "How so? or whether the defendant had heard of her arrival?" To which the defendant answered, "No; but that, from the winds, he presumed that she had arrived, and that he had not yet effected any insurance." On this D. Thorne expressed his surprise, and observed, "that he supposed that the insurance had been effected immediately, by the defendant, according to his promise, otherwise, he would have had it done himself; and that, if the defendant would not have the insurance immediately made, he would have it effected." The defendant replied, that "He (D. Thorne) might make himself easy, for he would that day apply to the insurance offices, and have it done."

The vessel was wrecked on the 21st December, on the coast of North Carolina. No insurance had been effected. No abandonment was made to the defendant by the plaintiffs.

The defendant moved for a non-suit, on the ground that the promise was without consideration and void; and that, if the promise was binding, the plaintiffs could not recover, without a previous abandonment to the defendant. These points were reserved by the judge.

A verdict was taken for the plaintiffs, for one-half of the cost of the vessel, with interest, subject to the opinion of the court on the points reserved.

J. Radcliff, for the plaintiffs.

T. A. Emmet and *Baldwin, contra.*

KENT, C. J., delivered the opinion of the court. The chief objection raised to the right of recovery in this case, is the want of a consideration for the promise. The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party intrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement, enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the non-feasance. Sir William Jones, in his "Essay on the Law of Bailments," considers this species of undertaking to be as extensively binding in the English law, as the contract of *mandatum*, in the Roman law; and that an action will lie for damage occasioned by the non-performance of a promise to become a mandatary, though the promise be purely gratuitous. This treatise stands high with the profession, as a learned and classical performance, and I regret, that on this point, I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case; but only some *dicta* (and those equivocal) from the Year Books, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument.

A short review of the leading cases will show, that by the common law, a mandatary, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages are averred.[1] . . .

Judgment for the defendant.

WHITEHEAD *v.* GREETHAM.

EXCHEQUER CHAMBER. 1825.

[2 *Bing.* 464.]

ERROR from K. B. on a verdict in an action of assumpsit against the defendant below, for failure in an undertaking to make a secure investment of certain money deposited in his hands by the plaintiff below for that purpose.

The ground of error was, that a general verdict had been given by the jury for the plaintiff below, upon the first five counts of the declaration, with general damages, though the third count was substantially defective in not alleging a sufficient consideration for the promise and undertaking set forth in that count, which was as follows: —

Whereas before the making of the promise and undertaking of the said defendant hereinafter mentioned, to wit, on, &c., at, &c., the said plaintiff, at the special instance and request of the said defendant, retained and employed the said defendant to advance and lay out a certain sum of money, to wit, the sum of £700 for the said plaintiff, in the purchase of an annuity, to be well and sufficiently secured, he the said defendant undertook, and then and there faithfully promised the said plaintiff, to use due and sufficient care to advance and lay out the said sum of money in the purchase of an annuity, the payment whereof should be well and sufficiently secured; and the said plaintiff in fact saith, that he, confiding in the said last-mentioned promise and undertaking of the said defendant, afterwards, to wit, on, &c., at, &c., delivered to him the said defendant the said last-mentioned sum of money, for the purpose last aforesaid; and although the said defendant afterwards, to wit, on, &c., at, &c., did advance and lay out the said sum of money for the said plaintiff, in the purchase of a certain annuity, to wit, the purchase from the Reverend Samuel Locke, of an annuity or annual payment of £96, during the life of the said Samuel Locke, for and in consideration of the said sum of £700, the money of the said plaintiff, then and there advanced and paid by the said defendant to the said Samuel Locke; nevertheless the said defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtilly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would use due and sufficient care to advance and lay out the said sum of money in the purchase of an annuity, to be well and sufficiently secured, but wholly neglected so to do, and thereby craftily and subtilly deceived and defrauded the said plaintiff in this, to wit, that the said defendant then and there wrongfully and unjustly advanced and paid the said sum of £700 to the said Samuel Locke as aforesaid, on a bad, insufficient, and inadequate security; and also in this, to wit, that the said Samuel Locke, before and at the time of the said advance of the said sum of £700 to him as aforesaid, and from thence hitherto hath been, and still is, in bad and insolvent circumstances, and wholly unable to pay the said annuity or any part thereof; and, in truth and in fact, by reason of the badness and insufficiency of the said security, and of the said bad and insolvent circumstances of the said Samuel Locke, he, the said plaintiff, hath been and is wholly unable to recover or receive payment or satisfaction of the said annuity, and is likely to lose the same, as well as the said sum of £700, so advanced and paid to the said Samuel Locke as aforesaid; and thereby also, he, the said plaintiff, hath lost and been deprived of the use and benefit of divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of £200 paid by the said plaintiff, in and about the effecting and keeping on foot a certain policy of insurance effected on the life of the said Samuel Locke, to wit, at Westminster aforesaid, in the county aforesaid.

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[1] The discussion of the cases has been omitted. — ED.

Tindal, for the plaintiff in error.

Chitty, *contra.*

Best, C. J. The court is of opinion, that this count is sufficient after verdict. The objections which have been made to it, are, first, that there was no consideration for the defendant's promise; secondly, that if there was, it is insufficiently stated.

The second objection cannot be raised in this stage of the cause; if available at all, it is an objection on demurrer, but not in error or arrest of judgment.

Is there, then, any consideration for the defendant's promise? the count states, that the plaintiiff had retained the defendant at his request to lay out £700 in the purchase of an annuity. That the defendant promised to lay it out securely, and that the plaintiff delivered him the money for that purpose. The case of Coggs *v.* Bernard decides that this was abundant consideration; the consideration in that case was the delivery of brandy; here it is the delivery of £700, which casts it on the defendant to account for the same. It is urged, indeed, that though this consideration appears, it is nowhere stated to be the consideration for the defendant's promise; but after verdict it must be taken that the promise was made upon this consideration. The principle is, to ascertain what the judge would require to be proved at *Nisi Prius*, and in the present case nothing less would have been sufficient than proof of the delivery of the money to the defendant, and of his engagement to lay it out. The judgment of the court above, therefore, must be *Affirmed.*

PARKER *v.* BRANCKER ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1839.

[22 *Pick.* 40.]

In July, 1832, Parker, the plaintiff, consigned to Brancker, Delius, & Co., the defendants, commission merchants in Hamburg, 1640 bags of coffee, on which, according to a previous agreement, Brancker, Delius, & Co. made large advances. Parker sent a letter of instructions limiting the sale at a certain price. Brancker, Delius, & Co. afterwards brought a suit against Parker, to recover the amount of their advances. The coffee had not then been sold, but having been sold pending the suit for a sum less than the advances, expenses, and interest, credit was given in the suit, for the net proceeds. In that suit, Parker offered evidence tending to show that Brancker, Delius, & Co. could and ought to have sold the coffee at the limit, in September, 1833, before the commencement of that suit. To the admission of this evidence the counsel of Brancker, Delius, & Co. objected, but it was admitted. The jury found a verdict in favor of Brancker, Delius, & Co. for the amount of the advances, expenses, and interest, deducting the net proceeds of the coffee. Upon this verdict judgment was rendered Pending that suit, the coffee having been sold by Brancker, Delius & Co. at a price much below the limit, Parker brought the present action, in which he claimed damages of them: 1. for not selling the coffee at the limit, in September, 1833; and 2. for afterwards selling it below the limit, after having commenced their action to recover back their advances.

In answer to the claim for not selling at the limit, the defendants offered, with other evidence, the judgment in the former suit, and proof that the same matter had been submitted to the jury in the defence of that suit; to the admission of which the plaintiff objected, on the ground that the former suit being for money had and received, evidence of a breach of orders in not selling at the limit was inadmissible, and therefore that proof that it was submitted to the former jury was inadmissible in the present case. But the Chief Justice, before whom the action was tried, admitted the evidence, reserving the question for the whole court.

In support of the second claim, for selling the coffee below the limit, the plaintiff introduced the letter of instructions sent with the consignment, dated the seventh of July, 1832, fixing the limit at sixty shillings the hundred weight, and the answer of the defendants, dated the 21st of August, 1832, acknowledging the receipt of the orders and accepting the consignment. Also a letter from the plaintiff to the defendants, dated in February, 1833, reducing the limit to fifty-eight shillings. Also the writ in the former suit, by which it appeared, that on the 14th of June, 1834, the defendants commenced that suit and directed the sheriff to attach property to the amount of $3500, which was done. The plaintiff also proved, that on the 21st of October, 1834, and pending the former suit, the defendants sold the coffee at a price very much below the limit, and that in the following spring coffee rose to a considerably higher price than that at which the plaintiff's coffee had been sold; and the plaintiff claimed the difference between the actual sales and the price which the article would have brought in the following spring.

The defendants contended, 1. that they had exercised due care and diligence in the sale of the plaintiff's coffee; that there was no period when they could have realized the price limited by the plaintiff, and especially they could not do so in September, 1833. 2. That the question of due diligence and ability to realize the plaintiff's limit in September, 1833, had been submitted by the present plaintiff to the jury in the former suit; and had been found against him. 3. That at divers times, and especially in June, 1834, the defendants' agent demanded payment of the plaintiff for a portion of the sum advanced, which was not complied with. 4. That the plaintiff, in June, 1834, fixed on the autumn of that year as the period when he wished the sale of his coffee to be made, and it was actually kept till that time by the defendants and then sold to the best advantage at the then market prices.

In support of these allegations the defendants read certain depositions and letters; also a report of the former suit, and the bill of particulars, verdict, judgment, and execution therein.

Upon the evidence in the case the Chief Justice instructed the jury, that a commission merchant, having received goods to sell at a certain limited price, and made advances upon such goods, had a right to reimburse himself by selling such goods at the fair market price, though below the limit, if the consignor refused, upon application and after a reasonable time, to repay the advances. To this instruction the plaintiff excepted, and the question was reserved.

F. Dexter, for the plaintiff.

C. P. Curtis, for the defendants.

WILDE, J.[1] The rule of law thus laid down appears to the court to have been stated with perfect accuracy, and with all the qualifications which are applicable to the defendants' right of sale, as claimed by them on the evidence.

The law appears to be well settled, both in England and in this country, that the pledgee of personal property, after the debt becomes due, may sell without a judicial process and decree of foreclosure, upon giving reasonable notice to the debtor to redeem.

It was so decided in Tucker *v.* Wilson, 1 P. Wms. 261, and in

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[1] The opinion has been abbreviated by omitting, at the beginning and elsewhere, passages not dealing with the instructions. — ED.

Lockwood *v.* Ewer, 2 Atk. 303. The same rule of law was laid down in De Lisle *v.* Priestman, 1 Brown's Penn. R. 176, and in New York by Chancellor Kent, in Hart *v.* Ten Eyck, 2 Johns. Ch. R. 100, and again in his Commentaries; 2 Kent (3d edit.), 582.

The principle thus settled seems to be founded in good sense, and may be essentially necessary to enable the pledgee to avail himself of his pledge, in a reasonable manner, for the discharge of his demand.

In the present case the defendants were not merely pledgees, but they were expressly authorized to sell the property consigned to them, and thereby to reimburse themselves for their advances. There was no time limited within which the sale was to have been made. The defendants were, therefore, bound by their acceptance of the consignment, to wait a reasonable time, if the sale could not be made for the price limited, although by the delay their security might be impaired.

But after such a reasonable time had elapsed, and a demand had been made upon the plaintiff to repay the money advanced, and he had refused so to do, he had no further power, by any principle of law or justice, to control the defendants' right of sale to their prejudice. Such a power would be inconsistent with the understanding of the parties, as it must be presumed to have been when the advances were made; and it would enable the plaintiff to impair the defendants' security, at his own will and pleasure for an unlimited time, if he were disposed so to do. To sanction such a right, would operate injuriously on the interests of consignees, and would check the continuance of those large advances, by the aid of which a flourishing trade has been carried on, for years past, to the great profit of the mercantile community. For although such advances may sometimes lead to overtrading, and may induce individuals to venture upon rash speculations, yet it cannot be doubted, that on the whole they have contributed to the increase of the wealth and prosperity of the country. The principle, therefore, involved in this case is of great importance, and has been considered by the court with great care. . . .

The defendants . . . are entitled to judgment on their verdict.[1]

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[1] *Acc.*: Brown *v.* McGran, 14 Pet. 479, 494–495 (1840); Frothingham *v.* Everton, 12 N. H. 239 (1841); Marfield *v.* Goodhue, 3 N. Y. 62 (1849); Feild *v.* Farrington, 10 Wall. 141 (1869).

See Weed *v.* Adams, 37 Conn. 378 (1870).

Compare Smart *v.* Sandars, 5 C. B. 895 (1848); De Comas *v.* Prost, 3 Moo. P. C. N. S. 158 (1865). — ED.

WILSON *v.* BRETT.

EXCHEQUER. 1843.

[11 *M. & W.* 113.]

CASE. The declaration stated, that the plaintiff, at the request of the defendant, caused to be delivered to the defendant a certain horse of the plaintiff of great value, to wit, &c., to be by the defendant shown to a certain person to the plaintiff unknown, and to be redelivered by the defendant to the plaintiff on request, and that thereupon it then became and was the duty of the defendant to take due and proper care of the said horse, and to use and ride the same in a careful, moderate, and reasonable manner, and in places fit and proper for that purpose: yet the defendant, not regarding his duty, &c., did not nor would take due and proper care of the said horse, but on the contrary used and rode the same in a careless, immoderate, and improper manner, and in unfit and improper places, &c., whereby the said horse was injured, &c. Plea, not guilty.

At the trial before ROLFE, B., at the London Sittings in this term, it appeared that the plaintiff had intrusted the horse in question to the defendant, requesting him to ride it to Peckham, for the purpose of showing it for sale to a Mr. Margetson. The defendant accordingly rode the horse to Peckham, and for the purpose of showing it, took it into the East Surrey Race Ground, where Mr. Margetson was engaged with others playing the game of cricket: and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses. The learned judge, in summing up, left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and told them, that under the circumstances, the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it; and that, if they thought the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly there, they ought to find for the plaintiff. The jury found for the plaintiff, damages £5 10*s*.

Byles, Sergt., now moved for a new trial, on the ground of misdirection. — There was no evidence here that the horse was ridden in an unreasonable or improper manner, except as to the place where he was ridden. The defendant was admitted to be a mere gratuitous bailee; and there being no evidence of gross or culpable negligence, the learned judge misdirected the jury, in stating to them that there was no difference between his responsibility and that of a borrower. There are three classes of bailments: the first, where the bailment is altogether for the benefit of the bailor, as where goods are delivered for deposit or carriage; the second, where it is altogether for the benefit of the bailee, as in the case of a borrower; and the third, where it is partly for the benefit of each, as in the case of a hiring or pledging. This defendant was not within the rule of law applicable to the second of these classes. The law presumes that a person who hires or borrows a chattel is possessed of competent skill in the management of it, and holds him liable accordingly. The learned judge should therefore have explained to the jury, that that which would amount to proof of negligence in a borrower, would not be sufficient to charge the defendant, and that he could be liable only for gross or culpable negligence.

Lord ABINGER, C. B. We must take the summing up altogether; and all that it amounts to is, that the defendant was bound to use such skill in the management of the horse as he really possessed. Whether he did so or not was, as it appears to me, the proper question for the jury. I think, therefore, that the direction was perfectly right, and that no rule ought to be granted.

PARKE, B. I think the case was left quite correctly to the jury. The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned judge as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it.

ALDERSON, B. The learned judge thought, and correctly, that, this defendant being shown to be a person of competent skill, there was no difference between his case and that of a borrower; because the only difference is, that there the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant has it.

ROLFE, B. The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability. I said I could see no difference between *negligence* and *gross* negligence — that it was the same thing, with the addition of a vituperative epithet; and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence. *Rule refused.*[1]

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[1] See Shiells *v.* Blackburne, 1 H. Bl. 158 (1789). — ED.

OPIE *v.* SERRILL.

SUPREME COURT OF PENNSYLVANIA. 1843.

[6 *W. & S.* 264.]

ERROR to the District Court for the city and county of Philadelphia.[1]

Hieskell, for the plaintiff in error.

P. Morris and *McCall*, *contra.*

SERGEANT, J. This was an action of assumpsit for goods sold and delivered. The original debt was not denied, but the defendant alleged that the plaintiffs received from him on account certain claims against a third person in Nashville, Tennessee, consisting of a note to the defendants, then due, and a book-account for a small sum, transferred to the plaintiffs, both of which were received by the plaintiffs for collection; that afterwards the plaintiffs took from the debtor at New Orleans a new note at four months for the whole amount due from him, made payable to the order of the plaintiffs, and thereupon delivered up to him the original note and book-account. To prove these facts, he offered in evidence the plaintiffs' answer to a bill of discovery, but the court rejected it. We are of opinion that the evidence ought to have been received. In itself, the answer, with the bill, was evidence to go to the jury, and there is nothing in the answer which takes away the defence, though the whole of the answer be, as it is contended it ought to be, taken together. It is alleged that the undertaking to collect was gratuitous, and therefore the plaintiffs, as agents, were only liable for gross negligence. It is not necessary to examine the law on this head, because whenever an agency is assumed, whether gratuitous or not, the parties are bound by the terms agreed upon between them. Jones on Bailm. 101, 114, 115, 116; Story on Bailm. 137. An agent undertaking to collect a debt placed in his hands, who releases it and takes from the debtor a new note to himself, does, in law, receive payment of the debt, and is at once liable to the principal as if he had received the money. In Floyd *v.* Day, 3 Mass. 403, an attorney employed to collect a demand compromised it by receiving a note (part of which had been paid), specially endorsed to himself; and in an action of trover for the note brought against him, the court say, that when the defendant, instead of money, received this note, and discharged the debtor, the property of the note was in the defendant, and he became immediately answerable to the plaintiff for the amount of the liquidated damages, which made part of the consideration of the principal, and an action of assumpsit was the proper remedy. He must be considered as having made himself liable for the money he ought to have received. In the case before us, the plaintiffs released and extinguished the original debt by a surrender of the note and book-account, and the taking a new note was as much a payment of it, as regards the defendant, as if the plaintiffs had received the money. Having collected the debt, therefore, they must be responsible for it.

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[1] The reporter's statement has been omitted. — ED.

Judgment reversed, and a venire facias de novo awarded.[1]

WOLFF AND HENRICKS *v.* KOPPEL.

COURT OF ERRORS OF NEW YORK. 1845.

[2 *Denio*, 368.]

ON error from the Supreme Court. Koppel sued Wolff & Henricks in the New York C. P. in assumpsit for the price of certain goods sold by the defendants as the plaintiff's factors under an agreement, as alleged, to guaranty the sales. The question upon the trial was whether the defendants acted under a *del credere* commission or not. The plaintiff produced the account of sales rendered by the defendants, in which a commission of five per cent was charged, and much of the evidence related to the question whether the amount charged for commissions afforded evidence of an agreement to guaranty the sales. There was other evidence upon the principal question arising out of the acts and declarations of the parties. When the plaintiff rested, the defendants moved for a nonsuit, insisting that they could not be made responsible as guarantors of the sales, except upon an undertaking in writing valid within the Statute of Frauds. The motion was denied, and the defendants' counsel excepted. The cause was afterwards submitted to the jury, who found for the plaintiff, and judgment was rendered accordingly. The defendants brought error to the Supreme Court, where the judgment of the Common Pleas was affirmed; upon which the defendants brought error to this court. The reasons for the judgment of affirmance are contained in the report of the case in 5 Hill, 458.

George Wood, for the plaintiffs in error.

C. E. Benedict, for the defendant in error.

PORTER, Senator. This writ of error seems to have been brought to determine whether the agreement of a factor to guaranty the sales made by him is a contract within the Statute of Frauds, requiring an agreement in writing to prove its existence. This necessarily involves an inquiry into the nature of the contract which the factor makes in such a case. The plaintiff insists that one acting under a *del credere* commission is a guarantor or surety for the debt which the purchaser of the goods contracts; while the defendants, on the other hand, maintain that the factor contracts an original absolute obligation, to pay the principal the amount of the sales, at the expiration of the term of credit. It depends upon the character of the contract in this respect, whether the promise of the factor is to pay the debt of another, or his own proper debt, and consequently whether it can be proved by parol.

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[1] *Acc.*: Paul *v.* Grimm, 165 Pa. 139 (1895). — ED.

I find no case decided prior to the year 1816 which favors the position taken by the defendants. Previous to that time, there are many cases directly hostile to that position. In 1786, in the case of Grove *v.* Dubois, 1 T. R. 112, Lord Mansfield, C. J., held that the engagement of a broker acting under a *del credere* commission was absolute; and that he was liable in the first instance, and at all events. Buller, J. agreed with him fully, and said he had never heard the inquiry made, whether a demand had been made upon the purchaser. We find these two very distinguished judges speaking of this as a familiar principle, and one universally acknowledged and practised upon. The case of Scott *v.* Mackenzie, decided in Scotland in 1795, involved the same principle. The defendant, a factor, acting under a *del credere* commission, at the request of his principal, transmitted the proceeds of the sales in a bill on a house in London. The parties to the bill failed before payment. On the question as to the liability of the factor, the court in Scotland decided that no payment but such an one as would have satisfied a proper debt, was sufficient to discharge the factor; and gave judgment for the plaintiff. This judgment was affirmed in the House of Lords in 1796. 6 Bro. Par. Cas. 280. In Houghton *v.* Matthews, 3 Bos. & Pull. 489, Chambre, J. says, that where a factor sells under a *del credere* commission, he becomes responsible for the price, and he is to be considered, as between himself and the vendor, as the sole owner of the goods. In the same case Lord Alvanley, Ch. J. says, that the effect of a *del credere* commission is to make the factor responsible for the value of the goods to his principal. These opinions were given in 1803. Mr. Bell, in his Commentaries, published in 1816, at p. 378, lays down the rule thus: "The correct legal import of a *del credere* engagement, is an engagement to be answerable as if the person so binding himself was the proper debtor. This seems to be the correct legal import of the undertaking; and it is as nearly as possible, the meaning of the Italian phrase which we have adopted. He is placed, in relation to the principal, precisely in the same situation as if he had actually received in loan the money of the principal." Paley on Agency, p. 39, adopts the same rule. Mr. Comyn, in his treatise on contracts, vol. I. p. 253, is equally explicit in his statement of this rule. He says, "a factor *del credere*, on the sale of the goods makes himself absolutely liable in the first instance, for the payment of the price of such goods, in the same manner as if he were himself the purchaser, and was debited for them by the principals as such." Chancellor Kent, in the first edition of his commentaries, published in 1826, states his view at that time of the law on this point as follows: "When a factor acts under a *del credere* commission for an additional premium he becomes liable to his principal when the purchase money falls due;

for he is substituted for the purchaser, and is bound to pay, not conditionally, but absolutely, and in the first instance." 2 Kent's Com. 1st ed. 487. The principle is stated in the same way in 2 Chitty on Com. Law, 220, 1.

Here we have a whole current of decisions and a coincidence of opinions among eminent authors, in favor of the absolute liability of the factor to pay the price for which goods are sold under such a commission, when the credit has expired. This should, I think, settle the question. But the doctrine has been questioned, and finally overruled, in England. It was first doubted in Morris *v.* Cleasby, 4 Maule & Selw. 566, decided in 1816; and Chancellor Kent, in the fourth edition of his commentaries, modifies what he had before stated, and treats the point as a *vexata questio*, while in a note to his last edition, he says, it is now settled in England, that the factor is only a surety for the solvency of the purchaser. I do not find, however, that the recent innovation in England has been adopted in this country, except in Thompson *v.* Perkins, 3 Mason's Rep. 232, where Mr. Justice Story has followed the case of Morris *v.* Cleasby. We are now asked to give the new rule the sanction of this court. But in my judgment we should not follow the courts in England in their departure from the former rule. This is a class of contracts that have existed in this country as long as commerce has flourished, and under which business is daily transacting to a large amount. The understanding of the mercantile community has, I apprehend, been general and uniform, that the agreement between the principal and factor was original and absolute to pay the price of the sale, deducting the commission, at the time the credit expired. Doubtless the factor expected the fund would be received from the purchaser; but whether received or not, he charges himself with the amount in his account with his principal. A contrary rule would require the principal to exhaust his remedy against the purchaser, in order to determine his insolvency, before he could charge the factor as surety.

The Supreme Court of Massachusetts have had this question before them, and have adhered to the law as it was understood in England prior to 1816. In Swan *v.* Nesmith, 7 Pick. 220, decided in 1828, Parker, Ch. J. in giving the opinion of the court, speaking of a *del credere* contract, says: "The legal effect of such a contract is, to make the defendants, the factors, liable at all events for the proceeds of the sale, so that according to some authorities, though denied by others, they may be charged in *indebitatus assumpsit*, or for goods sold to them. And there seems to be no good reason why they should not be so charged, if upon receiving the goods they became accountable; except that their liability is not fixed until a sale is made, or if upon credit, until the time of payment arrives." I am not satisfied that the new rule is an improvement, if we were at liberty to take our choice; but on the other hand, think it wise to adhere to the old principle, that adjudges the contract of the factor in such cases to be an original and absolute one, for the payment of the price, and shall therefore vote for affirming the judgment of the Supreme Court.

For reversal: Senators **HAND**[1] and **MITCHELL** — 2.

For affirmance: Senators **BACKUS**, **BEEKMAN**, **BEERS**, **BOCKEE**, **CORNING**, **DEYO**, **EMMONS**, **FOLSOM**, **JOHNSON**, **JONES**, **LOTT**, **PORTER**, **SEDGWICK**, **SMITH**, **TALCOTT**, and **WRIGHT** — 16.

Judgment affirmed.[2]

JOHNSTON AND OTHERS *v.* KERSHAW.

EXCHEQUER. 1867.

[*L. R.* 2 *Ex.* 82.]

DECLARATION for money payable for goods bargained and sold, work done and commission due in respect thereof, for money paid, and for money found to be due on accounts stated.

Plea, never indebted. Issue thereon.

The cause was tried before MARTIN, B., at the Liverpool summer assizes, 1866, when the following facts were proved: —

The plaintiffs are merchants at Pernambuco, and the defendant is engaged in business at Liverpool. On the 8th of March, 1866, the defendant, who had on previous occasions bought cotton from the plaintiffs, wrote them the following letter: "I beg to confirm my letter of 23d February, and hope you will have executed fully all the cotton ordered, and consider still in force. If executed, please regard this as a new order for one hundred more, at extreme limit, $17\frac{7}{8}$*d.* for Pernam or Paraiba Firsts, and one hundred Bahia at $17\frac{3}{8}$*d.* good, fair, and in each case the same quantity additional for each halfpenny down in price. Maceios are not desirable, unless at $2\frac{1}{2}$*d.* or 3*d.* below, say about 15*d.* I shall be greatly disappointed if I get no cotton at these prudent limits. I congratulate myself on reducing on 8th January to $17\frac{1}{2}$*d.*, avoiding losses." On the 17th of March, the defendant sent a telegram (which was afterwards confirmed by letter) repeating the order, and altering the maximum limit for Pernam and Paraiba cotton to 19*d.* per lb.

In conformity with this order, the plaintiffs bought, in the market at Pernambuco, on the defendant's account, one hundred bales of Paraiba cotton, ninety-four being Paraiba firsts, and six being Paraiba seconds. On the 12th of April they gave notice by letter to the defendant of this purchase, and of the shipment of the goods. In the letter they stated that six of the bales were "seconds," and requested the defendant, if he did not want them, to hand them over to Messrs. Samuel Johnston

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[1] A dissenting opinion by Senator HAND has not been reprinted. — ED.

[2] *Acc.*: Couturier *v.* Hastie, 8 Exch. 40 (1852). — ED.

& Co., of Liverpool [the plaintiff's Liverpool house], who would pay the invoice cost. Meanwhile, there having been a heavy fall of prices in the Liverpool market, the defendant had written on the 7th of April to the plaintiffs, reducing his limits 3*d.* per lb., and also directing them, if any cotton above 17½*d.* had been bought on his account, to resell the same upon the spot, at least possible loss, and to cancel all his orders to that date for cotton and sugar. The letter continued thus: "I will write by next mail, when I hope to be able to fix a maximum price for cotton. In the meantime I hope and trust you have not effected any purchase on account of yours, &c." On the 23d of April the defendant again wrote to the plaintiffs, reiterating the instructions contained in the letter of the 7th, and fixing, in the event of a panic in the market, a fresh maximum for one hundred bales of Paraiba firsts. The plaintiffs, on the 28th of April, in acknowledging the receipt of the letter of the 7th, stated, with reference to the defendant's request to sell any cotton they might have bought on his account on the spot, that they were unable to comply with his instructions in that respect, as the only order they held for him was for the one hundred bales already shipped.

The plaintiffs drew a bill on the defendant for the price of these one hundred bales, which was presented at maturity to him for payment. He refused, however, to pay it. The plaintiffs thereupon brought this action. No direct evidence was given of the state of the market at Pernambuco, nor as to whether it would have been possible for the plaintiffs to have bought the whole one hundred bales of "firsts" at the time they bought the ninety-four.

Under these circumstances, a verdict was entered for the plaintiffs for the price of the one hundred bales, the value of the six bales being taken according to the proportion in the invoice that had been sent with the goods. Leave was reserved to move to enter a verdict for the defendant, on the ground that, on the facts proved, the plaintiffs were not entitled to recover, and that there was no evidence to go to the jury in support of any of the counts of the declaration: or to reduce the damages by the value of the six bales of "seconds."

A rule having been obtained accordingly,

Quain, Q. C., and *Benjamin*, showed cause.[1] The defendant is bound to pay for as many bales of the proper quality as were bought on his account. The transaction is one of agency, and therefore not governed by the same rules as a transaction between vendor and vendee. The principles governing the case are those laid down in Story on Agency, § 170: "The principal is not bound by the unauthorized acts of his agent, but is bound where the authority is substantially pursued, or so far as it is distinctly pursued. But the question may often arise whether, in fact, the agent has exceeded what may be deemed the substance of his authority. Thus, if a man should authorize an agent to buy one hundred bales of cotton for him, and he should buy fifty at one time of one person, and fifty at another time of a different person; or if he should buy fifty only, being unable to purchase more at any price, or at the price limited, the question might arise whether the authority was well executed. In general, it may be answered that it was; because in such a case it would ordinarily be implied that the purchase might be made at different times, of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed." Here there is no direct evidence that the plaintiffs had done all they could in buying ninety-four bales, but there are materials enough to show that they were unable to do more. In Ireland *v.* Livingston, Law Rep. 2 Q. B. 99, the defendant was held liable under almost exactly similar circumstances to the present. There has been a *substantial* compliance with the terms of the order; and even granting it was not strictly executed, the defendant's subsequent conduct, as shown by the correspondence, amounts to a ratification. With regard to the form of the declaration, the count for money paid at all events will certainly lie.

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[1] The liability of the defendants to take the six bales was not insisted on. — REP.

Jones, Q. C., in support of the rule. The order is on the face of it for one hundred bales, neither more nor less; and in order to entitle the plaintiffs to maintain that it means "*up* to one hundred," they should have given evidence as to the usage of the market at Pernambuco, as was done in Ireland *v.* Livingston. As the case stands there is nothing to show that a purchase of anything but the exact number of one hundred bales was contemplated by the defendant, or would be considered a performance of the order. The transaction ought not to be treated as one of agency entirely, but as of sale; and regarding it in that view it could scarcely be contended that the vendee would be bound to take a part only of the goods ordered by him.

Kelly, C. B. I am of opinion that the plaintiffs are entitled to our judgment. The question for our consideration turns entirely upon the meaning to be placed upon an order from the defendant to the plaintiffs, contained in a letter dated the 8th of March, 1866, in these terms: "I beg to confirm my letter of the 23d of February, and hope you will have *executed fully* all the cotton ordered, and consider still in force. If executed, please regard this as an order for one hundred more." Then follows a description of the sort of cotton required, and limitations as to price. Now the question is, whether this letter necessarily means an order to purchase one hundred bales of cotton *at once*, in one and the same purchase, or whether it may not mean an order to buy these one hundred bales in such manner, and at such times, as the agent might find practicable, having regard to the state of the market. I regret that there is no direct evidence before us of what the state of the market was at Pernambuco, as was the case in Ireland *v.* Livingston. There is, however, in my judgment, enough in this case apparent, from the defendant's language and conduct, to enable us to collect that the state of the market was not such as to admit of the whole one hundred bales being purchased at one and the same time. I consider that we have materials for inferring that the mode of executing the order contemplated by the parties was, that the agents at Pernambuco should go into the market and buy the bales ordered, in such minor quantities as they might find convenient or practicable. If they could at one time have obtained all the one hundred bales, it would have been their duty to have done so. But we may fairly conclude from their conduct that they could not. They actually bought ninety-four. Surely they would, if they could, have bought the remaining six. Not being able to buy them, were they to leave the order altogether unexecuted? Rather it was their duty, and was, I think, contemplated by the defendant, that they should buy as many bales as they could get, and make up the total number as soon as practicable.

The view I take of the meaning of the order is confirmed by the reference to the order of the 23d of February, contained in the letter of the 8th of March. That order was, it appears,[1] also for one hundred bales of cotton, and the defendant in his letter expresses a hope that it had been "fully executed." Here, then, is a direction by the defendant to his agent at Pernambuco to buy "one hundred bales more," if the agent had "fully executed" the previous order, *i. e.* if they had already bought one hundred. That implies a notion on the part of the defendant that very likely his agents had not "fully executed" the previous order, *i. e.*, had only bought as many of the one hundred as they could get. I think, therefore, that, although we have no *direct* evidence on the point, there is sufficient evidence to show that the state of the market at Pernambuco was such as to render it impossible for the plaintiffs to purchase the one hundred bales all at once, and that the parties to the transaction must have understood that the purchase was to be made, if necessary, in several minor quantities. The whole question, it is true, turns on the meaning of the order, but that must be taken with reference to the state of the market for which it was given.

Under these circumstances, I think that this rule should be discharged. I may add that it is very satisfactory to find that our judgment is in accordance with the proposition cited during the argument from Justice Story's work on Agency.[2] *Rule discharged.*[3]

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[1] The order had not been put in evidence at the trial, but it was stated to the court, during the argument, and admitted on both sides, to have been an order for one hundred bales. — REP.

[2] MARTIN, CHANNELL, and PIGOTT, BB., concurred. The opinion of CHANNELL, B., has been omitted. — ED.

[3] Compare Lathrop *v.* Harlow, 23 Mo. 209 (1856). — ED.

RECHTSCHERD, PLAINTIFF IN ERROR, *v.* THE ACCOMMODATION BANK, DEFENDANT IN ERROR.

SUPREME COURT OF MISSOURI. 1870.

[47 *Mo.* 181.]

ERROR to St. Louis Circuit Court.

Casselberry, for plaintiff in error.

Krum & Decker, for defendant in error.

WAGNER, J. Plaintiff brought his action on a certificate of deposit for $2,600, which defendant, by its answer, admits to be due.

Defendant, in its answer, sets up a counter-claim, and states that before the plaintiff's action accrued, the plaintiff, in consideration that defendant would receive him into its employ as collector and agent and pay him a salary of one thousand dollars per annum, promised and agreed with defendant that he would carefully and diligently attend to his duties as such collector and agent, and safely and prudently care for and deliver over and account for to defendant any moneys which he might receive into his custody as such agent and collector; and that defendant, relying upon such engagement and promise, did receive the plaintiff into its employ as collector and agent, and did pay him his said salary, and did in all things perform all the terms and conditions of said contract on its part to be performed, but that defendant, not regarding his said engagement and employment, failed and refused to account for and deliver a large sum of money, to wit: the sum of $2,983.06, the money of the defendant, which came into his care and custody while in the employment of defendant as such collector and agent, which sum of money, the property of the defendant, was, through the fault and neglect of the plaintiff, wholly lost to the defendant.

The plaintiff, in his replication, does not deny the terms and conditions of the contract and employment as set forth in the answer, but avers that he has in all things complied with the same. He denies that the sum alleged in the answer, or any other sum, was lost to the defendant through his fault or negligence, and alleges that the money was, without any neglect or fault on his part, taken from him by thieves, robbers, and other persons, whilst he had the same in his possession and was taking extraordinary care of the same for and as the agent of the defendant, and therefore he was not liable for the same. The cause was tried at Special Term before a jury, who, after hearing the evidence and being instructed by the court, rendered a verdict for the plaintiff. Upon appeal to General Term the judgment was reversed and the cause remanded for a new trial, and from this judgment the case is brought here by writ of error.

If the money was taken from the plaintiff by thieves or robbers when he was using ordinary care and guilty of no negligence, he was clearly not liable. But this was a question of fact for the jury to determine upon proper instructions. There was something said in the argument (and it is alluded to in the record) about inconsistent instructions being given to the plaintiff in the transaction of his business, by the cashier and the note clerk, two of the defendant's officers. Whether the note clerk had any authority to give the orders, or it was the duty of the plaintiff to obey, was not very clearly developed in the evidence, and should be rendered more apparent.

The first instruction given for the plaintiff is on the subject of contributory negligence, and, although not objectionable as a proposition of law, is hardly justified by the evidence. Of its own motion, the court instructed the jury that the plaintiff, as collector for the defendant, was bound to use such care as men of ordinary prudence would have used under like circumstances; if, therefore, the plaintiff used such care in doing the business of the defendant, he was not guilty of negligence, unless he disregarded reasonable instructions given to him by defendant or its authorized agents.

The following instruction asked by the defendant was refused: "Although the jury may believe from the evidence that the moneys in controversy in the counter-claim were taken from the plaintiff by thieves or robbers, yet the plaintiff is not excused from liability to the bank on that account, if the jury find that such loss by theft or robbery was occasioned by the failure of the plaintiff to obey the instructions given to him by the said Accommodation Bank or any of its officers thereto authorized."

It will be perceived that the view of the court was, that in order to render the plaintiff responsible for disregarding the instructions of the principal, those instructions must be reasonable; whilst the instruction asked by the defendant asserted the absolute right of the principal to give whatever instructions it saw proper, and the duty of the agent to obey. We suppose that there is no doubt about the established rule at law, that an agent is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken to perform them, unless prevented by some unavoidable accident, without any default on his part, or unless the instructions require him to do an illegal or immoral act; and it is no defence that he intended to act for the benefit of his principal. He is still responsible for loss occasioned by any violation of his duties, either in exceeding or disregarding instructions. Switzer *v.* Connett, 11 Mo. 88; Story on Agency, § 192; Hays *v.* Stone, 7 Hill, 128; Wilson *v.* Wilson, 26 Pa. 394.

It is the duty of the agent to adhere faithfully to the orders of the principal, and if a loss occurs in consequence of his voluntary deviation, he will not be held faultless. It is true that instructions may be disregarded in cases of extreme necessity arising from unforeseen emergencies, or if performance becomes impossible, or if they require a breach of law or morals. Story on Agency, § 194. These are, however, exceptional cases. But the general rule is as indicated in what has been said above, and the case as made in the record is not brought within any of the exceptions. I think, therefore, that the instruction given by the court of its own motion was objectionable, and that the instruction asked by the defendant should have been given.

Judgment affirmed.[1]

The other judges concur.

COHEN *v.* KITTELL.

QUEEN'S BENCH DIVISION. 1889.

[22 *Q. B. D.* 680.]

APPEAL from the Mayor's Court. The action was brought by the plaintiff to recover the sum of £27 13*s.* 6*d.* either as money had and received by the defendant to the plaintiff's use, or as damages for breach of contract by the defendant as the plaintiff's agent.

It appeared that the defendant was a turf commission agent, who undertook to bet for customers for a commission of 2½ per cent on winnings. The particulars of the claim consisted of an account showing a number of bets of amounts not exceeding £5, which the plaintiff alleged that the defendant had made or agreed to make on his behalf on these terms on horses which ran at Sandown Park and Newmarket races in October, 1888. The sum claimed was the excess of gains over losses shown by this account, after deducting the defendant's commission of 2½ per cent on the former. The assistant judge left the case to the jury as regards the claim for damages, and they found a verdict for the plaintiff for the full amount claimed. The grounds of appeal were that the action was not maintainable, and that, if otherwise, the plaintiff was not entitled to more than nominal damages.

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[1] In Switzer *v.* Connett, 11 Mo. 88, 91 (1847), MCBRIDE, J., for the court, said: "Suppose I ride to town and put my horse in a livery-stable, and whilst there the keeper of the stable tells me that there is an individual in the town who is purchasing horses, and that my horse answers the description which he wishes to purchase, and inquires if he may sell him my horse. I reply he may, provided he can get $100 for the horse. On my return to the stable he offers me $80, stating that he sold my horse for that sum, and that it is the fair market value of the horse. May I not have an action against him to recover the price fixed by me on my horse? If it be my right or privilege to place a value upon my own property, I certainly can do so, even should the price thus fixed by me exceed the market value."

In Wilson *v.* Wilson, 26 Pa. 393 (1856), LEWIS, C. J., for the court, said: "It is not sufficient that the deviation was not material if it appear that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. This may be a difficult task in a case like the present; but the defendant voluntarily assumed it when he substituted his own plan for that prescribed by the plaintiff."

And see Short *v.* Skipwith, 1 Brockenbrough, 103 (1806); Williams *v.* Higgins, 30 Md. 404 (1868).

As to the doctrine that an emergency may justify a departure from instructions, see Forrestier *v.* Bordman, 1 Story, 43, 51 (1839); Greenleaf *v.* Moody, 13 Allen, 363 (1866). — ED.

Candy, Q. C. (*Herbert Reed* with him), for the defendant.

Wildey Wright (*McCullagh* with him), for the plaintiff.

Huddleston, B. I am of opinion that this appeal should be allowed. The plaintiff claims damages from the defendant for the breach of a contract of agency, into which he is alleged to have entered with the plaintiff as his principal. It must be taken as found by the verdict, that the plaintiff employed the defendant to make certain bets on his account, and that the defendant did not make the bets which he was thus employed to make. The case is apparently new. Certainly the recent cases arising out of similar transactions do not apply, as they are cases in which the agent did make the bets.

Suppose the agent had done so here, what would have been his position? In that case, had he won and been paid, Beeston *v.* Beeston, 1 Ex. D. 13, and Bridger *v.* Savage, 15 Q. B. D. 363, show that he must have paid the money over to the plaintiff. Had he lost and paid, Read *v.* Anderson, 15 Q. B. D. 779, in my opinion shows that the plaintiff must have recouped him. On the other hand, if he had won, but the third persons had not paid him, the effect of 8 & 9 Vict. c. 109, § 18, must have been to leave him without any legal remedy. That section enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to have been won upon any wager." The contract of agency, therefore, for the breach of which the plaintiff sues the defendant, is one by which the plaintiff employed the defendant to enter into contracts which, if made, would have been null and void, and the performance of which could not have been enforced by any legal proceeding taken by the defendant for the benefit of the plaintiff. The breach of such a contract by the agent can give no right of action to the principal. I see no difference between the case and the employment of an agent to do an illegal act The section of Story on Agency, which has been cited, shows that the right of the plaintiff to have recovered in respect of the contract to have been made by the agent on his behalf is an "essential ingredient" in the case against the agent for negligence in not contracting. In this case this "essential ingredient" is wanting, and Webster *v.* De Tastet, 7 T. R. 157, shows that, this being so, the consideration urged on behalf of the plaintiff, that the losers of the bets to the defendant would probably have paid them as debts of honor, is wholly immaterial.

Manisty, J. A decision in favor of the plaintiff in this case would still further defeat the object of this statute, which, as the preamble shows, was to add to the strictness of the law with respect to gambling. Since the act passed, however, and in consequence, as I cannot but think, of some of the decisions upon it, the practice which it was intended to discountenance has greatly increased, and that with results of a most disastrous character, as regards both horseracing and transactions in stocks. The contracts avoided by the 18th section are not, it is to be observed, "contracts of gaming and wagering," but "contracts *by way of* gaming and wagering." These words, which are perhaps capable of a different interpretation, have been held not to apply to contracts between principals and agents by which the agents agree to bet with third persons on behalf of the principals. Doubtless where the gambling transaction is a thing of the past, the bet having been won or lost, and the money having been received or paid, as the case may be, by the agent, it would be unjust that he should not in the one case account to, and in the other case be recouped by his principal. But in Read *v.* Anderson, it was held by a majority of the Court of Appeal that as soon as a bet has been made by an agent in his own name on account of a principal, the principal cannot revoke the authority to pay the bet should it be lost, because forsooth the result to the agent may be the inconvenience of exclusion from Tattersall's. The decision is, of course, binding on this court, but I personally agree with the dissenting judgment of the Master of the Rolls. I cannot see why the position of the agent in such a case should differ from that of a stakeholder.

We are now invited to go a step further and to hold that a principal who employs an agent to make bets on his account, can maintain an action for negligence against the agent should the latter refuse to bet for him. The custom of Tattersall's is again invoked, this time to make the agent responsible. It is clear, however, that the action cannot be maintained. It is unnecessary to refer at length to the legal question, which is discussed in Story on Agency, 7th ed., §§ 222, 330. It is sufficient to say that the effect of Statute 8 & 9 Vict. c. 109, § 18, being to render bets irrecoverable at law, a principal can suffer no real loss through the refusal of his agent to make bets on his account.

Appeal allowed.

SECTION II.

Loyalty.

TENANT *v.* ELLIOTT.

COMMON PLEAS. 1797.

[1 *B. & P.* 3.]

ASSUMPSIT for money had and received. Verdict for the plaintiff.

The defendant, being a broker, effected an insurance for the plaintiff, a British subject, on goods from Ostend to the East Indies, on board the "Koenitz," an Imperial ship. The ship being lost, the underwriters paid the amount of the insurance to the defendant, who, without any intimation from them to retain the money, refused to pay it over to the plaintiff.

Shepherd, Serjt., now moved for a rule to show cause why the verdict in this case should not be set aside, and a nonsuit entered. By 7 Geo. 1, St. 1, c. 21, § 2, it is enacted "That all contracts and agreements whatsoever made or entered into by any of his Majesty's subjects, or any person or persons in trust for them, for or upon the loan of any moneys by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies, or parts in the said act before mentioned; and all contracts and agreements whatsoever made by any of his Majesty's subjects, or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo or lading of any sort of goods, merchandise, treasure, or effects, or with any provisions, stores, or necessaries, shall be and are hereby declared to be void." Now the goods on board the "Koenitz" being the property of the plaintiff, a subject of Great Britain, and the "Koenitz" being a foreign ship, bring this transaction within the provisions of the above act. In Camden *v.* Anderson, 6 Term Rep. 730, it was determined that a policy effected in contravention of an act of Parliament, made for the purpose of protecting the monopoly granted to the East India Company, was void. The voyage, being illegal, makes the policy illegal also. If, then, the plaintiff could not have succeeded in an action against the underwriters, neither can he recover against the present defendant. The defendant is in the nature of a stakeholder; and the plaintiff's right of action being grounded on his claim against the underwriters, he must now stand precisely in the same situation as if he had immediately sued them.

Buller, J. Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over, who is entitled to it, but the plaintiff?

Eyre, C. J. The defendant is not like a stakeholder. The question is whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot.

The defendant took nothing by his motion.[1]

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[1] In Baldwin *v.* Potter, 46 Vt. 402 (1874), the plaintiffs put up packages containing candy and prizes, and employed the defendant to sell on commission boxes of such packages. The defendant made sales to persons who knew what prizes were contained in each box, and who, as the plaintiffs and defendant knew, intended to sell the packages at retail in defiance of statutes prohibiting lotteries. It was held that for the purchase-money received by the defendant the plaintiffs could maintain an action in general assumpsit. Pierpoint, C. J., for the court, said: "We do not find it necessary . . . to consider . . . whether the contract for the sale of the property referred

to, by the plaintiffs, to the several persons who purchased it, were contracts made in violation of law, and therefore void, or not. This action is not between the parties to those contracts; neither is it founded upon, or brought to enforce them. If those contracts were illegal, the law will not aid either party in respect to them; it will not allow the seller to sue for and recover the price of the property sold, if it has not been paid; if it has been paid, the purchaser cannot sue for and recover it back. The facts in this case show that the purchasers paid the money to the plaintiffs, — not to the plaintiffs personally, but to the defendant as the agent of the plaintiffs, authorized to receive it. When the money was so paid, it became the plaintiffs' money; and when it was received by the defendant as such agent, the law, in consideration thereof, implies a promise on the part of the defendant to pay it over to his principals, the plaintiffs. It is this obligation that the present action is brought to enforce: no illegality attaches to this contract. But the defendant insists that, inasmuch as the plaintiff could not have enforced the contracts of sale as between himself and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money that I as agent receive, over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise; and the fact that the defendant acted as the agent of the plaintiffs in obtaining orders for the goods does not vary the case."

In Bridges *v.* Savage, 15 Q. B. D. 363 (C. A. 1885), BRETT, M. R., said: "The plaintiff employed the defendant to make bets for him, and if he should win on those bets to receive the money payable thereon, and to pay the same over to him, the plaintiff; and the defendant for a consideration, viz., the commission which he charged, agreed to do so. The defendant thereupon made bets on certain horses. It is true that when he won on those bets the persons with whom he made them might not have paid; but they did pay, and therefore after that any dispute as to their validity was gone. The matter, therefore, stands thus: the defendant has received money which he contracted with the plaintiff to hand over to him when he had received it. That is a perfectly legal contract." And BOWEN, L. J., said: "It is to be observed that the original contract of betting is not an illegal one, but only one which is void. If the person who has betted pays his bet, he does nothing wrong; he only waives a benefit which the statute has given to him, and confers a good title to the money on the person to whom he pays it. Therefore when the bet is paid the transaction is completed; and when it is paid to an agent, it cannot be contended that it is not a good payment for his principal. If not, how monstrous it would be that the agent, who has received money which belongs to his principal, and which he received for his principal, and only on that account, should be allowed to say that the payment was bad and void. The truth is that the contract under which he received the money for his principal is not affected by the collateral contract under which the money was paid to him."

And see Farmer *v.* Russell, 1 B. & P. 296 (1798); Armstrong *v.* Toler, 11 Wheat. 258, 271 (1826); Sharp *v.* Taylor, 2 Phil. 801 (1849); Brooks *v.* Martin, 2 Wall. 70 (1863).

Compare Snell *v.* Dwight, 120 Mass. 9, 15–19 (1876).

See also Biddle *v.* Bond, 6 B. & S. 225 (1865). — ED.

THOMPSON *v.* HAVELOCK.

NISI PRIUS. 1808.

[1 *Camp.* 527.]

THIS was an action for money had and received.

In April, 1800, the plaintiff was at Smyrna as captain of the ship "Lord Nelson," of which the defendant was owner. There he entered into an agreement with the deputy commissary of the English army in Egypt, to let the ship to government for six months. Having stipulated that his owner should have 40*s.* per ton per month, he required that he himself should be allowed the usual primage. The commissary refused to make any allowance by way of primage, the freight being so very high; but, as he expected great assistance from the plaintiff's skill and activity in managing the transport service in that quarter, he agreed, that instead of primage, Captain Thompson, for his personal exertions in the public service, should be allowed 1*s.* per ton per month upon the tonnage of the "Lord Nelson." The plaintiff and the ship remained in the Mediterranean under this contract about nine months; and the defendant afterwards received from government the money which they had thus earned. The question was, whether the plaintiff as captain, or the defendant as owner of the ship, was entitled to the 1*s.* per ton per month. On the part of the plaintiff it was proved that, by the usage of the Mediterranean trade, if he had brought home a cargo of merchandise from Smyrna (which he was about to do when he entered into the service of government), he would have been entitled to a primage of £5 per cent. upon the freight, and that while he continued in the service of government, his personal exertions, independently of the ship, were of considerable benefit to the public.

Lord ELLENBOROUGH. Is it contended that a servant who has engaged to devote the whole of his time and attention to my concerns, may hire out his services, or a part of them, to another? It would have been a different thing if the owner had been suing for this money; but I am clearly of opinion that at all events the present plaintiff has no right to it. Under this contract, he must have been taken from superintending the defendant's ship; and I don't know how far it might go, if such earnings could be recovered in a court of justice. No man should be allowed to have an interest against his duty. I will assume that the plaintiff obtained as high a freight as possible for his owners, and that his services to government were meritorious. Still there would be no security in any department of life or of business, if servants could legally let themselves out in whole or in part. My opinion upon the subject is quite decisive; and if it be doubted, I beg that a bill of exceptions may be tendered.

The plaintiff's counsel acquiesced in this decision; and, upon the recommendation of the chief justice, it was agreed that the defendant should make the plaintiff an allowance for primage.[1]

Park and *Abbott* for the plaintiff.

The Attorney-General, *Garrow*, and *Marryat* for the defendant.

ROBINSON, Appellant, *v.* MOLLETT and others, Respondents.

House of Lords. 1875.

[*L. R.* 7 *H. L.* 802.]

This was an appeal against a judgment given in the Court of Common Pleas for the plaintiffs (now the respondents) on a case stated, which judgment, through an equal division of opinion among the judges in the Exchequer Chamber, had stood affirmed.

Robinson was a merchant at Liverpool; Mollett, Bull, & Unsworth were tallow brokers in London. On the 2d of April, 1869, Unsworth was in Liverpool and saw Robinson, who then gave him an order to purchase for him (Robinson) 50 tons of tallow at 46*s.* 6*d.* On the 29th of April Robinson sent up from Liverpool an order to Mollett & Co. to purchase for him 200 tons of tallow (100 tons for himself, 100 tons for a friend), to book the whole to him, and to make the purchase (not at a specified price, but) on the "best terms." The two orders were for the June delivery.

Mollett & Co. had before bought, and did afterwards buy, from various persons considerable quantities of tallow, none specifically for Robinson, but proposed to supply the whole 250 tons, at the June delivery, out of their various purchases. In their bought notes, sent immediately after each of Robinson's orders had been given, Mollett & Co. said, "We have this day bought for your account," and signed these notes with the addition of the words, "Mollett, Bull, & Unsworth, sworn brokers." The price of tallow fell in the market between the dates of the orders and the time for the June delivery. When that time arrived, Mollett & Co. tendered 250 tons of tallow, but Robinson refused to accept the tallow so tendered. Mollett & Co. sold the tallow, and then brought assumpsit to recover the difference, which amounted to £362, insisting that they were entitled to do so in virtue of the established usage of the London tallow market.

The first count of the declaration alleged that the defendant employed the plaintiffs as his agents and brokers to purchase the tallow, and undertook to accept and pay for the tallow according to the contract, and would indemnify the plaintiff against liability or loss they might sustain by having made the contract for the defendant; that the plaintiffs did, in pursuance of the said employment, and upon the terms thereof, purchase the tallow. Averment of performance of all the conditions. Breach, that the defendant refused to accept, whereby plaintiffs sustained damage by reason of the price of tallow having fallen, etc., and defendant refused to indemnify the plaintiffs.

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[1] See Co. Lit. 117 (a), Hargrave's note (1).
See also, Diplock *v.* Blackburn, 3 Camp. 43 (1811).
Compare Ætna Ins. Co. *v.* Church, 21 Ohio St. 492, 498 (1871). — Ed.

The second count alleged an agreement between the plaintiffs and the defendant, that the plaintiffs should sell to him, and that he should buy and accept from them, the tallow, etc., and stated the sale by the plaintiffs to the defendant, and the refusal to accept; and then there were a count for goods bargained and sold and the money counts.

The defendant traversed all the allegations in the first and second counts, and then pleaded exoneration, and discharge, never indebted, payment, and set-off. Issue thereon.

The cause was tried before Lord Chief Justice BOVILL at the London sittings after Michaelmas, 1869, when it appeared that the plaintiffs and defendant had had several dealings together on former occasions; that the course which the plaintiffs had pursued on this occasion (though the defendant was not shown to have known the fact) was that which they had ordinarily pursued in their dealings; that in these cases the principals' names were not disclosed on either side; and that by these notes the plaintiffs became bound personally to the sellers for the fulfilment of the contracts.

The 14th paragraph of the case stated that "settlements of transactions in tallow are usually made in London in the months of April, May, and June respectively, and on the May settlement Messrs. Simpson & Co., persons from whom the plaintiffs had bought some of the tallow intended to be supplied to the defendant, failed, and were unable to meet their engagements. Thereupon the plaintiffs and Simpson & Co., having many transactions together outstanding in respect of the sale and purchase of tallow, balanced and settled an account thereof, wherein the quantity of tallow sold was set off against the quantity of tallow purchased by the plaintiffs on account of Simpson & Co., whereby it appeared that the plaintiffs had sold between 100 and 200 tons more than they had purchased on that account."

The defendant admitted that the tallow tendered was in accordance with the contracts.

The 29th paragraph of the case was in these terms: "At the trial it was proved that there exists an established custom in the London tallow trade for brokers, when they receive an order from a principal for the purchase of tallow, to make a contract or contracts in their own names without disclosing their principals, and also to make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities at their convenience, at the same time exchanging bought and sold notes with the selling brokers as above described in the present case, and passing to their principals a bought note for the specific quantity ordered by them, as before described in this case, and that when a broker so purchases in his own name he is personally bound by the contract, and that on the usual settling-days the brokers balance between themselves the purchases and sales so made, and make or receive deliveries to or from their principals, as the case may be, or if their principals refuse to accept or deliver, then to sell or buy against them, as the case may be, and charge them with the loss, if any, or if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other. This custom does not exist at Liverpool, and was unknown to the defendant. The whole of the transactions and dealings in the present case were carried out in accordance with this custom."

A verdict was taken for the plaintiffs for £362, subject to leave reserved to enter a nonsuit. The case was afterwards argued, and the judges differed in opinion, Lord Chief Justice BOVILL and Mr. Justice MONTAGUE SMITH being of opinion that the plaintiffs were entitled to have the verdict entered for them, and Mr. Justice WILLES and Mr. Justice KEATING being of opinion that a nonsuit ought to be entered. L. R. 5 C. P. 646. On appeal, the judges in the Exchequer Chamber were also equally divided in opinion, L. R. 7 C. P. 84, and so the judgment of the court below stood affirmed. This appeal was then brought.

The judges were summoned, and Mr. Justice BLACKBURN, Mr. Justice MELLOR, Mr. Justice BRETT, Mr. Baron CLEASBY, Mr. Justice GROVE, and Mr. Baron AMPHLETT attended.

Mr. Cohen, Q. C. (*Mr. C. P. Butt, Q. C.*, and *Mr. H. Davidson* were with him), for the appellant Robinson.

Mr. *Benjamin*, Q. C., and Mr. *Watkin Williams*, Q. C., for the defendants in error.

The LORD CHANCELLOR proposed the following question to the judges: Whether the judgments of the Courts of Common Pleas and Exchequer Chamber were right?

MELLOR, J. The further consideration of this case, and the argument addressed to your lordships by the learned counsel at the bar, have failed to convince me that the opinion which I expressed in the Court of Exchequer Chamber, L. R. 7 C. P. 99, is erroneous.

Indeed, I feel more strongly than I there expressed myself, as to the mischievous consequences likely to result from permitting evidence of usages to be admitted beyond the limit already prescribed by decided cases, and I have always understood that limit to be, that such evidence is admissible only to explain mercantile expressions and to add incidents, or to annex usual terms and conditions which are not inconsistent with the written terms between the parties, Brown *v.* Byrne, 3 El. & Bl. 703–715; Humfrey *v.* Dale, 7 El. & Bl. 266, 274, and that it cannot be admitted to convert a broker employed to buy for his employer, into a principal to sell to him, unless in cases where the person employing the broker knows and assents to the dealing on the footing of such custom. The custom with regard to the mode of buying and selling is described in the case, and I submit, with deference to your lordships' consideration, that it would be difficult to conceive any practice or custom of a market so opposed to the well-understood character and authority of a broker. In the language of my brother Hannen, in the court below, L. R. 7 C. P. 98: "It appears to me to amount to a custom for a broker in the tallow trade in London, to do something entirely inconsistent with the character of a broker, viz., to convert himself, from an agent to buy for his employer, into a principal to sell to him."

In the present case the mode in which the contract is said to have been performed was not by purchasing 50 tons of tallow on account of the appellant, or actually appropriating to him 50 tons from the larger purchase made by the respondents from Simpson & Co. as stated in the case, but, in fact, the respondents did no more than form an intention to appropriate 50 tons out of the 150 tons so purchased by them from Simpson & Co., but which, according to the usage set out, would, as stated by my brother Cleasby, L. R. 7 C. P. 95, "only form an item in the tallow account between Simpson & Co. and the plaintiff."

By this course of dealing the defendants would lose the responsibility of any other "principal" than his "broker."

It is said by Willes, J., in his judgment in the Court of Common Pleas, L. R. 5 C. P. 655, that "it is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper; a different rule would give the broker an interest against his duty."

I agree in this, and think that although a custom of trade may control the mode of performance of a contract, it cannot change its intrinsic character.

My experience as a judge convinces me of the necessity of keeping within strict limits the shifting, varying, and constantly expanding usages, by which it is sought to change or affect the written terms of contracts of this description.

A person who authorizes a broker to buy in a market the usages of which are not known to him, may reasonably expect to find that the mode of dealing in that market may not be in all respects such as he would anticipate, but he can hardly be supposed to contemplate that the universal acceptance of the nature and dealing of a broker to buy for him will be converted into a principal to sell to him.

As the usage in question appears to me wholly inconsistent with the written terms between the parties, I answer your lordships' question by saying that in my opinion the judgments of the Courts of Common Pleas and Exchequer were not right and ought to be reversed.[1]

Lord CHELMSFORD. My Lords, the great difference of judicial opinion in this case has led to the extraordinary result of there being nothing but a formal judgment given in both the courts below.[2] . . .

In the arguments and in the judgments in this case, it seems to have been taken for granted that the custom applies in the case of a single transaction of a broker buying in the market upon the order of a principal. But upon a careful examination of the terms of the custom as stated, it appears to me that it merely regulates the dealings of brokers amongst themselves, in buying and selling as principals, and the mode of adjusting and settling accounts with each other, and that no part of it is applicable to the ordinary employment of a broker engaged to buy for a real principal.

Assuming, however, that the custom would have applied in the present case if it had been known to the appellant at the time of employing the respondents as his brokers, the question arises whether it is of such a nature as to be binding on a person who is ignorant of its existence, by merely employing a broker to buy for him in the market where the custom prevails.

The effect of this custom is to change the character of a broker, who is an agent to buy for his employer, into that of a principal to sell to him. No doubt a person employing a broker may engage his services upon any terms he pleases; and if a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character. It was not contended in the present case that if the respondents were employed in the ordinary character of brokers, they had performed their duty to their employer. Of course, if the appellant knew of the existence of the usage, and chose to employ the respondents without any restriction upon them, he might be taken to have authorized them to act for him in conformity to such usage. . . .

I submit to your lordships, that the judgments of the Common Pleas and of the Exchequer Chamber ought to be reversed, and the judgment entered for the defendant Robinson.[3]

Judgment of the Court of Exchequer Chamber reversed, and judgment entered for the defendant.[4]

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[1] BRETT, J., CLEASBY, B., and GROVE, J., also gave opinions for reversal.

BLACKBURN, J., gave an opinion for affirmance. AMPHLETT, B., also dissented — ED.

[2] From this opinion have been omitted passages stating and discussing the facts. — ED.

[3] The Lord Chancellor (Lord CAIRNS), Lord HATHERLEY, and Lord O'HAGAN concurred without giving formal opinions. — ED.

[4] On the question whether an agent can ever sell his own property to his principal,

BELL *v.* McCONNELL.

SUPREME COURT OF OHIO. 1881.

[37 *Ohio St.* 396.]

ERROR to the District Court of Mahoning County.

The original action was brought by Arthur B. McConnell, a real-estate broker, to recover certain commissions claimed to have been earned in making an exchange for the defendants, William Bell and others, now plaintiffs in error, of certain real estate, to wit, certain city lots, with one Augustus Neal, for certain other real estate, upon terms satisfactory to the defendants, upon an express agreement for commissions at the rate of three per cent of the value of the property exchanged.

The defendants, by answer, among other things, alleged that, before the alleged employment by the defendants, the plaintiff had been employed by said Neal to sell or exchange a certain farm of said Neal, to wit, the same property given in exchange to defendants, upon such terms as might be approved, for an agreed compensation at the rate of four per cent of the value thereof; and that, at the time said exchange was effected, said Neal had no knowledge or information of the alleged employment of the plaintiff by defendants.

The plaintiff, by reply, alleged, in effect, that said Neal, at the time said exchange was negotiated, had knowledge of his employment by the defendants.

On the trial testimony was offered by each party tending to prove the issue in accordance with the respective allegations; and thereupon the plaintiff requested the court to charge the jury as follows:

"That if the jury find from the evidence that said defendants employed said plaintiff to act as their agent in the exchange of the property mentioned and described in the petition for the farm of Mr. Neal, located in said township of Boardman, or employed him to aid and assist in such exchange, and agreed to pay him three per cent commission on said property, and at the same time knew that said plaintiff was the agent of said Neal for the sale or exchange of said farm, and that he was acting as his agent, and that said defendant assented thereto and agreed to pay said commission, and that said Neal knew that said plaintiff was acting agent of said defendant in

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see Rothschild *v.* Brookman, 2 Dow & Clark, 188 (1831); Gillett *v.* Peppercorne, 3 Beav. 78 (1840); Conkey *v.* Bond, 36 N. Y. 427 (1867).

On the question whether the agent can ever become the purchaser of property entrusted to him by his principal, see Lowther *v.* Lowther, 13 Ves. Jr. 95, 103 (1806); Rothschild *v.* Brookman, 2 Dow & Clark, 188 (1831); Kerfoot *v.* Hyman, 52 Ill. 512 (1869); Ruckman *v.* Bergholz, 37 N. J. L. 437 (1874); Bain *v.* Brown, 56 N. Y. 285 (1874); De Bussche *v.* Alt, 8 Ch. D. 286 (C. A. 1878); Porter *v.* Woodruff, 36 N. J. Eq. 174 (1882); Jansen *v.* Williams, 36 Neb. 869 (1893).—ED.

said exchange, and assented thereto, and agreed to pay said plaintiff the commission stipulated in the written contract of agency, said plaintiff would be entitled to recover in this case," but the court refused to charge the jury as above requested, and did charge as follows:

"That if you find that Neal employed plaintiff to sell or exchange his farm in Boardman for cash or property, and agreed to pay him for such services, and if while so employed, defendant Bell and others employed plaintiff to find a purchaser for their (defendants') city property, or one who would exchange country property for it, and if plaintiff's duty was simply to bring the buyer and seller together, and for that service defendants agreed to pay plaintiff a fixed amount, and if plaintiff performed that service the defendants are bound in law to pay said amount so fixed, even though plaintiff was acting as agent for the party — in this case Neal — so introduced.

"But I say to you, if the contract between plaintiff and defendants was, that plaintiff should sell for, or assist the defendants in selling or exchanging their property, and did so sell or exchange defendants' property, or assist them in selling it to, or exchanging it with said Neal, while he was also acting for Neal, or assisting him in the same sale or exchange, under a contract with said Neal for pay on the part of said Neal for such service so rendered him, then plaintiff is not entitled to your verdict in this case, even though both Bells and Neal were aware of, and assented to said plaintiff's employment and acts in the premises."

Exceptions were taken to the refusal to charge as requested and to the charge given.

Verdict and judgment were rendered for the defendants. On petition in error the judgment of the Court of Common Pleas was reversed, and this proceeding is prosecuted to reverse the judgment of reversal.

R. B. Murray, for plaintiff in error.

George F. Arrel, for defendant in error.

McIlvaine, J. This case presents the single question: Can a real-estate broker, who assumes to aid both contracting parties in making an exchange of real estate, recover compensation for his services from either, upon an express promise to pay, in a case where each principal had full knowledge of and assented to the double employment?

It has been decided (Rupp *v.* Sampson, 16 Gray, 398, and Siegel *v.* Gould, 7 Lans. 177), and is not doubted, that such broker may recover from both or either where his employment was merely to bring the parties together; and it is equally clear, both upon principle and authority, that in case of such double employment he can recover from neither, where his employment by either is concealed from or not assented to by the other. Several reasons may be given for this rule. In law, as in morals, it may be stated that, as a principle, no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Luke xvi. 13. Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment, and discretion. The agent cannot divide this duty and give part to another. Therefore, by engaging with the second, he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact disable himself from rendering to the first employer the full quantum of service contracted for, at least tempts himself not to do so. And for the same reason he cannot recover from the second employer, who is ignorant of the first engagement. And if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer. It is no answer to say that the second employer having knowledge of the first employment should be held liable on his promise, because he could not be defrauded in the transaction. The contract itself is void as against public policy and good morals, and both parties thereto being in *pari delicto*, the law will leave them as it finds them. *Ex dolo malo non oritur actio.*

The non-liability of the second employer having knowledge of the first employment has been maintained in the following cases: Farnsworth *v.* Hemmer, 1 Allen, 494; Walker *v.* Osgood, 98 Mass. 348; Smith *v.* Townsend, 109 Mass. 500; Rice *v.* Wood, 113 Mass. 133; Bollman *v.* Loomis, 41 Conn. 581; Everhart *v.* Searle, 71 Pa. St. 256; Morrison *v.* Thompson, 9 Q. B. (L. R.) 480. But in each of these cases it is strongly intimated, if not distinctly announced, that a recovery may be had by such agent, when he acted with the knowledge and consent of both principals. In Lynch *v.* Fallon, 11 R. I. 311, the same general doctrine is held, and it is said that a broker acting at once for both vendor and purchaser, assumes a double agency disapproved of by law, and which, if exercised without the full knowledge and free consent of both parties, is not to be tolerated. The same, in Meyer *v.* Hanchett, 43 Wis. 246, wherein the question whether such double agency is consistent with public policy, though exercised with the consent of both parties, is left undecided, but it is decided that mere knowledge of such double agency, without actual consent on the part of the principals, will not entitle the agent to commissions.

The validity of such contracts of double agency, where all the principals were fully advised and consented to the double employment, was more directly before the courts, and affirmed in the following cases: 35 N. Y. Super. Ct. 189; Rowe *v.* Stevens, 53 N. Y. 621; Alexander *v.* N. W. C. University, 57 Ind. 466; Joslin *v.* Cowee, 56 N. Y. 626; Adams Mining Co. *v.* Senter, 26 Mich. 73; Fitzsimmons *v.* Southwestern Ex. Co., 40 Geo. 330; Rolling Stock Co. *v.* Railroad, 34 Ohio St. 450; Pugsley *v.* Murray, 4 E. D. Smith, 245. See also note by Bennett to Lynch *v.* Fallon, 16 Am. L. Reg. 333.

Raisin *v.* Clark, 41 Md. 158, holds the contrary doctrine, if knowledge and consent on the part of the first employer is to be regarded as fully proved. Other cases bearing more or less directly on the point might be cited; but enough are given to show a want of harmony in the decisions; yet we think the decided current of authority is in favor of the validity of such contracts where the consent of both principals to such double agency is clearly proved.

We admit that all such transactions should be regarded with suspicion; but where full knowledge and consent of all parties interested are clearly shown we know of no public policy, or principle of sound morality, which can be said to be violated. It seems to us rather that public policy requires that contracts, fairly entered into by parties competent to contract, should be enforced where no public law has been violated, and no corrupt purpose or end is sought to be accomplished. True, such agent may not be able to serve each of his principals with all his skill and energy. He may not be able to obtain for his vendor principal the highest price which could be obtained, or for the purchaser the lowest price for which it could be purchased. But he can render to each a service entirely free from falsehood and fraud; a fair and valuable service in which his best judgment and his soundest discretion are fully and freely exercised. And in such case, such service is all that either of his principals contracted for. Undoubtedly, if two persons desire to negotiate an exchange or a bargain and sale of property, they may agree to delegate to a third person the power to fix the terms, and no suspicion of a violated public policy would arise. It may be said that such third person is an arbitrator chosen to settle differences between his employers, an agency or office greatly favored in the law. And so it is. But what is the distinction between that employment and the one in the present case, which should cause the law to favor the former and abhor the latter? I can see none.

True, in the case put, the contracting parties deal directly with each other, and in the case at bar their minds meet through the medium of a third person in whose judgment and discretion they mutually repose confidence. His judgment and discretion are invoked by each to aid in fixing the terms of a contract between them. And after the terms are thus adjusted through the aid of their mutual agent, and ratified by the parties, in the free exercise of their own volitions, to hold that the relation between such agent and either of his principals is in violation of a sound public policy supposed to rest on some moral abstraction, would be a refinement in legal ethics too subtle for my comprehension.

Of course, to relieve such double agent from suspicion that inconsistent duties have been assumed, which *prima facie* will be presumed, it is necessary that it should appear that knowledge of every circumstance connected with his employment by either should be communicated to the other, in so far as the same would naturally affect his action; but when that is done, and free assent is given by each principal to the double relation of the agent, the right of such agent to compensation cannot be denied on any just principle of morals or of law.

The refusal of the Court of Common Pleas to charge as requested, and the second proposition given, if not plainly in conflict with the views above expressed, were at least so susceptible of such construction, that the jury may have been misled. Hence, we think the district court did not err in reversing the judgment.

Judgment of district court affirmed.[1]

DAVIS *v.* HAMLIN.

SUPREME COURT OF ILLINOIS. 1883.

[108 *Ill.* 39.]

APPEAL from the Appellate Court for the First District, — heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, judge, presiding.

This was a bill in equity brought by John A. Hamlin, against William J. Davis, seeking to have the latter declared to be a trustee for the former of a certain lease of the Grand Opera House in Chicago, which Davis had obtained for himself from William Borden. Upon the hearing the circuit court decreed the relief prayed for. The decree was affirmed by the Appellate Court for the First District, and the defendant appealed to this court.

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[1] See York Buildings Co. *v.* Mackenzie, 8 Bro. P. C. (Tomlin's ed.), 42 (1795); New York Central Ins. Co. *v.* National Protection Ins Co., 14 N. Y. 85 (1856); Rice *v.* Wood, 113 Mass. 133 (1873); Morison *v.* Thompson, L. R. 9 Q. B. 549 (1874); Ranney *v.* Donovan, 78 Mich. 318 (1889).

In Empire State Ins. Co. *v.* American Central Ins. Co., 138 N. Y. 446 (1893), EARL, J., for the court, said: "It is not doubted that the same person may sometimes act as agent for the two parties in the same transaction. But he can do so only in case he has no discretion to exercise for either party. An agent to sell for one party may also act as agent for the buyer, but only in case the price and terms of sale have been fixed by each party, so that nothing is left to his discretion. But an agent to sell intrusted with a discretion, and thus bound to obtain the best price he can, cannot buy for himself or as agent for another. In such a case he would occupy antagonistic positions, and there would be a conflict of interests. He could not faithfully serve the one party without betraying the interests of the other. He would at least be under great temptation to betray the interest of one of the parties. So a person may sometimes act as agent of both parties in the making of any contract. But he cannot do so when he is invested with a discretion by each party, and when each is entitled to the benefit of his skill and judgment."

In Knaus *v.* Krueger Brewing Co., 142 N. Y. 70 (1894), PECKHAM, J., for the court, said: "It is undeniable that where the broker or agent is invested with the least discretion, or where the party has the right to rely on the broker for the benefit of his skill or judgment, in any such case an employment of the broker by the other side in a similar capacity, or in one where by possibility his duty and his interest might clash, would avoid all his right to compensation. The whole matter depends upon the character of his employment. If A. is employed by B. to find him a purchaser for his house upon terms and conditions to be determined by B. when he meets the purchaser, I can see nothing improper or inconsistent with any duty he owes B. for A. to accept an employment from C. to find one who will sell his house to C. upon terms which they may agree upon when they meet. And there is no violation of duty in such case in agreeing for commissions from each party upon a bargain being struck, or in failing to notify each party of his employment by the other." — ED.

The facts appearing from the evidence are, that Hamlin was the lessee and manager of the theatre known as the Grand Opera House, in the city of Chicago, and for some ten years had occupied the premises, first as owner, and then as lessee. After the Chicago fire, in 1871, he purchased the lots and built thereon the building, and has used it since that time as a place of amusement. He expended in its construction and improvement over $75,000. Mortgages had been given upon the lots, which were finally foreclosed, and he lost the title to the lots. Subsequently he became a lessee, and contracted with William Borden, who was then the owner of the premises, that the latter should fit up the house for a first-class opera house, and that he would pay him a rental, after it was finished, amounting to about $18,000 a year. The building being completed about the month of August, 1880, Hamlin entered into the possession, and opened it as a place for first-class entertainments. He had a lease which would expire April 23, 1883, and it was his intention to continue permanently in this building in the amusement business, and at the expiration of his lease to renew it. During the first year after opening his new opera house, about the first of September, 1880, he cleared, over and above all expenses, the sum of $7,000, and the next year, from September, 1881, to September, 1882, $24,000. When he was about to open in September, 1880, he secured the services of William J. Davis, the defendant, as a general business manager. The evidence shows that the duties of a manager or assistant manager are to correspond with companies, operas, troupes, etc., for engagements of from one to four weeks, according to their acceptableness, and so arrange the engagements, that they will follow one another in future months without loss of time. In making these engagements it is necessary to show the exact expense of the house each night, including rent, and the custom of business is to make a settlement between the proprietor of the theatre and the manager of the attraction, and divide the money every night. Davis, about September, 1880, entered upon the discharge of his duties, and from that time until the making of the lease in question continued in the management of the theatre. For this service he received $50 per week as a fixed salary, and ten per cent of the profits.

Respecting the renewal of the lease there is but the uncontradicted testimony of Davis and Hamlin themselves. Davis testifies the first negotiation he had with Borden was about December 1, 1881. He went to Borden for the purpose of purchasing the theatre, and offered $200,000 for it. Borden did not care to sell, and inquired what rent Davis would be willing to pay, and Davis said, ten per cent on Borden's valuation of it, if it did not run above $225,000. Borden asked Davis if he would give that rent, and Davis said he would, if there was any use of his making an offer for it, — if the theatre was in the market. Borden said he was going to New York, and would see Davis on his return. Davis says he next saw Borden on the 19th of January, 1882, when he called upon Borden in Chicago in response to a note from Borden to do so. Borden then inquired of Davis what he would give for the lease of the theatre. Davis told him. Borden did not accept the offer, but asked Davis to see him another day, and after further negotiation, Borden, on the 24th of January, 1882, executed to Davis a lease of the theatre for the term of ten years, at the rental of $22,500 per year. Davis says he told Borden, at the interview on January 19, that Hamlin would pay him nearly double what Davis offered for the theatre, because Hamlin had told him (Davis) that he would pay $40,000 a year for the theatre, and sink $10,000 from his private income, before he would surrender it, but Borden said he thought Hamlin was "blowing."

Hamlin testifies that soon after the opening, in 1880, he made application to Borden for a lease to him and one Nunnemacher for twenty years, which Borden declined, then, to give; that the next talk he had with Borden was in New York, between the middle of December, 1881, and the middle of January, 1882, when he told Borden he would take a lease for any term of years, and would pay all that it was possible for any prudent business man to pay, and would pay as much rent as anybody. Borden said he would talk it over the next week in Chicago. Subsequently he had two interviews in Chicago with Borden on the subject. At the second one he offered $20,000 per year rent, but Borden declined to take it, saying he must see the other parties first; that there were two persons he had offers from; that they were managers, and Chicago men. Hamlin testifies that he went immediately to Davis, and inquired of him if he was attempting to secure a lease of the Grand Opera House, and Davis answered no — that he was not. He said he then told Davis what he had just learned from Borden, and that he would pay double the value of the theatre rather than anybody else should have it. Davis said to him: "I would not give an extravagant price for it if I were you; I would not give a dollar more than it is worth." The parties agree as to this interview and conversation, differing only as to its date, Davis testifying that it was on the 17th, and Hamlin that it was on the 23d of January, 1882.

The evidence was that a theatre well managed has a good-will, of value, attached to it; that there were only four first-class theatres in Chicago, including the Grand Opera House, and there was no probability that Hamlin could get another theatre without building a new one.

Mr. E. Jamieson and *Mr. L. W. Perce*, for the appellant.

Mr. L. Swett and *Messrs. Quigg & Tuthill*, for the appellee.

SHELDON, C. J. Under the facts in this case the only question arising is, whether Hamlin, by reason of Davis' agency and confidential relation to him, is entitled to the benefit of the lease executed by Borden to Davis.

In the employment of an agent the principal bargains for the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. Upon entering into the employ of Hamlin, there rested upon Davis the duty of fidelity to his employer's interest, and of acting for the furtherance and advancement of the business in which he was engaged, and not in its injury. We view the whole conduct of Davis in regard to the lease in question as violative of the duty of the relation in which he stood toward Hamlin. His first offer to rent the premises from Borden, about December, 1881, was an act hostile to the interest of his employer. He offered Borden a rent which was nearly $5,000 in excess of the rent which Hamlin was then paying. Borden knew that this was an offer made upon an exact knowledge of the profits of the business, which Davis, from his employment, had peculiar means of knowing, and the natural effect would be to cause Hamlin to pay an enhanced rent when he should come to ask for a renewal of his lease. Davis violated the duty of his relation in concealing from Hamlin that he was attempting to get the lease. Davis excuses his denial to Hamlin of such attempt by saying that this was on January 17, and that it was true that at that time he was not making such an attempt, but had given it over, not up to that time having received any response from Borden to Davis' offer to rent, made on December 1, and that he was then, on January 17, making, or had made, preparations to go into another business. Taking this to be so, we find Davis only two days later, January 19, in the act of negotiation for the lease, and making an offer to Borden for the lease, which the latter took time to consider. Now, Davis knew that it was of vital importance to the interest of Hamlin that the latter should get a renewal of his lease; that Hamlin was most anxious to ascertain whether Davis — who alone, with Hamlin, had exact knowledge of the profits of the business — was in competition for the lease; and from Davis, only two days before, denying that he was competing for the lease. Davis knew, on January 19, that the belief was resting on Hamlin's mind, from what Davis had told him two days before, that Davis was not a competitor for the lease. Under these circumstances Davis ought to have disabused the mind of Hamlin of the impression, which Davis had caused, that the latter was not attempting to get the lease, and have informed Hamlin of what the fact was, to give to the latter the opportunity to act accordingly, and Davis' not doing so was a breach of good faith towards his employer.

The obtaining of the lease by Davis amounted to a virtual destruction of his employer's whole business at the termination of the old lease, under which the latter was holding. By some ten years of labor Hamlin had built up a business of a very profitable character. There was a good-will attached to it, which was valuable. Hamlin was intending to make it a lifetime business. Sustaining this lease to Davis, at the end of Hamlin's lease, April 16, 1883, all this business would come to an end, and pass, good-will and all, from Hamlin, the employer, into the hands of Davis, the employee. And this would have been accomplished by the means of a renewal lease obtained by a confidential agent, in violation of the duty of his relation, and acquired, presumably, because of peculiar means of knowledge of the profitableness of the business, afforded him by the confidential position in which he was employed. A personal benefit thus obtained by an agent, equity will hold to inure for the benefit of the principal.

Public policy, we think, must condemn such a transaction as that in question. To sanction it would hold out a temptation to the agent to speculate off from his principal to the latter's detriment. Davis very well knew that his employer would be willing to pay a much higher rent than that at which he obtained the lease, and that he could dispose of the lease to Hamlin at a large profit to himself, and such means of knowledge was derived from his position as agent. If a manager of a business were allowed to obtain such a lease for himself, there would be laid before him the inducement to produce in the mind of his principal an under-estimate of the value of the lease, and to that end, maybe, to mismanage so as to reduce profits in order that he might more easily acquire the lease for himself.

It is contended by appellant's counsel that the rule we apply, which holds an agent to be a trustee for his principal, has no application to the case at bar, because Davis was not an agent to obtain a renewal of the lease, and was not charged with any duty in regard thereto; that his was but the specific employment to engage amusements for the theatre, and that he was an agent only within the scope of that employment; that Hamlin, having a lease which would expire April 16, 1883, had no right or interest in the property thereafter, and that Davis in negotiating for the lease, did not deal with any property wherein Hamlin had any interest, and that such property was not the subject matter of any trust between them. Although there was here no right of renewal of the lease in the tenant, he had a reasonable expectation of its renewal, which courts of equity have recognized as an interest of value, secretly to interfere with which, and disappoint, by an agent in the management of the lessee's business, we regard as inconsistent with the fidelity which the agent owes to the business of his principal. There was the good-will of the business, which belonged to the business as a portion of it, and this the agent got for himself.

It is further argued that the relation here between Hamlin and Davis was that of master and servant, or employer and employee, and that the rule has never been applied to that relation as a class, and that the classes coming within that doctrine are embraced within the list of defined confidential relations, such as trustee and beneficiary, guardian and ward, etc. The subject is not comprehended within any such narrowness of view as is presented on appellant's part In applying the rule, it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation. Of this principle Bispham says: "The rule under discussion applies not only to persons standing in a direct fiduciary relation towards others, such as trustees, executors, attorneys and agents, but also to those who occupy any position out of which a similar duty ought, in equity and good morals, to arise." (Bispham's Equity, sec. 93.) In Greenlaw *v.* King, 5 Jur. 19, Lord Chancellor Cottenham, speaking of this doctrine, says: "The rule was one of universal application, affecting all persons who came within its principle, which was, that no party could be permitted to purchase an interest when he had a duty to perform which was inconsistent with the character of a purchaser." "It is the duty of a trustee," said Lord Brougham, in Hamilton *v.* Wright, 9 Cl. & Fin. 111, "to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust." And on page 124: "Nor is it only on account of the conflict between his interests and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is, of itself, sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust." Although this was said of a trustee, we think it may be equally said here with respect to Davis and the business which he was employed to manage. The rule we apply, as to its broadness in extent, is aptly expressed in the American note to Keech *v.* Sanford, 1 Lead. Cases in Eq. 53, as follows: "Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."

The views which we have above expressed we believe to be in accordance with the well-established principles of equitable jurisprudence. See Devall *v.* Burbridge, 4 Watts & S. 305; Hill *v.* Frazier, 22 Pa. St. 320; Fairman *v.* Bavin, 29 Ill. 75; Gilman, Clinton and Springfield R. R. Co. *v.* Kelly, 77 id. 426; Bennett *v.* Vansyckle, 4 Duer, 462; Gillenwaters *v.* Miller, 49 Miss. 150; Grumley *v.* Webb, 44 Mo. 446.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.[1]

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[1] *Acc.*: Gower *v.* Andrew, 59 Cal. 119.

See Yovatt *v.* Winyard, 1 Jac. & W. 394 (1820); Vallette *v.* Tedens, 122 Ill. 607 (1887); Tabor *v.* Hoffman, 118 N. Y. 30 (1889). — ED.

PAGE *v.* WEBB.

COURT OF APPEALS OF KENTUCKY. 1888.

[7 *S. W. Rep.* 308.]

APPEAL from circuit court, Adair county.

H. C. Baker, for appellant.

Montgomery & Jones, for appellee.

PRYOR, C. J. The appellee, Webb, living in Memphis, Tennessee, and owning a large tract of land in Adair county, in this State, employed the appellant, Page, to take charge of his land, list it for taxation, and pay the taxes as they became due. The agent paid the taxes for three years prior to the year 1874, but declined to pay them for the years 1874, 1875, 1876, and 1877. The land was sold to pay the taxes for those years, and purchased by the sheriff, who assigned his bid to Page, appellee's agent, and the latter obtained a deed therefor. This action is to cancel that deed, and compel the appellant to surrender his claim, the appellee tendering the full amount paid. That the appellee was derelict in his duty in failing to furnish the appellant with money to pay the taxes, is established, and this agent was left to pay them out of his own pocket, which he did up to 1873. The land was listed for the years during which the taxes were unpaid by the appellant, as the agent of the appellee, and, when sold, was purchased by the appellant. The latter states that he does not recollect whether he listed the property in that way or not; still the assessor's books show that it was listed in that manner. The agent of the principal was purchasing the principal's property, and must be regarded as holding it for his principal. He purchased the 1,000 acres of land for $32; and looking to the relation of the parties at the time, with reference to the subject-matter of controversy, the Chancellor properly held that the agent acquired the title to protect the claim of the appellee, and he cannot, in a court of conscience, be deemed to have purchased the land for any other purpose. *Judgment affirmed.*[1]

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[1] *Acc.*: Bowman *v.* Officer, 53 Iowa, 640 (1880).

For other applications of the doctrine as to loyalty, see Ringo *v.* Binns, 10 Pet. 269, 280 (1836); Carter *v.* Palmer, 1 Dr. & Walsh, 722 (1839); Gardner *v.* Ogden, 22 N. Y. 327 (1860); Claflin *v.* Farmers' & Citizens' Bank, 25 N. Y. 293 (1862); Eoff *v.* Irvine, 108 Mo. 378 (1891). — ED.

MERRYWEATHER *v.* MOORE.

CHANCERY DIVISION. 1892.

[[1892] 2 *Ch.* 518].

IN 1881, the defendant, Edward J. Moore, apprenticed himself, for the purpose of learning the business of mechanical engineering, to the plaintiffs, a firm of fire-engine makers, for a period of five years. After having served his apprenticeship, he was taken by the plaintiffs into their employ as a draughtsman, at a salary of 30*s*. a week. In May, 1891, Moore left the plaintiffs' service, and entered the employment of the defendants, Mobbs & Co., Limited, makers of machinery; and shortly afterwards that company, in conjunction with the defendants, the Sphincter Grip Armoured Hose Company, Limited, commenced the business of fire-engine makers, under the style of "The Fire Appliances Company." From the evidence it appeared that about two days before leaving the plaintiffs' employ the defendant Moore, without their knowledge or authority, compiled a table of dimensions of the various types of fire-engines made by the plaintiffs, which dimensions the plaintiffs claimed to be "trade secrets;" and the plaintiffs stated their belief that these dimensions were taken for the purpose of being communicated to the defendant companies, inasmuch as those companies had recently exhibited in their shop for sale a fire-engine of the same dimensions as those of one of the engines whose dimensions were given in the table in Moore's possession. The plaintiffs then commenced this action, and now moved for an interim injunction to restrain the defendant Moore from publishing or communicating to any person the paper or table of dimensions or the contents thereof; "which paper had been compiled by him in breach of his contract of employment with the plaintiffs, and in breach of the confidence reposed in him by the plaintiffs," and to restrain the defendant companies from publishing or using, in the construction of fire-engines, or otherwise in the course of their trade or business, the information so obtained from the plaintiffs by the defendant Moore. The defendant Moore deposed that he prepared the table merely for his general information; that when he left the plaintiffs' service he placed the table with his engineering and mechanical text-books; that since he had been in the service of the defendant companies he had not been employed in designing or making drawings for any fire-engines for which the table or any information therein could be of the slightest use; and he denied ever having shown it to his present employers.

The managers of the defendant companies deposed that they had never made use of or even seen the table in question; and they denied that the engine referred to by the plaintiffs was of any of the dimensions therein stated.

Warmington, Q. C., and *T. E. Scrutton*, for the plaintiffs.

Kerly, for the defendant Moore.

Martin, Q. C., and *Arnold Statham*, for the defendant companies.

KEKEWICH, J.[1] What is the state of the law as regards a gentleman occupying the position of clerk or servant in the employ of a professional man or a tradesman, that is to say, a person carrying on a professional or commercial business? It is laid down in clear terms in several cases which have been cited, and there really is no dispute about it. The law is taken from Tipping *v.* Clarke, 2 Hare, 383; and that law is repeated in Prince Albert *v.* Strange, 1 Mac. & G. 45. It is again to be found in other cases, and it is summed up in a few words in a recent case which was not cited, and which I do not refer to for its facts, namely: Pollard *v.* Photographic Company, 40 Ch. D. 345, before Mr. Justice North, who says, 40 Ch. D. 354: "It is quite clear that, independently of any question as to the right at law, the Court of Chancery always had an original and independent jurisdiction to prevent what that court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence;" and for that he refers to Prince Albert *v.* Strange. As pointed out by Mr. Scrutton in reply, it is sometimes difficult to say whether the court has proceeded on the implied contract or the confidence, for I will put aside once for all any cases arising on express contract. Perhaps the real solution is that the confidence postulates an implied contract: that, where the court is satisfied of the existence of the confidential relation, then it at once infers or implies the contract arising from that confidential relation, — a contract which thus calls into exercise the jurisdiction to which I have referred.[2] . . .

Now, here I have a gentleman formerly apprenticed to the plaintiffs; apprenticed, of course, to learn his trade. It is immaterial to consider whether he paid a fee, or what the terms of his articles were; generally speaking, the object was, to him that he should learn his trade, to them that he should give them, besides any fee which he might have paid, such services as he could perform. No question arises respecting his duties during that apprenticeship. If there did, I might have thought it right further to consider the matter; but after the termination of his apprenticeship he is taken into the employment of his principals as a paid clerk; and from that time forward the duty to instruct on the part of the employer ceases, and then the bargain must be — I am not told what it actually was — that the clerk shall give his full time during the ordinary office hours to the employer in exchange for proper accommodation and proper remuneration, all which is a matter of bargain. I cannot imply from that relation any obligation on the part of the employer to instruct the clerk, or to enable him to inform himself otherwise than by doing his work. If he is able, in the progress of his work, to learn, an object which he ought of course to have before him, that will be so much the better for him in the course of his employment as giving him a claim to higher remuneration and a better position, and also better for him in future years; but I see no obligation on the part of the employer to instruct him, or to give him the opportunity, otherwise than by doing his work, of instructing himself. I see no obligation on the part of the employer to put the books and materials at his disposal for the purpose, if he so pleases, of employing his spare hours in the advancement of his learning in the particular trade. It is simply a bargain that, for so much money or other remuneration, the clerk shall perform such and such services. He, being in that relation, thinks fit, within a few days of his leaving the service of his employers, and when he of course knew that he was leaving their service, and when therefore anything that he did would be of no advantage to them, to draw out this table. It may be that this table was compiled from data which were at his disposal as clerk in the employment of the plaintiffs. It may be that with care all these details might have been obtained by inspection of the different engines which were either at hand or available, perhaps, through working drawings or otherwise; but in this particularly compendious form it is common ground that these materials did not exist. Mr. Moore considered it to be for his benefit that they should exist, and exist in his possession; and he must be taken, whatever he says, to have intended to use them for his own purposes. Was it lawful for him to do that? Is it right that he should either retain or use these materials? If he can carry them in his head, no one can prevent his doing that and making use of them. But the question is, is not this an abuse of the confidence necessarily existing between him and his employers, — a confidence arising out of the mere fact of employment, the confidence being shortly this, that the servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information? In my opinion, though I admit the question to be one of some novelty and difficulty, this is an abuse of the confidence necessarily arising out of the circumstances; and I think the abuse is shown and evidenced by the fact of this table having been compiled during the last few days of his service, when it is idle to say that it was was done for any purpose that could be of the slightest advantage to the employers.

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[1] After explaining the inconvenience of trying the question on motion. — ED.

[2] Here Reuter's Telegram Co. *v.* Byron, 43 L. J. N. S. Ch. 661 (1874), was explained. There is further comment on that case in Lamb *v.* Evans [1893] 1 Ch. 218, 226, 231-232 (C. A. 1892). — ED.

Mr. Scrutton made an extremely valuable remark in his reply. If Mr. Moore was at liberty to compile this table from the materials before him, he might have made extracts from the working drawings which were no doubt under his hand: he might have made copies of the working drawings as a whole or of any part; he might have copied that which, without being patented or protected by a trade-mark, was nevertheless peculiarly valuable to the plaintiff's firm, and have carried away elsewhere the means of doing that which he had learnt to do there. One might suppose other abuses, but the working drawings furnish an example which seems to me directly apposite. It is impossible to draw a line with any accuracy and to say that to do this would be an abuse of the confidence, and to do that would not. It is impossible to lay down a general rule with reference to all trades and all professions. The circumstances may vary. It was put in the course of argument that the pupil of a conveyancer copies precedents. The answer is that, though no express contract has, I suppose, ever been made, it is certainly the unwritten law of the profession that barristers who take pupils shall allow them to have their books of precedents, not only for consultation, but to copy; and we all know that, not only as regards conveyancers' precedents, but still more, perhaps, as regards pleading precedents, in olden times they were of such great value that many gentlemen went into particular chambers for the mere purpose of employing themselves in that dry work of copying precedents. We all know what a long time Lord Campbell spent in copying precedents in a pleader's chambers. I say one cannot draw the line exactly; but the present case, for the reasons I have mentioned, seems to me to go beyond the line and to be an abuse of confidence, and therefore I think Mr. Moore must be restrained from publishing or communicating to any person this particular paper or the contents thereof.

As regards the companies, there is certainly an element of suspicion in the case. There is a good deal to be said in support of that suspicion, but the evidence displaces it for the present purpose; and as Mr. Marten is willing on their behalf that the order shall contain an express disclaimer of their intention to make use of this paper for any purpose, I think that I ought not to grant any injunction against them. I come to that conclusion on the ground that they have not threatened to use it, that there is no proof of their intention to use it, which intention they have disclaimed, and that the evidence has not established any reasonable probability of their using it. Possibly a case may be made hereafter against them, but I will not prejudice that question either one way or the other by making any comments on the evidence beyond what I have already made. I will leave that entirely open; and with the same view, in order that there may be no indication of any opinion on my part, which I may say candidly I have not formed, I had better deal with the costs by making them costs in the action.

Accordingly there will be an interim injunction against the defendant, Mr. Moore, but no order against the defendant companies, upon their, by their counsel, disclaiming any intention to publish or use this paper or its contents. The costs of the plaintiffs and of the defendant companies will be costs in the action.[1]

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[1] See Lamb *v.* Evans [1893] 1 Ch. 218 (C. A. 1892); Robb *v.* Green [1895] 2 Q. B. 1. — Ed.

CHAPTER VIII.

DELEGATION BY AN AGENT.

SECTION I.

The Rule.

PALLISER *v.* ORD.

NISI PRIUS. 1724.

[*Bunbury*, 166.]

DEBT was brought upon the certificate of the commissioners for stating the debts due to the army pursuant to the Stat. 6 Geo. for one hundred and five pounds eighteen shillings and seven pence farthing, certified to be due to the plaintiff, for which the statute gave an action of debt upon a demand made and refusal. In proving the demand, it was of one hundred and five pounds eighteen shillings and six pence farthing, instead of seven pence farthing, which varied from the sum certified. Lord Chief Baron EYRE (before whom this cause was tried) was of opinion that this certificate was in the nature of a judgment; that it being a debt thereby reduced to a certainty, and the demand being of a different sum it was fatal; and thereupon the plaintiff was nonsuited.

NOTA, The plaintiff gave an authority to *Moore*, his attorney, to make the demand, or to authorize any other person to do it, who accordingly executed a letter of attorney to another to do it; so it was objected, for the defendant, that a naked authority could not be delegated. But the Chief Baron was of opinion it might by express authority for that purpose, otherwise not.[1]

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[1] *Acc.*: Doe *d.* Rhodes *v.* Robinson, 3 Bing. N. C. 677 (1837).

See Cropp's Case, Godbolt, 38 (1557–58); Combes' Case, *ante*, p. 33; Southerne *v.* Howe, 2 Rolle's Rep. 5, 6 (1617–18), s. c. Cro. Jac. 468. — ED.

CATLIN *v.* BELL.

NISI PRIUS. 1815.

[4 *Camp.* 183.]

THIS was an action of assumpsit for not accounting for goods delivered by the plaintiff to the defendant, to be sold on her account.

The defendant is master of a ship trading from this country to the West Indies, and the plaintiff intrusted to him a quantity of millinery goods, which he undertook to sell for her there.

The first defence was that these goods had paid no duty on exportation; and it was proved that the defendant's ship, in which they were carried, cleared out at the custom-house in ballast. It was contended, therefore, that the adventure was illegal, and that no action could arise out of it.

Lord ELLENBOROUGH. You do nothing unless you show that it formed part of the agreement between the parties to defraud government of the duties. This would contaminate the contract on which the action is founded; but it cannot be affected by the simple circumstance of the ship clearing out in ballast.

It was then stated that the defendant, not being able to sell the goods in the island to which they were destined, had sent them to the Caracas in search of a market, where they had been destroyed by an earthquake; but

Lord ELLENBOROUGH clearly held that there being a special confidence reposed in the defendant, with respect to the sale of the goods, he had no right to hand them over to another person, and to give them a new destination. *The plaintiff had a verdict.*

Park and *Barnewall*, for the plaintiff.

Topping, for the defendant.

STEPHENS *v.* BADCOCK.

KING'S BENCH. 1832.

[3 *B. & Ad.* 354.]

ASSUMPSIT for money had and received, &c. Plea, the general issue. At the trial before TAUNTON, J., at the Cornwall Lent assizes, 1831, the following facts appeared. The plaintiff was rector of Ludgvan near Penzance; the defendant had been clerk to Mr. Samuel John, an attorney, whom the plaintiff had for several years employed to receive his rents and tithes. On the 10th of August, 1829, John, being in embarrassed circumstances, left his home; he had not returned, and a commission of bankrupt had issued against him, when this action was brought. After his departure, and before the cause of it was known in his office, Reynolds, his principal clerk, who had occasionally received payments for him in his absence, went to attend Bodmin assizes, leaving the defendant behind. At the assizes, at some time from the 18th to the 20th of August, Reynolds first heard that John was not likely to return. In Reynolds's absence one of the plaintiff's parishioners called at the office to pay £9 0*s.* 2*d.*, on account of a composition for tithes. The defendant said that Mr. John was absent, but he would receive the money (which he was, in fact, authorized by Reynolds to do); it was paid to him, and he gave a stamped receipt for the sum as follows: "Received 20th August, 1829, of Mr. H. T., £9 0*s.* 2*d.*, for half a year's composition for tithes due to Rev. J. S. at Lady-day last past, for Mr. S. John, John Badcock." On Reynolds's return the defendant accounted to him for other sums received during his absence, but said nothing of this; nor did Reynolds know of this payment till the end of the year. Reynolds stated that at the time of these transactions John was indebted to the plaintiff on the balance of account between them. It did not appear that the defendant had any claim upon John. The defendant having refused to pay the plaintiff the £9 (which he had not paid over to John or his estate), this action was brought to recover it. Two objections in point of law were taken at the trial: first, that, as the defendant acted only as clerk to John in receiving the sum in question, the action should have been brought against his principal; to which point Sadler *v.* Evans, 4 Burr. 1984, and Miller *v.* Aris, 1 Selw. N. P. 92, n., 8th ed., in which Lord Kenyon recognized the principle of the former case, were cited: secondly, that the plaintiff could not recover the money as had and received by the defendant to his use, there being no privity of contract between them; as to which Williams *v.* Everett, 14 East, 582, was referred to. TAUNTON, J., thought the money was recoverable, as having been paid to the defendant under a mistake, and not paid over by him to his principal before notice. He therefore directed a verdict for the plaintiff, giving leave to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose,

Praed, on a former day of the term showed cause.[1]

Follett, *contra*. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows: "Under these circumstances my learned brother who tried the cause thought that the sum in question might be recovered from the defendant as money paid to him in a mistake. But we are of opinion that it cannot be so recovered. It is perfectly clear that the defendant received it as the agent or servant of John, and must have paid it over to him if he had returned. The receipt given was the receipt of John, and (if he had not been bankrupt) would have been evidence against him in an action brought by the present plaintiff. This differs from the case decided in the former part of the term, where a party was held to have received money belonging to a bankrupt's estate, on behalf of the general body of creditors, and not for an assignee who had become lunatic. There the defendant could have no authority to receive it for the lunatic assignee; here Badcock was clearly the agent of John when he received the money, and did receive it in that capacity. On the ground then that there was no privity of contract between the defendant and plaintiff, but that the privity of contract was between the defendant and John, and between John and the plaintiff, we think the rule for a nonsuit must be made absolute. *Rule absolute.*

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[1] Before Lord TENTERDEN, C. J., LITTLEDALE, TAUNTON, and PATTESON, JJ. — REP.

LOOMIS, CONGER, & CO. *v.* SIMPSON.

SUPREME COURT OF IOWA. 1862.

[13 *Iowa*, 532.]

APPEAL from the Dubuque City Court.

This action was brought to recover of defendant a sum of money which plaintiffs allege to be due for goods delivered to be sold on commission, for which he has failed to account. Defendant insists that he was instructed to sell a portion of the goods in Dubuque — to ship the other east and south — that he had accounted for all those sold either in Dubuque or elsewhere, for which he (defendant) has received payment. Trial, and judgment for plaintiffs.

John L. Harvey, for the appellant.

Cooley, Blatchley & Adams, for the appellee.

WRIGHT, J. The points made arise upon certain instructions, given and refused.[1] . . .

Two instructions were asked and refused, as follows: —

1. If the jury believe that Simpson asked plaintiffs whether he should send the goods to Memphis for sale, and they replied that he should do with them as he would with his own, and he thereupon sent them to a factor of good credit, defendant is not liable for the default of such factor.

2. If the employment of a sub-agent was necessary, and that fact was known to plaintiffs, and if defendant selected an agent of capacity and credit, he is not liable for the default of such sub-agent.

If the testimony showed that Morris (the merchant at Memphis) was substituted as the agent or factor of plaintiffs with their consent, express or implied, these instructions were correct, and should have been given. As a rule it is true that where the employment of a sub-agent is necessary, the agent, if he makes a fit and proper selection, is not responsible. And it is equally true as a rule that in the case of a factor or broker, the authority cannot be delegated. (Cochran *v.* Islam, 2 M. & S. 301; Solly *v.* Rathbone, Id. 298; Catlin *v.* Bell, 4 Camp. 183; 1 Pars. Cont. 71, 84.) But we suppose that the principal may confer the power of delegation or substitution, and that this may be done in writing, as by the letters conferring the power upon the agent, by words, or by acts, which acts or words may by implication give the authority or ratify the substitution after it is made. It must be remembered, however, that there is a wide difference between the employment of a servant or sub-agent by the factor, and the delegation of authority or a substitution. The factor may act through or by the hand of another, and yet there be no pretence that there has been a substitution in such a sense as to bind the principal. And until the fact of substitution, with the consent and approbation of the principal, is once established (or his subsequent ratification or confirmation), there can of course be no ground for claiming that his remedy is against the substitute, instead of the original agent.

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[1] A passage as to practice has been omitted. — ED.

In this case the instructions refused were predicated upon two facts. These were, that if plaintiffs told defendant "that he should do with the goods as he would with his own," or if "the employment of a sub-agent was necessary, and that fact was known to plaintiffs," then, in either event, defendant had a right to send the goods to a factor of good credit, to whom, and not defendant, plaintiffs should look for their proper disposition. We do not think, however, that if the jury had found both of these facts in favor of defendant, it necessarily followed that he would not be liable for the default of the person so selected. The inquiry still remained, was this person selected as the servant of the agent or factor, or did he become the agent of the principal? It by no means follows, where produce, for instance, is intrusted to a commission merchant in Dubuque, and sent forward by him to his correspondent or agent at Chicago or St. Louis, that a privity of contract exists between such correspondent and principal, to the extent that the original factor is released and the sub-agent only is liable. Nor does it make any difference that the principal or consignor knows that it must and will be sent forward to find a market. He has a right to, and is presumed to repose confidence in, the financial ability and business capacity of the person so employed, and if such factor employs other persons, he does so upon his own responsibility; and having greater facilities for informing himself and extending his business relations, upon him, and not upon the principal, should fall the loss of any negligence or default. If, however, another person has been substituted who, with the knowledge and approbation of the principal, takes the place of the original factor, or if such substitution is necessary from the very nature of the business, and this fact is known to the principal, the liability of the substitute may be direct to the principal, depending upon questions of good faith and the like, on the part of the factor in selecting the substitute.

Under the circumstances, we think the instructions were properly refused, and the judgment is, therefore, *Affirmed.*[1]

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[1] In Rossiter *v.* Trafalgar Life Assurance Association, 27 Beav. 377, 381, 382 (1859), ROMILLY, M. R., said: "It is undoubtedly quite true, that an agent cannot delegate his authority to another person, but I apprehend it to be equally clear, that an agent is entitled to perform, and must necessarily perform a great number of his acts and functions through the aid of persons to whom he delegates his authority. Thus, for instance, when a merchant receives goods from abroad for sale, and he deputes his foreman to go to the proper place for selling such goods, and the foreman sells them accordingly; in that case, it would be impossible for the consignor to say that the sale was void, because the merchant did not personally sell them himself, but employed another person for that purpose, by whom the sale was effected. The merchant would, no doubt, be answerable for all the acts of his foreman, but provided the acts done were proper and within the scope of his authority, they would be the acts of the merchant himself."

In Campbell *v.* Reeves, 3 Head, 226 (1859), consignors brought an action of assumpsit against their factors, and the Supreme Court of Tennessee, affirming a judgment for the plaintiffs, said, through MCKINNEY, J.: "Campbell & Co. sold and transferred their business to Marley & Ricardi, and . . . turned over to the latter a portion of the consignments which then remained undisposed of. This was done without the knowledge or consent of the consignors. . . .

"The circuit judge instructed the jury that the relation of factor and principal was one of personal trust and confidence. And that, in general, where a consignment of goods was made to a factor for sale on account of the principal, the factor would have no authority to deliver over the goods to a third party for sale, without the assent of the principal, unless some usage of trade to the contrary prevailed, or the act were subsequently ratified by the principal. And that the factor making such transfer — without the previous or subsequent sanction of the principal, and in the absence of any usage or custom of trade — would be liable for the value of the goods thus transferred. . . .

"It is true that a factor has a special property in the goods intrusted to him for sale, and a lien on them for his factorage or commission, and he may sell the goods in his own name. But, in general, he has no power to delegate his authority to another person, — it must be executed by him personally, unless authority to substitute another in his stead was, expressly or impliedly, conferred upon him by his principal. Story on Agency, §§ 13, 110, 201.

"If, then, the factor dispose of the goods, by a delegation of his authority to a third person, without the sanction of the principal, or of a usage of trade, what is the legal consequence? Clearly, it is a conversion of the goods by the factor. This must necessarily be so. The act being unauthorized, no privity is thereby created between such third person and the principal. Such wrongful act cannot be held to confer on the third person, as respects the principal, the rights, duties, or obligations of the factor himself. Wherever authority to appoint a sub-agent exists, a privity is created between the principal and such sub-agent, and the latter will be held directly responsible to the principal. But, if no such privity exists, the sub-agent would be responsible to his immediate employer; and the remedy of the principal is against his agent. Story on Agency, §§ 13, 201.

"The unauthorized disposal of the goods by the factor being a conversion, it clearly follows that the principal has an election either to sue in trover, grounding his action on the tort, or to waive the tort and recover the value of the goods in an action of assumpsit, based upon the breach of the implied contract."

In Darling *v.* Stanwood, 14 Allen, 504 (1867), FOSTER, J., for the court said: "In a business which requires or justifies the delegation of an agent's authority to a sub-agent, who is not his own servant, the original agent is not liable for the errors or misconduct of the sub-agent if he has used due care in his selection."

In De Bussche *v.* Alt, 8 Ch. D. 286, 310, 311 (C. A. 1878), **Thesiger**, L. J., for the court, said: "As a general rule, no doubt, the maxim '*delegatus non potest delegare*' applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed 'a sub-agent' or 'substitute' (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself."

In Barnard *v.* Coffin, 141 Mass. 37, 41 (1886), **Field**, J., for the court, said: "The principle which runs through the cases is, that if an agent employs a sub-agent for his principal, and by his authority, express or implied, then the sub-agent is the agent of the principal, and is directly responsible to the principal for his conduct, and, so far as damage results from the conduct of the sub-agent, the agent is only responsible for a want of due care in selecting the sub-agent; but if the agent, having undertaken to do the business of his principal, employs a servant or agent, on his own account, to assist him in what he has undertaken, such a sub-agent is an agent of the agent, and is responsible to the agent for his conduct, and the agent is responsible to the principal for the manner in which the business has been done, whether by himself or by his servant or agent." — Ed.

SECTION II.

Exceptions, real or apparent.

EX PARTE SUTTON.

IN THE MATTER OF PETER MARSHALL, A BANKRUPT.

CHANCERY. 1788.

[2 *Cox*, 84.]

IN August, 1787, Lewis and Potter came to an agreement with Gibson and Johnson, bankers in London, that Gibson and Johnson should accept bills for the use and accommodation of Lewis and Potter; but which bills were to be drawn by Peter Marshall, the bankrupt, and the account was therefore opened in the name of Peter Marshall. Lewis and Potter were to provide Gibson and Johnson with money before the bills became due, so as to prevent their ever being in advance; and for this Gibson and Johnson were to receive ¼ per cent commission on the bills so accepted.

Peter Marshall, accordingly, wrote a letter to Lewis and Potter, by which he authorized them "to make use of his name, by procuration or otherwise, to draw bills on Gibson and Johnson." The bill in question was drawn by one of the clerks of Lewis and Potter, and was signed,

By procuration of Peter Marshall,
ROBERT EDGCUMBE.

The petitioner was an indorsee of this bill for a valuable consideration, and applied to prove it under the commission against Peter Marshall, but was refused.

The ground of the refusal was, that this power of drawing in the name of Peter Marshall, being given only to Lewis and Potter, could not be delegated by them to any other person; and that Marshall was not bound by this signature of the clerk.

LORD CHANCELLOR.[1] In any case where the signature would not be good against Lewis and Potter themselves it will not bind Marshall; but wherever this sort of authority is given, I must take it as given to be made use of in the common course of business; and this clerk only did in the name of Marshall what he used to do in the name of Lewis and Potter, and the petitioner must therefore be at liberty to prove his debt.

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[1] Lord THURLOW. — ED.

BOOTH *v.* MISTER.

NISI PRIUS. 1835.

[7 *C. & P.* 66.]

CASE. The declaration stated that the cart of the defendant was so negligently driven by the defendant's servant that it struck against a cabriolet in which the plaintiff was riding, whereby the plaintiff was injured. Plea, not guilty.

It appeared that a servant of the defendant, named Usher, whose duty it was to have charge of the cart, was riding in the cart at the time when the accident occurred, but that another person, who was not in the defendant's service, was driving the cart, Usher having given him the reins.

Erle and *G. Henderson*, for the defendant, submitted that the defendant was not liable, on the ground that, as a person not in the defendant's service was driving at the time of the accident, the allegation that the cart was driven by the defendant's servant was not sustained by the evidence.

Lord ABINGER, C. B. I will reserve the point, but I think that the evidence is sufficient to support the allegation. As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself. *Verdict for the plaintiff.*[1]

Platt and *Ball*, for the plaintiff.

Erle and *G. Henderson*, for the defendant.

S. & M. ALLEN *v.* THE MERCHANTS' BANK.

COURT OF ERRORS OF NEW YORK. 1839.

[22 *Wend.* 215.]

ERROR from the Supreme Court. This was an action of assumpsit, brought in the Superior Court of the city of New York by S. & M. Allen against the bank, to recover the amount of a bill of exchange, drawn in New York on a mercantile house in Philadelphia, and deposited by the plaintiffs with the Merchants' Bank in New York for collection, which was lost to the plaintiffs in consequence of the omission to give notice of the non-acceptance to the indorsers. On 26th June, 1830, F. I. Spooner, at the city of New York, drew a bill of exchange on Messrs. Boller & Baker, of Philadelphia, for $600, payable five days after date to his own order. He indorsed the bill to James M. Gould, who sold it to the plaintiffs and indorsed his name upon it. The plaintiffs, on the day of its date, deposited the bill for collection with the Merchants' Bank, who sent it to the Philadelphia Bank in the city of Philadelphia. On 28th June, the Philadelphia Bank delivered the bill to its notary, who, on the same day, presented it to the drawers for acceptance, which being refused, he noted the bill for non acceptance, and returned it to the bank, but omitted to give notice of non-acceptance to the indorsers.[1] . .

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[1] No motion was made on the point reserved. — REP.
See Althorf *v.* Wolfe, 22 N. Y. 355 (1860). — ED.

Mr. Justice OAKLEY charged the jury, that the defendants, upon general principles of law, and independent of any custom or usage, or of any agreement, express or implied, were only bound to transmit the bill to Philadelphia in due time and to some competent agent; and were not liable for any negligence or omission of such agent in giving notice of the non-acceptance of the bill. . . . To this charge the plaintiffs excepted. The jury found for the defendants, on which judgment was entered. The plaintiffs removed the record into the Supreme Court, where the judgment of the Superior Court was affirmed. See the opinion of the court delivered by the Chief Justice, 15 Wendell, 486, *et seq.* The plaintiffs thereupon sued out a writ of error, removing the record into this court.

H. E. Davies, for the plaintiffs in error.

H. P. Edwards and *G. Wood*, for the defendants in error.

S. A. Foot, in reply.

By Senator VERPLANCK.[2] What then is the ordinary undertaking, contract, or agreement of a bank with one of its dealers, in the case of an ordinary deposit of a domestic note or bill, payable in the same town received for collection? It is a contract made with a corporate body having only a legal existence, and governed by directors, who can act only by officers and agents; or if it be with a private banker, he too is known to carry on his business by clerks and agents. The contract itself is to perform certain duties necessary for the collection of the paper and the security of the holder. But neither legal construction nor the common understanding of men of business can regard this contract (unless there be some express understanding to that effect) as an appointment of the bank as an attorney or personal representative of the owner of the paper, authorized to select other agents for the purpose of collecting the note and nothing more. There is a wide difference made as well by positive law as by the reason of the thing itself, between a contract or undertaking to do a thing, and the delegation of an agent or attorney to procure the doing the same thing, — between a contract for building a house (for example), and the appointment of an overseer or superintendent, authorized and undertaking to act for the principal, in having a house built. The contractor is bound to answer for any negligence or default in the performance of his contract, although such negligence or default be not his own, but that of some sub-contractor, or under-workman. Not so the mere representative agent, who discharges his whole duty if he acts with good faith and ordinary diligence in the selection of his materials, the forming his contracts, and the choice of his workmen. Now in the case of the deposit for collection of a domestic note or bill payable in the same town, no one can imagine that this, instead of being a contract with the bank to use the proper means for collecting the paper, is a mere delegation of power to act as an attorney for that purpose. . . .

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[1] The reporter's statement has been abbreviated by omitting part of the evidence, and so much of the charge as was not made the subject of comment in the Court of Errors. — ED.

[2] The passages omitted in reprinting this opinion are almost exclusively restatements of the facts, citations of authorities, and discussions of the question whether the notary was negligent, and of the question whether any distinction is to be based upon the fact that the notary was a public officer. — ED.

Is there anything in the mere fact of the paper being payable in another city, and therefore requiring the aid of other agents, sufficient to take that case out of the general rule? I mean irrespectively of any agreement or implied understanding as to the matter. The Chief Justice, in delivering the opinion of the Supreme Court, holds that there is, and says: "A note or bill left at a bank, and received for the purpose of being sent to some distant place for collection, would seem to imply, upon a reasonable construction, no other agreement than that it should be forwarded with due diligence to some competent agent, to do what should be necessary in the premises. The language and acts of the parties fairly import so much, but nothing beyond it. The person leaving the note is aware that the bank cannot personally attend to the collection, and that it must therefore be sent to some distant or foreign agent." This seems to me to assume the very question in dispute. In a deposit of a note for collection, payable in the same place, the holder is equally aware that the bank cannot personally attend to the collection, and its management must be left to some one or more competent agents. But he makes an implied contract with the bank that the proper and expedient means shall be used to collect his note. So he does as to a foreign debt; and in each case he alike presumes that proper agents will be employed. In neither case has he any knowledge of the agents, or privity with them. I can perceive no reason for liability or exemption from liability in either case which does not equally apply to the other. The bank, if its officers think fit, and the dealer will consent, may vary that liability in either case. It may receive the paper only for transmission to its correspondents. That would form a new and different contract, and would limit the responsibility to good faith and due discretion in the choice of an agent. But if this be not done, or unless there be some implied understanding on the subject, I see no difference between the responsibility assumed in the undertaking to collect foreign bills, and that for collecting domestic paper, payable at home. . . .

On the question being put, shall this judgment be reversed? the members of the court divided as follows: —

In the affirmative: Senators FOX, HAWKINS, HUNT, HUNTINGTON, LEE, H. A. LIVINGSTON, MAYNARD, MOSELEY, NICHOLAS, PECK, SKINNER, VAN DYCK, VERPLANCK, WAGER — 14.

In the negative: The CHANCELLOR,[1] and Senators BEARDSLEY, CLARK, HULL, HUNTER, JOHNSON, JONES, PAIGE, SPRAKER, STERLING — 10.

Whereupon the judgment of the Supreme Court was reversed, a *venire de novo* directed to be awarded, and the costs in this court and in the Supreme Court ordered to abide the event.

In this case, the court adopted the following resolution: Resolved, that when a bank or broker, or other money-dealer receives, upon a good consideration, a note or bill, for collection in the place where such bank, broker, or dealer carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent either in the negotiation, collection or paying over the money, by which the money is lost or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied.[2]

COMMERCIAL BANK OF LAKE ERIE *v.* NORTON AND FOX, IMPLEADED.

SUPREME COURT OF NEW YORK. 1841.

[1 *Hill*, 501.]

ASSUMPSIT, tried at the Erie Circuit, before GRIDLEY, C. J., Aug. 29, 1840. The plaintiffs sought to recover as indorsees of two bills of exchange drawn by Gillespie, Joice & Co., on E. Norton & Co., payable to Gillespie & Woodruff, at sixty days after date. The firm of E. Norton & Co. was composed of said Norton and Simeon Fox, two of the defendants, who alone defended the suit.

The acceptance on each of the bills was in this form: "E. Norton & Co. — Per A. G. Cochrane;" and was in Cochrane's handwriting.

The bills were discounted on the day of the date, by the plaintiffs for the drawers, and were afterwards accepted for the drawers' accommodation; the defendants Norton and Fox having no funds of the drawers, but the latter being then largely indebted to them.

Henry Norton testified on the trial that he directed Cochrane to accept these bills, the latter being the book-keeper of E. Norton & Co. As to Henry's own authority, he testified that he was the general agent of E. Norton & Co., financial and otherwise, they not interfering in the business, but being engaged mostly elsewhere; that, with their knowledge and assent, he had been in the habit of drawing drafts, making notes and indorsements for them; though, by the written articles of co-partnership between E. Norton and Fox, his (the witness') power was more limited.

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[1] Chancellor WALWORTH delivered a dissenting opinion. — ED.

[2] *Acc.*: Ayrault *v.* Pacific Bank, 47 N. Y. 570 (1872). — ED.

The defendants' counsel moved for a nonsuit upon the ground that the acceptances were made without authority; but the circuit judge denied the motion, and the defendants' counsel excepted. He further insisted at the trial, that the acceptances were without consideration, and therefore void. The circuit judge ruled the contrary; whereupon the said counsel again excepted. Verdict for the plaintiffs. The defendants now moved for a new trial on a bill of exceptions.

E. Norton, for defendants.

H. K. Smith, for the plaintiffs.

By the court, COWEN, J.[1] But Henry Norton, it is said, did not appear on the proof to have had any adequate power to accept. There was, however, at least, evidence of authority sufficient to go to the jury; and all the judge did, on this point being started, was to refuse a nonsuit. I admit that the powers conferred on him by the defendants' articles of copartnership did not reach accommodation acceptances; nor did it appear that he had ever made such an acceptance before. But he said he was the general agent of the defendants' firm, having the sole management of the business; and had, with the defendants' knowledge, drawn drafts and made notes and indorsements for them. True, he did not mention the specific act of acceptance; but his general powers in the business, and the usage of putting their names to commercial paper in all other shapes, was the same thing, and calculated to raise an inference in the public mind that he had such a power as to this. It is not necessary, in order to constitute a general agent, that he should have before done an act the same in specie with that in question. If he have usually done things of the same general character and effect with the assent of his principals, that is enough. A. holds himself out to the world as B.'s partner; this authorizes B. to do, in the name of both, all things which one partner can do in the name of the firm; and, among others, to draw, accept, and indorse bills and notes. This is on the principle that one partner is the general agent of the concern. Any other agent recognized as holding the like power may do the same thing. The agency of H. Norton extended to the whole business of the defendants. Neither of the latter pretended to interfere. Whatever transaction therefore the world might regard as pertaining to that business, and clearly an acceptance is one, ought to bind the firm. It is like the case stated by Malyne, — a known servant taking up moneys beyond the seas upon his master's account, and drawing a bill upon him. He is liable, though he refused to accept; because, adds the writer, it is understood that the money is obtained on his credit, unless he have made public declaration denouncing his servant to the brokers of exchanges and otherwise. Mal. Lex. Merc. pt. 3, ch. 5, § 6, p. 264, ed. of 1656. Chitty says the authority to draw, indorse, or accept, by procuration, need not be special; "but the law may infer an authority from the general nature of certain acts permitted to be done, and usual employ is evidence of an authority." Chitt. on Bills, 35 *a*, Am. ed. of 1839. These are very nearly the words of Lord Eldon, Ch. in Davison *v.* Robertson, 3 Dow's Parl. Rep. 218, 229, whom Chitty cites. Henry Norton was the factotum of the firm. A more comprehensive general agency can hardly be conceived.

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[1] The opinion is shortened by omitting at the beginning and at the end passages not pertaining to Agency. — ED.

But it is said he could not delegate the power to accept. This is not denied, nor did he do so. The bills came for acceptance; and having as agent made up his mind that they should be accepted, he directed Cochrane, the book-keeper, to do the mechanical part, — write the acceptance across the bills. He was the mere amanuensis. Had anything like the trust which is in its nature personal to an agent, a discretion, for instance, to accept what bills he pleased, been confided to Cochrane, his act would have been void. But to question it here would be to deny that the general agent of a mercantile firm could retain a carpenter to make a box, or a cooper to make a cask. The books go on the question whether the delegation be of a discretion. Such is the very latest case cited by the defendants' counsel: Emerson *v.* The Prov. Hat Manufacturing Co., 12 Mass. Rep. 237, 241, 242; and the latest book, 2 Kent's Com. 633, 4th ed. Blore *v.* Sutton, 3 Meriv. 237, is among the strictest cases I have seen. There the clerk of the agent put his own initials to the memorandum, by direction of the agent; and held, insufficient. Henderson *v.* Barnewall, 1 Young & Jerv. 387, followed it. Both were cases arising under the statute of frauds, which requires that the memorandum should be signed by the principal or his agent; and I admit it is very difficult to distinguish the manner of the signatures there from that now in question by Cochrane. Everything there seems to have been mechanical merely, as here; and there may be some doubt, I should think, whether such cases can be sustained. At any rate, in our attempt to apply them, we are met with a case as widely the other way. *Ex parte* Sutton, 2 Cox, 84. The rule as there laid down is, that "an authority given to A. to draw bills in the name of B. may be exercised by the clerks of A." Such is the marginal note, and it is entirely borne out by the case itself. Peter Marshall wrote to Lewis & Potter authorizing them "to make use of his name by procuration or otherwise to draw bills on G. & J." The clerk of Lewis & Potter drew the bill, signing thus: "By procuration of Peter Marshall, Robert Edgecumbe." The Lord Chancellor put it on the ground that the signature of the clerk would have bound Lewis & Potter, had he signed their name under the general authority which he had. We thus make very little progress one way or the other on direct English authority. Left to go on the principle of any other English case I have seen, and there are many, all we have to say is, I think, that the agent shall not delegate his discretion, but may at least do any mechanical act by deputy. I do not know that the language of Lord Ellenborough in Mason *v.* Joseph, 1 Smith's Rep. 406, has been anywhere directly carried into an adjudication. But it sounds so much like all the cases professing to go on principle, that I can scarcely doubt its being law. His Lordship said, "It is true an attorney appointed by deed cannot delegate his authority to a third person. He must exercise his own judgment on the principal subject for the purpose of which he is appointed; but as to any mere ministerial act, it is not necessary that he should do it in person, if he direct it to be done or upon a full knowledge of it adopt it. Suppose, for instance, he had got the gout in his hands, and could not actually sign himself, he might have authorized another to sign for him." . . . *New trial denied.*[1]

DORCHESTER AND MILTON BANK *v.* NEW ENGLAND BANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1848.

[1 *Cush.* 177.]

THIS was an action of assumpsit for the recovery of damages by the plaintiffs against the defendants, for not accounting for the proceeds of certain accepted bills of exchange, payable at Washington, in the District of Columbia, in six months from their respective dates, which had been received by the defendants from the plaintiffs for collection.

On the trial in this court, before WILDE, J., the following facts appeared in evidence. On the part of the plaintiffs, it was proved that the bills in question had been discounted by them, and left, at different times during the months of October, November, and December, 1837, for collection, with the defendants, who were their general agents in Boston; that the defendants had never paid over the amount of the bills, or returned them to the plaintiffs; that the defendants always charged the plaintiffs a commission for making collections out of Boston; and that the plaintiffs, on the 21st February, 1844, demanded of the defendants that the proceeds of the bills should be placed to their credit.

On the part of the defendants, it was proved that, from the year 1833 or 1834, until the failure of the Commonwealth Bank, they had employed that bank to make collections for them and their customers at Washington, and other places at the South, where the defendants had no agent; that they placed the bills received by them of the plaintiffs in the hands of the Commonwealth Bank for collection, — first indorsing them thus, "Pay to C. Hood, cashier," which was the form of indorsement uniformly adopted by them in such cases; that the Commonwealth Bank then was, and to the time of its failure, Jan. 11, 1838, continued to be, in good credit; that the bills in question were duly transmitted by the Commonwealth Bank to its correspondent in Washington, the Bank of the Metropolis; that all the bills had been accepted, but none of them had become due on the 11th of January, 1838, when the Commonwealth Bank stopped payment; that on the 13th of January the defendants took measures to demand the bills of the Bank of the Metropolis; that the latter refused to deliver the bills, but afterwards collected them, and claimed to hold the proceeds on account of a balance due to them from the Commonwealth Bank; and that the defendants thereupon commenced a suit for the recovery of the proceeds of the said bills against the Bank of the Metropolis, — which suit at the time of the trial was still pending, and the record of which is in the case, and may be referred to, subject to any legal objections thereto, by the plaintiffs.[1]

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[1] See Lord *v.* Hall, 8 C. B. 627 (1849); Williams *v.* Woods, 16 Md. 220, 248–250 (1860); Norwich University *v.* Denny, 47 Vt. 13 (1874); Weaver *v.* Carnall, 35 Ark. 198 (1879). — ED.

It was also proved, on the part of the defendants, that, in 1833 or 1834, the several banks employed by the government of the United States, as deposit banks, entered upon a system of mutual dealings, for the purpose of facilitating exchanges and transfers of funds; that the Commonwealth Bank was one of these banks, and was frequently employed by other banks, in Boston and elsewhere, to collect money in places (especially at the South and West, where the latter had no correspondents), and that in all such cases bills received for collection were indorsed in the manner above mentioned; and that since that time it had been the general practice of the banks in Boston, whenever any one of them received notes or drafts for collection which were payable at a place where it had no correspondent, to pass over the same for collection to some other bank in Boston which had a correspondent in such place, by a general indorsement exactly like that made use of in indorsing the bills in question to the Commonwealth Bank.

There was no evidence that any loss had ever happened in consequence of the failure of a bank in which bills or drafts had been thus deposited for collection, or that the owner of any such note or draft had in any instance sustained a loss in consequence of a failure of the collecting bank. It was proved that, although it was the general practice of the banks in Boston to receive bills and notes for collection which were payable in places where they had no correspondents, yet that they sometimes refused to undertake the collection of such paper.

The cashier of the plaintiffs testified that in the course of business at their bank, within the last eight or ten years, they had discounted and received a large quantity of Southern and other drafts, though not to a great amount on Washington, all of which were collected through the New England Bank; that in three or four instances, within the period mentioned, protested drafts had been returned to the plaintiffs by the New England Bank, from which it appeared, that that bank had indorsed bills and drafts, received by it for collection, to other banks in Boston in the same form in which the bills were indorsed to the Commonwealth Bank; and that the plaintiff had never found any fault with, or protested against, the employment by the defendants of other banks in Boston, though the witness could not say with certainty whether any such instances had occurred before the bills in question were placed in the hands of the defendants.

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[1] See 1 Howard, 234; 6 Ib. 212. — REP.

The cashier of the defendants produced and verified the protest of a draft sent by the plaintiffs to the defendants for collection in Mobile in May, 1836, and a copy of the defendants' letter returning the same, with a protest, to the plaintiffs; which draft was indorsed by the plaintiffs[1] and by the defendants, in the same manner with the bills now in question, to the cashier of the Merchants' Bank in Boston, to which it was sent for collection.

On these facts the case was withdrawn, by consent, from the jury, and submitted for consideration to the whole court, who are to order a nonsuit, default, or new trial, as in their judgment the case may require.

R. Fletcher, for the plaintiffs.

S. Bartlett, for the defendants.

WILDE, J.[2] This is an action of assumpsit; but the foundation of the plaintiffs' claim is the alleged negligence of the defendants in not collecting certain bills left with them for collection by the plaintiffs.

The defendants proved that they placed these bills in the hands of the Commonwealth Bank for collection, the same being payable in the city of Washington, where the defendants had no correspondents. This, the plaintiffs' counsel contend, the defendants had no right to do, on the ground that an agent has no right to delegate his authority to a sub-agent without the assent of his principal. This, no doubt, is generally true; but when, from the nature of the agency, a sub-agent or sub-agents must necessarily be employed, the assent of the principal is implied. Such was the nature of the agency in the present case. It could not have been expected that the defendants would employ one of their own officers to proceed to Washington to obtain payment of the bills. The bills undoubtedly were intended to be transmitted to Washington for collection; and if the defendants employed suitable sub-agents for that purpose, in good faith, they are not liable for the neglect or default of the sub-agents. This was so decided in Fabens v. Mercantile Bank, 23 Pick. 330. The Chief Justice, in delivering the opinion of the court, says: "It is well settled that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note, in the first instance, is seasonably to transmit the same to a suitable bank, or other agent, at the place of payment. And as a part of the same doctrine, it is well settled that if the acceptor of a bill, or promisor of a note, has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of the residence of the promisor." This decision of the court on both points is, we think, well founded in principle, and supported by a decided weight of authority. The only opposing decision is in the case of Allen v. Merchants' Bank, which was first reported in 15 Wend. 482, and which was afterwards removed to the Court of Errors, where the judgment of the court below was reversed by a majority of the Court of Errors. This reversal is opposed to a number of decisions of great authority, and is not, as we think, well founded in principle. If the bank in that case acted in good faith, in selecting a suitable sub-agent where the bills were payable, there seems to be no principle of justice, or public policy, by which the bank should be made liable for the neglect or misfeasance of the sub-agent. And it is admitted by Mr. Senator Verplanck, who states the grounds of the reversal of the judgment, that the bank would not have been liable if there had been an understanding or agreement, express or implied, that the bills were to be transmitted to another bank for collection. Now, we think, in that case as in this, there was manifestly such an understanding. There is another view of that case, taken by the learned senator, in which we cannot concur. He makes no distinction between the neglect of the officers of the bank, where the bills were deposited, and that of the bank to which they were transmitted for collection. We think the distinction is obvious. We agree, however, with the learned senator, that the decisive question in such cases is what was the understanding of the parties as to the duties the collecting bank undertook to perform. And as to this, we have no doubt of the understanding of the parties in the present case. That was, we think, that the defendants were to transmit the bills, or to cause them to be transmitted, to some suitable bank or other agent in Washington for collection; and the questions are whether, in employing the Commonwealth Bank to transmit the bills, the defendants acted in good faith, and if so, whether they are responsible for the failure of that bank. That the defendants acted in good faith we cannot doubt. The Commonwealth Bank at the time was in perfectly good credit, and had great facilities for obtaining payment of bills and notes payable in distant States. The defendants were the plaintiffs' general agents, and they had no instructions; they were, therefore, to exercise their best judgment as to the transmission of the bills and the remittance of the money when collected. And we see no cause to doubt that they acted in good faith, and exercised a sound judgment. It was objected that the defendants ought to have made restricted indorsements; but it is a satisfactory answer that the defendants made their indorsements in the same manner the plaintiffs did. Considering, then, that the defendants acted in good faith, and exercised a sound judgment in employing the Commonwealth Bank, we think there is no principle of law or equity which can subject them to any liability by reason of the subsequent failure of that bank.

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[1] In the argument for the defendants, and in the opinion of the court, it is stated that the bills were indorsed by the plaintiffs to the defendants in the same manner that they were indorsed by the defendants to the Commonwealth Bank; but the fact does not distinctly appear from the evidence contained in the statement of the case. — REP.

[2] The Chief Justice did not sit in this case. — REP.

In our opinion, the defendants' responsibility was limited to good faith and due discretion in the choice of an agent to transmit the bills, and to procure a remittance of the money when paid. This case is not distinguishable from the case of Fabens *v.* Mercantile Bank, and the cases there cited.

We do not think that the proof of any usage is necessary to support these decisions; but in the present case the usage is well proved to have been uniform, in similar cases, ever since the year 1833 or 1834, three or four years before these bills were deposited in the defendant bank.

It was also proved that one bill had been transmitted in like manner by the defendants for the plaintiffs, and returned to them with protest, and without objection by them. This was in 1836, more than a year before the bills in this case were deposited. This would be sufficient notice of the usage or manner in which the defendant transacted such business, if any such notice were required. It seems, however, that the usage of a bank is binding on all persons dealing with the bank, whether they know of the usage or not. Lincoln and Kennebeck Bank *v.* Page, 9 Mass. 155; Bank of Washington *v.* Triplett, 1 Pet. 25. That is a point, however, not necessary to be decided in this case.

Plaintiffs nonsuit.[1]

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[1] *Acc.*: East Haddam Bank *v.* Scovil, 12 Conn. 303 (1837); Guelich *v.* National State Bank, 56 Iowa, 434 (1881); First National Bank *v.* Sprague, 34 Neb. 318 (1892).

Contra: Montgomery County Bank *v.* Albany City Bank, 7 N. Y. 459 (1852); Exchange National Bank *v.* Third National Bank, 112 U. S. 276 (1884); Power *v.* First National Bank, 6 Mont. 251 (1887).

The authorities are collected in the cases cited in this note, and also in Ames' Cases on Trusts (2d ed.), 14, n. (1). — ED.

JOHN HALUPTZOK *v.* GREAT NORTHERN RAILWAY CO.

SUPREME COURT OF MINNESOTA. 1893.

[55 *Minn.* 446.]

APPEAL by defendant, Great Northern Railway Company, from an order of the District Court of Wright County, THOMAS CANTY, J., made April 15, 1893, denying its motion for a new trial.[1]

W. E. Dodge and *Wendell & Pidgeon*, for appellants.

W. E. Culkin and *J. T. Alley*, for respondent.

MITCHELL, J. The plaintiff brought this action to recover for personal injuries to his infant child, caused by the negligence of the alleged servant of the defendant. 1878 G. S. ch. 66, § 34.

The injuries were inflicted by one O'Connell, and the only question presented by this appeal is whether O'Connell was defendant's servant. The evidence, in which there is no material conflict, is substantially as follows: The defendant maintained a public depot and freight and passenger station at the village of Waverly. The premises were owned and controlled by the defendant, but the Great Northern Express Company and the Western Union Telegraph Company had their offices in the same building, one Westinghouse being the common agent for all three companies. Westinghouse had exclusive charge of all of defendant's business at the station. He testified that he had no authority to employ any assistants, such authority being exclusively vested in the general officers of the company; and, as respects express authority, this testimony is not contradicted. For a year or more before the injury complained of, Westinghouse had permitted a young man named Foutch to use and practise on the instruments in the office, for the purpose of learning telegraphy; and during that time Foutch had been in the habit, as occasion required, of assisting Westinghouse in the performance of his railway duties, such as selling tickets, handling freight, putting out switch lights, etc. He had no contract with the railway company, and received no wages; the work he did evidently being in return for the privilege of the office, and the use of the instruments, in learning telegraphy. There is no evidence that the general officers of the defendant knew of or assented to Foutch's performing this work, except the length of time it had continued, and the absence of any testimony that they ever objected. About ten days before the accident, Westinghouse, with the permission of the Western Union Telegraph Company, gave O'Connell the privilege of the office, and the use of the instruments, for the purpose of learning telegraphy, evidently under substantially the same arrangement by which he had previously given Foutch similar privileges. O'Connell had no contract with the defendant, and received no wages. The time between his coming into the office and the date of the accident was so brief that the evidence is very meagre as to his doing railroad work about the station during that time, but there was evidence tending to show that he had on several occasions, with the knowledge and consent of Westinghouse, handled freight. On the day in question, he went to work, with a truck, to move some goods from the station platform into a freight-room. Foutch assisted him by piling up the goods in the room while O'Connell carried them in. While thus handling the truck, O'Connell ran it against plaintiff's child, who was walking around the depot, and inflicted the injury complained of. There is no evidence that at or prior to the accident the general officers of the defendant knew that O'Connell was employed about the station. But both Foutch and O'Connell, after the accident, continued at the depot, practising telegraphy, and assisting Westinghouse, as before, in selling tickets, handling freight, etc., and were still doing so at the date of the trial, which was five months after the accident, and over four months after the commencement of this action; and, while there is no direct evidence that this was with the knowledge of the general officers of the defendant, there is no evidence that they did not know of it, and none that they ever objected to it. Such we believe to be a fair and full statement of the effect of the evidence.

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[1] The reporter's statement has been omitted. — ED.

Under the doctrine of respondeat superior, a master, however careful in the selection of his servants, is responsible to strangers for their negligence committed in the course of their employment. The doctrine is at best somewhat severe, and, if a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they shall be. Hence, we think, in every well-considered case where a person has been held liable, under the doctrine referred to, for the negligence of another, that other was engaged in his service either by the defendant personally, or by others by his authority, express or implied. There is a class of cases, of which Bush *v.* Steinman, 1 Bos. & P. 404 (often doubted and criticised), is an example, which seem to hold that a person may be liable for the negligence of another, not his servant. But these were generally cases where the injury was done by a contractor, sub-contractor, or their servants, upon the real estate of the defendant, of which he was in possession and control; and they seem to proceed upon the theory that, where a man is in possession of fixed property, he must take care that it is so used and managed by those whom he brings upon the premises as not to be dangerous to others. In that view, he is held liable, not for the negligence of another, but for his own personal negligence in not preventing or abating a nuisance on his own premises. See Laugher *v.* Pointer, 5 Barn. & C. 547. There will also be found in some text-books statements to the effect that where a servant is employed to do a particular piece of work, and he employs another person to assist him, the master is liable for the acts of the person so employed, as much as for the acts of the servant himself. Thus generally stated, without qualification, the proposition is misleading, as well as inaccurate.

The cases most generally cited in support of it are Booth *v.* Mister, 7 Car. & P. 66, and Althorf *v.* Wolfe, 22 N. Y. 355. In Booth *v.* Mister, the defendant's servant, whose duty it was to drive his master's cart, was riding in the cart, but had given the reins to another person, who was riding with him, but was not in the master's employment, and through the negligent management of this other person the plaintiff was injured. The defendant was held liable, not for the mere negligence of such other person, but for the negligence of the servant himself, who was riding in the cart, and either actively or passively controlling and directing the driving, as much as if he had held the reins in his own hands.

In Althorf *v.* Wolfe, a servant, having been directed to remove snow from the roof of his master's house, secured the services of a friend to assist him; and while the two were engaged together, in throwing the snow from the roof into the street, a passer-by was struck and killed. It was held that it was immaterial which of the two threw the ice or snow which caused the injury; that in either case the master was liable. The case is a very unsatisfactory one, and it is very difficult to ascertain the precise ground upon which it was decided. WRIGHT, J., seems to put it on one or all of three grounds: (1) That the servant had implied authority to procure assistance; (2) That defendant's family, who were left in charge of the house, ratified the act of the servant; and (3) upon the same ground upon which Booth *v.* Mister was decided. On the other hand, DENIO, J., seems to place his opinion upon the ground upon which we have suggested that Bush *v.* Steinman proceeds. It is also to be observed that two of the justices dissented. But neither of these cases, if rightly understood, is in conflict with the proposition with which we started out, — that a master, as such, can be held liable for the negligence only of those who are employed in his work by his authority; and hence, if a servant who is employed to perform a certain work procures another person to assist him, the master is liable for the sole negligence of the latter, only when the servant had authority to employ such assistant. Such authority may, however, be implied as well as express, and subsequent ratification is equivalent to original authority; and, where the servant has authority to employ assistants, such assistants, of course, become the immediate servants of the master, the same as if employed by him personally. Such authority may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent on part of the master may be inferred. It is not necessary that a formal or express employment on behalf of the master should exist, or that compensation should be paid by or expected from him. It is enough to render the master liable if the person causing the injury was in fact rendering service for him by his consent, express or implied.

Under this view of the law, the evidence made a case for the jury to determine whether Westinghouse had implied authority from the defendant to employ O'Connell as an assistant, or, to state the question differently, whether O'Connell was rendering these services for the defendant by its consent.

If the evidence were limited to the employment of O'Connell alone, and to what occurred during the ten days preceding the accident, it would probably be insufficient to support a verdict in favor of the plaintiff. But it is an undisputed fact that Westinghouse had for over a year before this been employing Foutch as an assistant under a similar arrangement, without, so far as appears, any objection on part of the defendant, although the length of time was such that its knowledge of the fact may be fairly inferred. It is true that implied authority to employ Foutch as assistant would not necessarily include authority to employ O'Connell, but the fact of Foutch's long-continued employment has an important bearing upon the question of Westinghouse's implied authority, as indicated by the manner of conducting the business; and, as bearing upon this same question of implied authority, the fact is significant that after the accident both Foutch and O'Connell continued, without objection, to perform these services for defendant, as assistants to Westinghouse, up to the date of the trial. Additional force is added to all this, when considered in connection with the nature of the duties of a station agent at a place like this, which are of such multifarious character as to render the employment of an occasional assistant not only convenient, but almost necessary. The facts that the consideration for the services of these assistants moved from Westinghouse, rather than defendant, and that their aid was for the accommodation or convenience of Westinghouse, are not controlling.

There is nothing in the point that defendant is not liable because the freight which O'Connell was moving had been delivered to the consignee, who had promised to take care of it where it lay, on the station platform.

O'Connell's act was in the line of his employment, and was being done in furtherance of defendant's business. The liability of the defendant to third parties cannot be made to depend upon the question whether, as between it and the owner of the goods, it owed the latter the continued duty of taking care of them.

Order affirmed.

GWILLIAM *v.* TWIST AND ANOTHER.

COURT OF APPEAL. 1895.

[[1895] 2 *Q. B.* 84.]

APPEAL from the judgment of a Divisional Court (LAWRANCE and WRIGHT, JJ.) on an appeal from the County Court of Birmingham. [1895] 1 Q. B. 557.

The action was for damages for personal injuries.

The defendants were the proprietors of an omnibus which was being driven through the streets of Birmingham by a driver in the employment of the defendants named Harrison. A police inspector, being of opinion that Harrison was not sober and could not drive the omnibus with safety, ordered him to discontinue driving it and get down, which he did. The omnibus was at that time about a quarter of a mile from the defendants' yard. A man named Veares, who had formerly been a conductor in the defendants' employment, and who happened to be standing by, volunteered to drive, and did drive the omnibus home to the defendants' yard. While on the way there he drove over and injured the plaintiff, who was a passenger in the street. There was a conflict of evidence as to whether the police inspector ordered Veares to drive the omnibus home, or Harrison employed him to do so. The county court judge found as follows: That the accident was caused by the negligent or unskilful driving of Veares; that the police inspector did not order Veares to drive the omnibus home, but the driver and conductor acquiesced in his doing so; and that, as to the driver being the worse for drink, it was not necessary to give an opinion, but the inspector honestly thought that he was not in a fit state to drive, and acted properly in telling him to discontinue driving. The county court judge on these findings gave judgment for the plaintiff for £30 damages. He said, in giving judgment, that the driver Harrison and the conductor, having acquiesced in Veares' driving, must be taken to have authorized his driving on behalf of the defendants; that, as it was clearly necessary that some one should drive the omnibus back to the yard, it was, under the circumstances, within the scope of their authority to authorize Veares to drive; and that the defendants were therefore liable for Veares' negligence.

The defendants appealed against the judgment of the county court judge.

The Divisional Court dismissed their appeal.

Edward Pollock, for the defendants.

Boydell Houghton, for the plaintiff.

Lord ESHER, M. R. In this case a question of great importance has been raised, which, however, it is not necessary for us to decide; namely, whether, if there were a necessity for a servant to delegate his duty to another person, that delegation would make that other person a servant of the master so as to render the latter responsible for his acts. It seems to me perfectly clear that a servant employed for a particular purpose can have no authority to delegate the performance of his duty to another person, unless there is a necessity for so doing. The question therefore arises, whether there was in this case any evidence upon which the county court judge could reasonably find that there was a necessity to delegate the duty of driving the omnibus to Veares. I doubt whether the learned county court judge has in truth found that there was any such necessity; for he appears to have made certain specific findings of fact, among which there is no finding that there was such a necessity, and then in his judgment he subsequently seems to have treated the case upon those findings of fact as being one of necessity: but I will assume that he intended to find that there was in fact such a necessity. The question is whether there was evidence to support that finding. Was there any necessity for the delegation of the duty of driving the omnibus to Veares without consulting the employers? If there is an opportunity to consult the master on the subject, I do not see how it can be necessary that the servant should act on his own view. Here there was an omnibus in the street, and the driver became incapacitated for driving it by reason of an order given by a policeman which he was bound to obey. It was only a quarter of a mile from the yard where the owners of the omnibus carry on business. I cannot see anything to show that the omnibus might not have safely remained where it was while the conductor or some other messenger went to the owners' yard to inform them what had happened, and to ask what was to be done. If that were so, I think the judge would be bound to direct a jury, if there were one, or, if trying the case without a jury, would be bound to find himself, that it had not been made out that there was any necessity for the servant to delegate his duty to another person without communicating with his master. There being no evidence on which the judge was entitled to say that such a necessity had arisen, he was bound, I think, to hold that the servant had no authority to delegate his duty to another person, and that, consequently, the defendants could not be made responsible for the negligence of that other person. For these reasons I think the appeal must be allowed.

I am very much inclined to agree with the view taken by Eyre, C. J., in the case of Nicholson *v.* Chapman, 2 H. Bl. 254, and by Parke, B., in the case of Hawtayne *v.* Bourne, 7 M. & W. 595, to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of a bill of exchange for the honor of the drawer.[1]

Appeal allowed.[2]

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[1] Concurring opinions by A. L. SMITH and RIGBY, L. JJ., have been omitted.— ED.

[2] Compare Georgia Pacific Railroad *v.* Propst, 85 Ala. 203 (1887). — ED.

CHAPTER IX.

TERMINATION OF AGENCY.

SECTION I.

Modes of Termination.

(*A*) REVOCATION.

ANON. *v.* HARRISON.

NISI PRIUS. 1698.

[12 *Mod.* 346.]

A SERVANT had power to draw bills of exchange in his master's name, and afterwards is turned out of the service.

HOLT, C. J. If he draw a bill in so little time after that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bill in those cases shall bind the master.[1]

BROOKSHIRE *v.* BROOKSHIRE.

SUPREME COURT OF NORTH CAROLINA. 1847.

[8 *Iredell's Law,* 74.]

THIS was an action of assumpsit brought in the Superior Court of Randolph.

The following was the case: the plaintiff was employed by the defendant and others, as an agent, to go to Alabama, and settle the estate of their brother, and receive from the executor his share thereof and bring it to this State. The appointment of the plaintiff was by deed. He made one trip, and after returning home he made a second, when he was shown by the executor a letter from the defendant, revoking the power before given, so far as he was concerned. The action was brought to recover the defendant's aliquot portion of the expenses of both trips, and also the commissions of ten per cent on the distributive share of the defendant. It was admitted by the defendant that he was bound for one-sixth part of the expenses of the first trip, but insisted he was bound for no part of the second; as upon the return of the plaintiff he had revoked the power of attorney by parol. There was contradictory evidence of the parol revocation. On the part of the plaintiff, it was contended that, the power under which he acted being an instrument under seal, it could not be revoked, but by an instrument of equal dignity, and that, therefore, whether the revocation was attempted by parol after the termination of the first trip, or by the letter upon his return to Alabama, it was equally inoperative, and he was entitled to recover the defendant's share of the expenses of both trips.

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[1] *Acc.*: Trueman *v.* Loder, 11 Ad. & E. 589 (1840); Tier *v.* Lampson, 35 Vt. 179 (1862); Fellows *v.* Hartford & New York Steamboat Co., 38 Conn. 197 (1871); Claflin *v.* Lanheim, 66 N. Y. 301 (1876).

Compare Watts *v.* Kavanagh, 35 Vt. 34, 38 (1861); Pole *v.* Leask, 33 L. J. N. S. Ch 155, 162 (H. L. 1863).

And see Capen *v.* Pacific Mutual Ins. Co., 1 Dutcher, 67 (1855). — ED.

His Honor charged the jury that if they believed there was a parol revocation of the power of attorney before the plaintiff started upon the second trip to Alabama, they should allow damages to the amount of one-sixth of the expenses of the first trip; and if they should find that there was no revocation before the plaintiff left on the second trip, but that the power was revoked by letter after he reached Alabama, in that case they should allow damages for the expenses of the first trip and also for his expenses in going to Alabama the second time, but not his expenses home.

The jury returned a verdict of $43.16, being the defendant's share of the expenses of the first trip, and his share of his expenses out, the second.[1] . . .

The plaintiff then moved for a new trial for misdirection of the judge in charging the jury that the power of attorney could be revoked by parol or by letter. This motion was also overruled, and both parties appealed.

J. H. Haughton, for the plaintiff.

Iredell, for the defendant.

NASH, J. It is not denied by the plaintiff that, in this case, it was within the power of the defendant to put an end to his agency, by revoking his authority. Indeed, this is a doctrine so consonant with justice and common sense that it requires no reasoning to prove it. But he contends that it is a maxim of the common law, that every instrument must be revoked by one of equal dignity. It is true an instrument under seal cannot be released or discharged by an instrument not under seal or by parol; but we do not consider the rule as applicable to the revocation of powers of attorney, especially to such an one as we are now considering. The authority of an agent is conferred at the mere will of his principal and is to be executed for his benefit; the principal, therefore, has the right to put an end to the agency whenever he pleases, and the agent has no right to insist upon acting, when the confidence at first reposed in him is withdrawn. In this case, it was not necessary to enable the plaintiff to execute his agency, that his power should be under seal; one by parol, or by writing of any kind, would have been sufficient; it certainly cannot require more form to revoke the power than to create it. Mr. Story, in his treatise on Agency, page 606, lays it down that the revocation of a power may be, by a direct and formal declaration publicly made known, or by an informal writing, or by parol; or it may be implied from circumstances, and he nowhere intimates, nor do any of the authorities we have looked into, that when the power is created by deed, it must be revoked by deed. And, as was before remarked, the nature of the connection between the principal and the agent seems to be at war with such a principle. It is stated by Mr. Story, in the same page, that an agency may be revoked by implication, and all the text-writers lay down the same doctrine. Thus, if another agent is appointed to execute powers, previously intrusted to some other person, it is a revocation, in general, of the power of the latter. For this proposition, Mr. Story cites Copeland *v.* The Mercantile Insurance Company, 6 Pick. 198. In that case, it was decided that a power, given to one Pedrick to sell the interest of his principal in a vessel, was revoked by a subsequent letter of instruction to him and the master to sell. As then, an agent may be appointed by parol, and as the appointment of a subsequent agent supersedes and revokes the powers previously granted to another, it follows, that the power of the latter, though created by deed, may be revoked by the principal, by parol. But the case in Pickering goes further. The case does not state, in so many words, that the power granted to Pedrick was under seal, but the facts set forth in the case show that was the fact; and, if so, is a direct authority in this case. This is the only point raised, in the plaintiff's bill of exceptions, as to the judge's charge. . . .

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[1] From the statement and the opinion have been omitted passages dealing with certain motions not bearing on the question as to Agency. — ED.

PER CURIAM. Judgment affirmed on each appeal, and each appellant must pay the costs of his appeal.

ROBERTSON *v.* CLOUD.

SUPREME COURT OF MISSISSIPPI. 1872.

[47 *Miss.* 208.]

ERROR to the Circuit Court of Coahoma County, SHACKLEFORD, J.

Johnston & Johnston, for plaintiff in error.

Buck & Clark, for defendant in error.

Simrall, J. Cloud, the defendant in error, was constituted an agent by Robertson to sell a plantation in Coahoma County, on certain terms as to price and payment. Cloud, by active exertions, through correspondence and personal solicitation, found a purchaser who was willing to buy the property on the terms he was authorized to accept. If he should effect a sale, Robertson agreed to compensate him "liberally." The case in the Circuit Court was submitted to the judge on the law and facts. Without a separate finding as to the facts, a judgment was rendered in favor of Cloud for $350, which was $150 less than he claimed. The testimony was embodied in a bill of exceptions to the decision of the court denying a motion for a new trial.

The proposition made for Robertson in this court is, that compensation to Cloud was dependent upon a sale of the land, and inasmuch as Robertson had declined to sell for the $10,000, therefore there has been no breach of his contract with Cloud.

The principal has a right to control the action of his agent by instruction, or he may, at will, dissolve the relation altogether. But it is claimed for Cloud, that whilst his authority to negotiate a sale for $10,000 was operative, Carter, with whom he had been in treaty for some time, acceded to the terms, and agreed to buy. And if Robertson, the principal, then interfered and declined to consummate the sale, the fault was not with the agent. The rule is, that if complete performance of a contract is prevented by one party thereto, the other who had complied, or was able and willing to comply, shall be compensated in damages to the extent of making him whole. The doctrine on this subject is stated and examined in Friedlander *v.* Pugh, Slocumb, & Co., 43 Miss.; and Vicksburg & Meridian R. R. Co. *v.* Ragsdale (MS. opinion).

Cloud, in his evidence, stated that Carter had agreed to buy, before he was notified by Robertson not to sell for the $10,000. If such was the fact, and the judge so accepted it as proved, and anything remained to be done by Cloud, then the case would be governed in principle by Friedlander *v.* Pugh, Slocumb, & Co., and Cloud should secure compensation for partial performance, according to the terms of contract, and such damages as would legitimately result from the refusal of the plaintiff to permit a full performance.

The evidence shows that labor, time, and money were expended by Cloud about this business. In one view of the testimony, all was done by him that well could be done.

The extent of the authority given to Cloud, and the service to be performed by him, was to negotiate a sale, — find a purchaser who would comply with the terms of sale. That was done by the agent. But it is said that Robertson wrote a letter at New Orleans to Cloud, two days before Carter wrote accepting the offer of the land, revoking Cloud's authority to sell for $10,000. There was testimony to the effect that Carter's letter, agreeing to buy, was received by Cloud before the letter from Robertson revoking his agency or withdrawing the land from sale on the original terms. Robertson's letter was dated at New Orleans, two days prior to Carter's letter at Owl Creek, Virginia. But it may be true, as stated by Cloud in his testimony, that the former was received first. The revocation of an agency to be operative must be made known to the agent, and becomes effective from that time as to him. Story on Agency, § 470. The relation between Cloud and Robertson would be dissolved on the receipt by the former of knowledge of the revocation, and not from the date of writing and mailing the letter. There is no parallel in principle and reason to that class of cases, where one man makes an offer to buy or sell property to another through the mail. In such cases, the writing and mailing promptly of a response accepting the offer, concludes the contract. The *aggregatio mentium* has occurred. The parties have both assented to the bargain. The acceptance by the one of the terms proposed by the other, transmitted by due course of mail, closes the contract from the time of the acceptance. Adams *v.* Linsell, 1 Barn. & Ald. 681; Mactier's Admr. *v.* Frith, 6 Wend. 103; Tayloe *v.* Merchants' Fire Ins. Co., 9 How. (U. S.) 390; Curtis *v.* Blair, 26 Miss. 322.

Where a jury is dispensed with, and the whole case is submitted to the court, this court should regard the conclusions of the judge on the facts in evidence as it would the verdict of a jury. There was testimony to the point that Cloud had found a purchaser before he was actually notified by his principal that the terms of sale had been changed or his authority revoked.

We are of opinion that there is no error in the judgment.

Wherefore it is affirmed.

SECTION I. (*continued*).

(*B*) DEATH.

BAXTER, WIDOW AND EXECUTRIX, *v.* BURFIELD.

KING'S BENCH. 1746.

[2 *Str.* 1266.]

IN debt on bond, conditioned for Matthias Anderson's performance of the covenants in an indenture of apprenticeship, whereby he was bound to the plaintiff's testator, who was a mariner: the defendant pleaded that Anderson served faithfully to the death of the testator; the plaintiff replied that since the death of the testator, Anderson had absented from her service, to which there was a demurrer. And after argument at bar, the Chief Justice delivered the resolution of the court, viz.: That they were all of opinion, the defendant should have judgment, and the executrix could maintain no such action. The binding was to the man, to learn his art, and serve him, without any mention of executors. And as the words are confined, so is the nature of the contract; for it is fiduciary, and the lad is bound from a personal knowledge of the integrity and ability of the master (Hob. 134, Vaugh. 182, 3 Keb. 519 and 1 Keb. 820, 1 Sid. 116), and they denied the case in 1 Lev. 177. An award (Hil. 8 Ann. Horne *v.* Blake) that an apprentice should be assigned, was held void; unless there was a custom, or the concurrence of the apprentice. And they held it was not material that, according to Cro. Eliz. 553, the assets were liable on the master's covenant to maintain. Therefore judgment *pro def.*[1]

HARPER *v.* LITTLE.

SUPREME COURT OF MAINE. 1822.

[2 *Me.*, 14.]

THIS was a writ of entry upon the demandants' own seisin, and a disseisin by the tenant, and came before the court upon a case stated by the parties as follows:

William Jackson, late of Balize, in the province of Yucatan, and father of all the demandants except Harper, who sued in right of his wife, being seised of the demanded premises, March 25, 1811, made a general letter of attorney under seal to Harper, authorizing him, among other things, to sell, transfer and convey any real estate of his constituent in Portland, and in his name to give deeds of the same.

Jackson afterwards died at Balize, August 18, 1813, during the war between the United States and Great Britain.

Harper, not having heard of the decease of Jackson, the intercourse with Balize being interrupted by the war, made a deed January 8, 1814, in his capacity of attorney to Jackson, purporting to be a regular execution of the power, and to convey the demanded premises to the tenant, for the consideration of fifteen hundred dollars, which was paid by the tenant, but never paid over by Harper to the executors of Jackson's will.

Upon these facts the questions presented to the court were — 1st. Whether the deed from Harper to the tenant was effectual to pass the estate? 2d. If not, whether Harper was estopped by the deed from claiming any part of the demanded premises? If these questions should be resolved against the tenant, it was agreed that the cause should stand for trial, the tenant claiming the land under a sale for non-payment of direct taxes assessed by the United States.

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[1] See Yerrington *v.* Greene, 7 R. I. 589 (1863), s. c. Wambaugh's Cases for Analysis, 202; Lacy *v.* Getman, 119 N. Y. 109 (1890). — ED.

Greenleaf, for the demandants.

Todd and *Longfellow*, for the tenants.

MELLEN, C. J. The principal question, if not the only one, in this cause, is whether the deed made by Harper under the power of attorney from Jackson, operated to pass the estate to the tenant according to the intention of all concerned; or, in other words, whether the death of Jackson before the execution of the deed, though unknown to Harper and Little at that time, was such a determination of the power of attorney as to render the deed void and ineffectual as a conveyance of the estate.

It is admitted that a revocation of a power not coupled with an interest, will not defeat and render void those acts which are done in pursuance of it, and prior to notice of such revocation being given to the attorney. Authorities are clear and direct on this point. The tenant contends that the same principle is applicable and ought to prevail in case of the determination of a power of attorney by the death of the constituent; such death not being known at the time of the execution of the conveyance made pursuant to such power, — though he frankly admits that no case can be found which establishes that principle. This very circumstance goes far toward showing the legal distinction existing between the two cases. In the case of a revocation, the power continues good against the constituent, till notice is given to the attorney; but the instant the constituent dies, the estate belongs to his heirs, or devisees, or creditors; and their rights cannot be divested or impaired by any act performed by the attorney after the death has happened; the attorney then being a stranger to them and having no control over their property. In Watson *v.* King, 4 Campb. 272, it was decided by Lord Ellenborough that a power of attorney, though coupled with an interest, is instantly revoked by the death of the grantor; and an act afterwards *bona fide* done under it by the grantee before notice of the death of the grantor is a nullity.

The counsel for the tenant has contended that the power and the deed made in pursuance of it constitute but one act. Still, this one act was not completed till months after Jackson's death, and is equally ineffectual on this hypothesis. The deed is therefore ineffectual to pass the estate.[1] . . .

Upon the facts stated in the agreement of the parties, we are of opinion that the action is in law maintainable, — but, as it is suggested that the tenant has another defence on which he relies, grounded on a sale of the demanded premises under the law of the United States by one of their collectors of direct taxes, the cause must stand for trial that the merits of that defence may be investigated.[2]

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[1] The omitted passages held that there was no estoppel. — ED.

[2] *Acc.*: Watson *v.* King, 4 Camp. 272 (1815); Davis *v.* Windsor Savings Bank, 46 Vt. 728, 731 (1874); Weber *v.* Bridgman, 113 N. Y. 600, 605 (1889); Farmers' Loan & Trust Co. *v.* Wilson, 139 N. Y. 284 (1893).

Contra: Cassiday *v.* McKenzie, 4 W. & S. 282 (1842); Ish *v.* Crane, 13 Ohio St. 574 (1862). — ED.

JOHNSON *v.* JOHNSON'S ADMINISTRATORS.

SUPREME COURT OF OHIO.[1] 1834.

[*Wright*, 594.]

ASSUMPSIT for money had and received. The general issue joined. It appeared in evidence that sundry promissory notes were placed in the hands of the intestate to receive the amount and pay it out to others, and that after his death the administrators had collected the money, and paid it out accordingly.

Van Matre, for the plaintiff, claimed to recover the amount received, notwithstanding it had been applied according to the agreement, because there is no matter of set-off, and the defence is not admissible under the general issue.

Fox, *contra*.

LANE. J. The intestate received the notes to collect the amount and pay over to others, but before this was done he died. The authority to collect became inoperative by the death of the person receiving it. The right to act under the power did not pass to his administrator. As the case is without any evidence of interest in the intestate, and as the defendants acting as his administrators have received the money of the plaintiff, and have paid it out to others without authority, the payment is a nullity, and does not discharge their liability. If by such payment the defendants have acquired a right of the plaintiff, upon which they might sue, that is a proper subject of set-off, not of defence under the general issue. The law arising on the case as it stands is with the plaintiff. *Judgment for the plaintiff.*

GRIGGS *v.* SWIFT, SURVIVING PARTNER.

SUPREME COURT OF GEORGIA. 1889.

[82 *Ga.* 392.]

NONSUIT. Before Judge SMITH, Muscogee Superior court.[2] At the conclusion of the testimony for the plaintiff, defendant moved for a nonsuit, which was granted; and plaintiff excepted.

T. W. Grimes and *Peabody*, *Brannon & Hatcher*, for plaintiff.

McNeill & Levy, for defendant.

BLECKLEY, C. J. The hiring was by the partnership, for the term of one year from September 1, 1886, at $50 per month, besides board.

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[1] On circuit, LANE and WRIGHT, JJ., sitting. — ED.

[2] The reporter's statement has been omitted. — ED.

One of the two partners of which the firm consisted died in November, and the survivor discharged the plaintiff on the 1st of January. The plaintiff could obtain no other employment until the following July; and, after the year expired for which he was hired by the partnership, he brought this action, claiming the agreed compensation from the 1st of January, the time of his discharge, up to the date in July when he procured other employment, and his expenses for board during the same period.

As there is no trace in the evidence that the partnership was, by the terms of its creation, to subsist or continue after the death of one of its members, such death wrought a dissolution, and forever terminated the partnership. Code, §§ 1892, 1894. One of the parties, therefore, to the contract of hiring became extinct by the act of God.

The Code declares (section 2871) that if performance is impossible and becomes so by the act of God, such impossibility is itself equivalent to performance. There being no one, after the partnership went out of existence, to receive the personal services which the plaintiff had contracted to render as inspector of farms and collector for the partnership, the further execution of the contract was as much impossible as if the plaintiff himself had died before or after a dissolution of the firm had taken place. The survivor transacted no new business on the partnership account, but confined operations to closing up the firm affairs. The classification of every contract must depend upon a rational interpretation of the intention of the parties. Code, § 2721. From the very nature of a contract for the rendition of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent, on the one hand, upon the life of the employé, and, on the other, upon the life of the partnership, provided the death in either case was not voluntary. To this effect is the text of Wood, Mast. & Serv. § 163: "Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that the servant is absolved therefrom; but if the dissolution results from the act of the parties, they are liable to the servant for his loss therefrom; but if the dissolution results from the death of a member of the firm, the dissolution resulting by operation of law, and not from the act of the parties, no action for damages will lie. . . . So if a firm consists of two or more persons, and one or more of them dies, but the firm is not thereby dissolved, the contract still subsists, because one or more of his partners is still in the firm, and this is so even though other persons are taken into the firm. The test is whether the firm is dissolved. So long as it exists, the contract is in force, but when it is dissolved, the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law, or the act of the parties." Mr. Wood's reference is to two Scotch cases, which we have not seen, but the rule he deduces from them is so reasonable that we feel warranted in accepting it as law. See, also, Tasker *v.* Shepherd, 6 Hurl. & N. 575.

As to death of a person not a partner, but a sole employer, see Yerrington *v.* Greene, 7 R. I. 589; Wood, Mast. & Serv. §§ 95, 158.

The case of Fereira *v.* Sayres, 5 Watts & S. 210, is apparently in conflict with the text of Wood as above quoted, but we are satisfied to abide by the rule laid down in Wood, though it be at the expense of differing with the learned court of Pennsylvania, by whom the last-named case was decided. The contract upon which the plaintiff's suit was founded having become impossible of performance by reason of death, he had no right to recover upon the same against the surviving partner for services never actually rendered, and there was no error in granting a nonsuit. Of course, the claim for board was on the same footing as that for wages. *Judgment affirmed.*[1]

SECTION I. (*continued*).

(*C*) Some other Modes of Termination.

INSURANCE COMPANY *v.* DAVIS.

Supreme Court of the United States. 1877.

[95 *U. S.* 425.]

Error to the Circuit Court of the United States for the Eastern District of Virginia.

This was an action on a policy of life insurance issued by the New York Life Insurance Company, a New York corporation, before the war, upon the life of Sloman Davis, a citizen and resident of the State of Virginia. The policy contained the usual condition, to be void if the renewal premiums were not promptly paid. They were regularly paid until the beginning of the war. The last payment was made Dec. 28, 1860. The company, previous to the war, had an agent, A. B. Garland, residing in Petersburg, Va., where the assured also resided; and premiums on this policy were paid to him in the usual way, he giving receipts therefor, signed by the president and actuary, as provided on the margin of the policy, which were usually sent to the agent about thirty days in advance of the maturity of the premium. About a year after the war broke out the agent entered the Confederate service as a major, and remained in that service until the close of the war.

Offer of payment of the premium next due was made to the agent in December, 1861, which he declined, alleging that he had received no receipts from the company, and that the money, if he did receive it, would be confiscated by the Confederate government. A similar offer was made to him after the close of the war, which he also declined. He testified that he refused to receive any premiums, had no communication with the company during the war, and after it terminated did not resume his agency.

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[1] See Tasker *v.* Shepherd, 6 H. & N. 575 (1861).

Compare Bank of State of New York *v.* Vanderhorst, 32 N. Y. 553 (1865). — Ed.

Sloman Davis died in September, 1867.

The plaintiff below was assignee of the policy, and claimed to recover the amount thereof, $10,000, upon the ground that he was guilty of no laches, and that at the close of the war the policy revived.

It is unnecessary to state, in detail, the proceedings at the trial. The plaintiff contended, and the judge instructed the jury, in substance, that they might infer from the evidence that the place of payment intended by the parties was at the residence of the plaintiff; and that, if the company did not furnish receipts to its agent, so that the premiums could be paid according to the terms of the policy, it was not the fault of the plaintiff; and, if he was ready and offered to pay his premium to the agent, there could be no forfeiture of the policy, if within reasonable time after the war he endeavored to pay his premiums, and the company refused to receive them. On the other hand, the defendant contended that the war put an end to the agency of Garland, and the offer to pay the premium to him was of no validity, and the failure to pay rendered the policy void. This view was rejected by the court, and a verdict was rendered for the amount of the policy, less the amount of certain premium notes which had been given by the assured.

Judgment was rendered upon the verdict, and the company then brought the case here.

Mr. *Matt. H. Carpenter*, for the plaintiff in error.

Mr. *Samuel B. Paul*, *contra*.

Mr. Justice BRADLEY delivered the opinion of the court.[1]

The legal effect of the policy itself was, that payment should be made to the company at its domicile. The indorsement on the margin, which is much relied on by the plaintiff's counsel, has no such effect as he attributes to it. It is in these words: "All receipts for premiums paid at agencies are to be signed by the president or actuary." This is simply a notice to the assured that, if he shall pay his annual premium to an agent, or at an agency, he must not do so without getting a receipt signed by the president or actuary of the company. How this caution can possibly be construed into an agreement on the part of the company to make any particular agency the legal place of payment of premium it is difficult to see. The circumstances show nothing but the common case of the establishment of an agency for the mutual convenience of the parties, and do not present the slightest ground for varying the legal effect of their written contract. We think, therefore, that the charge was erroneous on this point. Of course, we do not mean to be understood as holding that, as long as an agency is continued, a tender to the agent would not be valid and binding on the company.

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[1] After citing New York Life Ins. Co. v. Statham, 93 U. S. 24. — ED.

But we deem it proper to consider more particularly the question of agency, and the alleged right of tendering premiums to an agent, during the war.

That war suspends all commercial intercourse between the citizens of two belligerent countries or States, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court, within the last fifteen years, that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same State with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it. Washington, J., in Conn *v.* Penn, Pet. C. Ct. 496; Buchanan *v.* Curry, 19 Johns. (N. Y.) 141. In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto, — the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision, or knowledge of what takes place, on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities, even for the limited purpose before mentioned, unless continued by the mutual assent of the parties. It is not compulsory; nor can it be made so, on either side, to subserve the ends of third parties. If the agent continues to act as such, and his so acting is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money, for the use of the principal, into the agent's hands, but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence, to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy. If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close. This is all. The injustice of holding a principal bound by what an agent, acting without his assent, may do in such cases, is forcibly illustrated by Mr. Justice Davis, in delivering the opinion of this Court in Fretz *v.* Stover, 22 Wall. 198. In that case, the agent had collected in Confederate funds the amount due on a bond. Having asserted that the agent had no authority to do this, the learned justice adds: "If it were otherwise, then, as long as the war lasted, every Northern creditor of Southern men was at the mercy of the agent he had employed before the war commenced. And his condition was a hard one. Directed by his government to hold no intercourse with his agent, and therefore unable to change instructions which were not applicable to a state of war, yet he was bound by the acts of his agent in the collection of his debts, the same as if peace prevailed. It would be a reproach to the law, if creditors, without fault of their own, could be subjected to such ruinous consequences." These observations have a strong bearing upon the point now under consideration.

What particular circumstances will be sufficient to show the consent of one person that another shall act as his agent to receive payment of debts in an enemy's country during war, may sometimes be difficult to determine. Emerigon says, that if a foreigner is forced to depart from one country in consequence of a declaration of war with his own, he may leave a power of attorney to a friend to collect his debts, and even to sue for them. Traité des Assurances, vol. i. 567. But though a power of attorney to collect debts, given under such circumstances, might be valid, it is generally conceded that a power of attorney cannot be given, during the existence of war, by a citizen of one of the belligerent countries resident therein, to a citizen or resident of the other; for that would be holding intercourse with the enemy, which is forbidden. Perhaps it may be assumed that an agent *ante bellum*, who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed, unless the contrary be shown; but that, where it is against his interest, or would impose upon him some new obligation or burden, his assent will not be presumed, but must be proved, either by his subsequent ratification, or in some other manner.

In some way, however, it must appear that the alleged agent assumed to act as such, and that the alleged principal consented to his so acting. It is believed that no well-considered case can be found anterior to these life-insurance cases which have arisen out of the late civil war, in which the existence or continuance of an agency, under the circumstances above referred to, have been established contrary to the assent of the alleged parties to that relation. Conn *v.* Penn, *supra*, is the leading authority on this subject in this country. The question in that case was whether the claimants of land in Pennsylvania, under contracts of purchase from the proprietaries (the Penns) before the revolutionary war, were entitled to an abatement of interest during the war; and Justice Washington held that this depended on the question whether, during the war, the proprietaries, being alien enemies, "had in the United States a known agent, or agents, authorized to receive the purchase-money and quit-rents due to them from the complainants," the vendees. To enable the parties to adduce proof on this point, the court allowed further evidence to be taken. The same thing was held, at the same term, in the case of Dennison *et al. v.* Imbrie, 3 Wash. 396, where Justice Washington says: "We think that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not to abate." It is obvious that, in these cases, the judge assumed that the relation of agency, if it existed, did so with the mutual consent of the parties thereto. And the same observation, it is believed, may be made with regard to all other cases on the subject, except some that have been very recently decided.

The same inference may be deduced from the cases decided in this court when the subject of payment to agents in an enemy's country has been discussed. Amongst others we may refer to the following: Ward *v.* Smith, 7 Wall. 447; Brown *v.* Hiatts, 15 id. 177; Montgomery *v.* United States, id. 395; Fretz *v.* Stover, 22 id. 198.

In some recent cases in certain of the State courts of last resort, for whose decisions we always entertain the highest respect, a different view has been taken; but we are unable to concur therein. In our judgment, the unqualified assumption on which those decisions are based — namely, "once an agent always an agent;" or, in other words, that an agency continues to exist notwithstanding the occurrence of war between the countries in which the principal and the agent respectively reside — is not correct, and that the continuance of the agency is subject to the qualifications which we have stated above.

Now, in the present case, except at the very commencement of the troubles, before the President's proclamation of non-intervention had been issued, and when it was yet uncertain what the differences between the two sections would amount to, there is not the slightest evidence that the company authorized Garland to act for it at all; and the latter expressly refused to do so when requested, both on the ground of having received no receipts from the company (which were his only authority for receiving payments), and of the liability of the funds to be confiscated in his hands. The war suspended his agency for all active purposes, and it could not be continued even for the collection of premiums without the defendant's consent; and this, so far as appears, was never given, either expressly or by subsequent ratification. Under these circumstances, it cannot be affirmed that the plaintiff could bind the defendant by a tender of payment to the supposed agent. However valid a payment may be, if made to an agent in time of war, where he consents to act as such, and has the assent of his principal in so acting, an offer of payment cannot have any force or effect if neither of these circumstances exists.

Waiving, therefore, the consideration of any question that may be made with regard to the validity of an insurance on the life of an alien enemy, we think that in the present case there was not the slighest foundation for the court to charge, as it did in effect, that a tender of the premium to Garland in Petersburg was a good tender, and binding on the company.

We do not mean to say, that if the defendant had continued its authority to the agent to act in the receipt of premiums during the war, and he had done so, a payment or tender to him in lawful money of the United States would not have been valid; nor that a stipulation to continue such authority in case of war, made before its occurrence, would not have been a valid stipulation; nor that a policy of life insurance on which no premiums were to be paid, though suspended during the war, might not have revived after its close. We place our decision simply on the ground that the agency of Garland was terminated by the breaking out of the war, and that, although by the consent of the parties it might have been continued for the purpose of receiving payments of premiums during the war, there is no proof that such assent was given, either by the defendant or by Garland; but that, on the contrary, the proof is positive and uncontradicted, that Garland declined to act as agent.

Judgment reversed, with directions to award a venire facias de novo.[1]

Mr. Justice CLIFFORD dissented.

DREW *v.* NUNN.

COURT OF APPEAL. 1879.

[4 *Q. B. D.* 661.]

THIS was an action brought by a tradesman to recover the price of goods supplied to the defendant's wife upon her order whilst the defendant was insane. The following facts were proved at the trial before MELLOR, J.

The wife of the defendant began to deal with the plaintiff in 1872; the defendant had been present when some of the goods were ordered by his wife, and also had paid for some of them. The defendant became ill in 1873, and in the month of November he instructed his agent to pay all his income to his wife, and empowered her to draw cheques upon his bankers. He became insane in December, and was confined in an asylum until April, 1877. Whilst the defendant was in the asylum, his wife ordered goods from the plaintiff, who supplied them to her upon credit. The plaintiff was ignorant that the defendant was insane and had been placed under restraint in an asylum, and he did not know that the defendant's income was paid to his wife. In April, 1877, the defendant recovered the use of his reason, and in the June following revoked any authority which he might have given to his wife either to act as his agent or to pledge his credit.

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[1] *Acc.*: Howell *v.* Gordon, 40 Ga. 302 (1869).
Compare Darling *v.* Lewis, 11 Heisk. 125 (1872). — ED.

Mellor, J., refused to ask the jury whether the income of the defendant's wife during his confinement in the asylum was sufficient to maintain her, and directed the jury that the plaintiff was entitled to recover, if what the defendant's wife did was according to the course pursued whilst the defendant lived with her. The jury found a verdict for the plaintiff.

The defendant applied to the Queen's Bench Division for a new trial; but the application was refused. Upon appeal to this Court, an order *nisi* for a new trial was granted upon the ground of misdirection.

Willis, Q. C. (*R. O. B. Lane*, with him), for the plaintiff, showed cause.

Horne Payne, for the defendant.

Cur. adv. vult.

Brett, L. J.[1] Upon this state of facts two questions arise. Does insanity put an end to the authority of the agent? One would expect to find that this question has been long decided on clear principles; but on looking into Story on Agency, Scotch authorities, Pothier, and other French authorities, I find that no satisfactory conclusion has been arrived at. If such insanity as existed here did not put an end to the agent's authority, it would be clear that the plaintiff is entitled to succeed, but in my opinion insanity of this kind does put an end to the agent's authority. It cannot be disputed that some cases of change of status in the principal put an end to the authority of the agent: thus, the bankruptcy and death of the principal, the marriage of a female principal, all put an end to the authority of the agent. It may be argued that this result follows from the circumstance that a different principal is created. Upon bankruptcy the trustee becomes the principal; upon death the heir or devisee as to realty, the executor or administrator as to personalty; and upon the marriage of a female principal her husband takes her place. And it has been argued that by analogy the lunatic continues liable until a fresh principal, namely, his committee, is appointed. But I cannot think that this is the true ground, for executors are, at least in some instances, bound to carry out the contracts entered into by their testators. I think that the satisfactory principle to be adopted is that, where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. In the present case a great change had occurred in the condition of the principal: he was so far afflicted with insanity as to be disabled from acting for himself; therefore his wife, who was his agent, could no longer act for him. Upon the ground which I have pointed out, I think that her authority was terminated. It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he had knowledge of his principal's incompetency to act. In a case of that kind he is acting wrongfully. The defendant's wife must be taken to have been aware of her husband's lunacy; and if she had assumed to act on his behalf with any one to whom he himself had not held her out as his agent, she would have been acting wrongfully, and, but for the circumstance that she is married, would have been liable in an action to compensate the person with whom she assumed to act on her husband's behalf. In my opinion, if a person who has not been held out as agent assumes to act on behalf of a lunatic, the contract is void against the supposed principal, and the pretended agent is liable to an action for misleading an innocent person.

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[1] After stating the case. — Ed.

The second question then arises, what is the consequence where a principal, who has held out another as his agent, subsequently becomes insane, and a third person deals with the agent without notice that the principal is a lunatic? Authority may be given to an agent in two ways. First, it may be given by some instrument, which of itself asserts that the authority is thereby created, such as a power of attorney; it is of itself an assertion by the principal that the agent may act for him. Secondly, an authority may also be created from the principal holding out the agent as entitled to act generally for him. The agency in the present case was created in the manner last-mentioned. As between the defendant and his wife, the agency expired upon his becoming to her knowledge insane; but it seems to me that the person dealing with the agent without knowledge of the principal's insanity has a right to enter into a contract with him, and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made upon his behalf. It is difficult to assign the ground upon which this doctrine, which however, seems to me to be the true principle, exists. It is said that the right to hold the insane principal liable depends upon contract. I have a difficulty in assenting to this. It has been said also that the right depends upon estoppel. I cannot see that an estoppel is created. But it has been said also that the right depends upon representations made by the principal and entitling third persons to act upon them, until they hear that those representations are withdrawn. The authorities collected in Story on Agency, ch. xviii. § 481, p. 610 (7th ed.), seem to base the right upon the ground of public policy: it is there said in effect that the existence of the right goes in aid of public business. It is however a better way of stating the rule to say that the holding out of another person as agent is a representation upon which, at the time when it was made, third parties had a right to act, and if no insanity had supervened would still have had a right to act. In this case the wife was held out as agent, and the plaintiff acted upon the defendant's representation as to her authority without notice that it had been withdrawn. The defendant cannot escape from the consequences of the representation which he has made; he cannot withdraw the agent's authority as to third persons without giving them notice of the withdrawal. The principal is bound, although he retracts the agent's authority, if he has not given notice and the latter wrongfully enters into a contract upon his behalf. The defendant became insane and was unable to withdraw the authority which he had conferred upon his wife; he may be an innocent sufferer by her conduct, but the plaintiff, who dealt with her *bonâ fide*, is also innocent, and where one of two persons both innocent must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and must bear the loss. Here it does not lie in the defendant's mouth to say that the plaintiff shall be the sufferer.

A difficulty may arise in the application of a general principle such as this is. Suppose that a person makes a representation which after his death is acted upon by another in ignorance that his death has happened: in my view the estate of the deceased will be bound to make good any loss which may have occurred through acting upon that representation. It is, however, unnecessary to decide this point to-day.

Upon the grounds above stated I am of opinion that, although the authority of the defendant's wife was put an end to by his insanity, and although she had no authority to deal with the plaintiff, nevertheless the latter is entitled to recover, because the defendant whilst he was sane made representations to the plaintiff, upon which he was entitled to act until he had notice of the defendant's insanity, and he had no notice of the insanity until after he had supplied the goods for the price of which he now sues. The direction of MELLOR, J., was right.

BRAMWELL, L. J. I agree with the judgment just delivered by BRETT, L. J. It must be taken that the defendant told the plaintiff that his wife had authority to bind him; when that authority had been given, it continued to exist, so far as the plaintiff was concerned, until it was revoked and until he received notice of that revocation. It may be urged that this doctrine does not extend to insanity, which is not an intentional revocation; but I think that insanity forms no exception to the general law as to principal and agent. It may be hard upon an insane principal, if his agent abuses his authority; but, on the other hand, it must be recollected that insanity is not a privilege, it is a misfortune, which must not be allowed to injure innocent persons: it would be productive of mischievous consequences, if insanity annulled every representation made by the person afflicted with it without any notice being given of his malady. If the argument for the defendant were correct, every act done by him or on his behalf after he became insane must be treated as a nullity. The limits of the doctrine as to the liability of an insane person may be uncertain, and it may not be possible to lay down any broad rule; but I think that the facts before us resemble the case of a guarantee. Suppose that a promise is made that, if the promisee will supply goods to a person named, the promisor will see that they are paid for, and suppose that the promisor intends to put an end to his liability, but that before he can give notice to the promisee, the latter supplies goods to the person named; surely the promisor is liable for the price; for the transaction between the promisor and promisee was equivalent to an agreement or license which was to continue to exist, until it should be revoked by the promisor, and until notice of that revocation should be received by the promisee.

It has been assumed by BRETT, L. J., that the insanity of the defendant was such as to amount to a revocation of his wife's authority. I doubt whether partial mental derangement would have that effect. I think that in order to annul the authority of an agent, insanity must amount to *dementia*. If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting. I think that the direction of MELLOR, J., was right.

BRETT, L. J. I am requested by COTTON, L. J., to state that he agrees with the conclusion at which we have arrived; but that he does not wish to decide whether the authority of the defendant's wife was terminated, or whether the liability of a contractor lasts until a committee has been appointed. He bases his decision simply upon the ground that the defendant, by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act upon his behalf, and that until the plaintiff had notice that this authority was revoked he was entitled to act upon the defendant's representations.

I wish to add that if there had been any real question as to the extent of the defendant's insanity, it ought to have been left to the jury; and that as no question was asked of the jury, I must assume that the defendant was insane to the extent which I have mentioned. I may remark that from the mere fact of mental derangement it ought not to be assumed that a person is incompetent to contract; mere weakness of mind or partial derangement is insufficient to exempt a person from responsibility upon the engagements into which he has entered.

Appeal dismissed.[1]

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[1] See Davis *v.* Lane, 10 N. H. 156 (1839); Motley *v.* Head, 43 Vt. 633 (1871); Matthiessen & Weichers Refining Co. *v.* McMahon, 38 N. J. L. 536, 546 (1876). — ED.

AHERN *v.* BAKER.

SUPREME COURT OF MINNESOTA. 1885.

[34 Minn. 98.]

APPEAL by plaintiff from an order of the District Court for Ramsey County, SIMONS, J., presiding, overruling a demurrer to the answer.

Linden & Williams, for appellant.

Berryhill & Davison, for respondent.

VANDERBURGH, J. The defendant, on the ninth day of September, 1884, specially authorized one Wheeler, as his agent, to sell the real property in controversy, and to execute a contract for the sale of the same. He in like manner on the same day empowered one Fairchild to sell the same land, the authority of the agent in each instance being limited to the particular transaction named. On the same day Wheeler effected a sale of the land, which was consummated by a conveyance. Subsequently, on the tenth day of September, Fairchild, as agent for defendant, and having no notice of the previous sale made by Wheeler, also contracted to sell the same land to this plaintiff, who, upon defendant's refusal to perform on his part, brings this action for damages for breach of the contract.

This is a case of special agency, and there is nothing in the case going to show that the defendant would be estopped from setting up a revocation of the agency prior to the sale by Fairchild. A revocation may be shown by the death of the principal, the destruction of the subject-matter, or the determination of his estate by a sale, as well as by express notice. The defendant had a right to employ several agents, and the act of one in making a sale would preclude the others without any notice, unless the nature of his contract with them required it. In dealing with the agent the plaintiff took the risk of the revocation of his agency. 1 Pars. Cont. 71.*

Order affirmed, and case remanded.[1]

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[1] See Dickinson *v.* Dodds, 2 Ch. D. 463 (C. A. 1876).
Compare Claflin *v.* Lenheim, 66 N. Y. 301 (1876). — ED.

SECTION II.

Irrevocability.

WALSH *v.* WHITCOMB.

NISI PRIUS. 1797.

[2 *Esp.* 565.]

THIS was an action of assumpsit for work and labor, goods sold and delivered, with the common counts.

Plea of *non assumpsit.*

The action was brought to recover a sum of money for work done by the plaintiff, who was a tailor.

The defence was that Walsh, the plaintiff, in the month of October, 1794, having become insolvent, had executed a power of attorney to one Barker, together with a general assignment by deed authorizing him to receive the several debts due to him for the benefit of his creditors, and to give proper receipts and discharges for the same; and that he had also given Barker a power to appoint a substitute or other person to act in his room for the same purposes.

In October, 1795, Barker, in pursuance of the power of substitution so given, executed an authority to one Charles Hindley.

Hindley applied to the defendant Whitcomb for the debt due to Walsh; he paid it and took his receipt.

Some time after Whitcomb was again applied to for payment of the same demand, by another person claiming under a power of attorney from Walsh, the plaintiff. The defendant, Whitcomb, produced the receipt he had received from Hindley, which the person who applied refused to allow; and the present action was brought.

For the plaintiff it was contended, that a power of attorney is from its nature revocable, and that the execution of the subsequent power of attorney was a revocation of the former.

Per Lord KENYON. There is a difference in cases of powers of attorney; in general they are revocable from their nature, but there are these exceptions: "where a power of attorney is part of a security for money, there it is not revocable; where a power of attorney was made to levy fine, as part of a security, it was held not to be revocable; the principle is applicable to every case where a power of attorney is necessary to effectuate any security; such is not revocable." In the present case Walsh assigned all his effects, etc., over to Barker, to whom amongst others he was indebted: the power of attorney was made to Barker to call in the debts for the benefit of the creditors; it was part of the security for the payment of the creditors. It was therefore by law not revocable, and the payment by the defendant is good.[1]

The jury found a verdict for the defendant.

Erskine and *Lawes*, for the plaintiff.

Garrow, for the defendant.

HUNT v. ROUSMANIER'S ADMINISTRATORS.

SUPREME COURT OF THE UNITED STATES. 1823.

[8 *Wheat.* 174.]

APPEAL from the Circuit Court of Rhode Island.

The original bill, filed by the appellant, Hunt, stated, that Lewis Rousmanier, the intestate of the defendants, applied to the plaintiff, in January, 1820, for the loan of $1450, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the brig "Nereus," then at sea, as collateral security for the repayment of the money. The sum requested was lent; and, on the 11th of January, the said Rousmanier executed two notes for the amount; and, on the 15th of the same month he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and, in the event of the said vessel or her freight being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained, also, a proviso, reciting, that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, the plaintiff was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to the said Rousmanier.

The bill farther stated, that on the 21st of March, 1820, the plaintiff lent to the said Rousmanier the additional sum of $700, taking his note for payment, and a similar power to dispose of his interest in the schooner "Industry," then also at sea. The bill then charged that on the 6th of May, 1820, the said Rousmanier died insolvent, having paid only $200 on the said notes. The plaintiff gave notice of his claim; and, on the return of the "Nereus" and "Industry," took possession of them, and offered the intestate's interest in them for sale. The defendants forbade the sale; and this bill was brought to compel them to join in it.

The defendants demurred generally, and the court sustained the demurrer; but gave the plaintiff leave to amend his bill.

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[1] *Acc.*: Gaussen *v.* Morton, 10 B. & C. 731 (1830); Wheeler *v.* Slocomb, 16 Pick. 52 (1834); American Loan and Trust Co. *v.* Billings, 58 Minn. 187 (1894).

See Smart *v* Sandars, 5 C. B. 895, 916-918 (1848). — ED.

The amended bill stated, that it was expressly agreed between the parties that Rousmanier was to give specific security on the "Nereus" and "Industry;" and that he offered to execute a mortgage on them; that counsel was consulted on the subject, who advised that a power of attorney, such as was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their arrival in port. The powers were accordingly executed, with the full belief that they would, and with the intention that they should, give the plaintiff as full and perfect security as would be given by a deed of mortgage. The bill prayed that the defendant might be decreed to join in a sale of the interest of their intestate in the "Nereus" and "Industry," or to sell the same themselves, and pay out of the proceeds the debt due to the plaintiff. To this amended bill, also, the defendants demurred, and on argument the demurrer was sustained and the bill dismissed. From this decree the plaintiff appealed to this court.

Mr. Wheaton, for the appellant.

Mr. Hunter, for the respondents.

MARSHALL, C. J., delivered the opinion of the court.

The counsel for the appellant objects to the decree of the circuit court on two grounds. He contends:

1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the "Nereus" and the "Industry."

2. Or, if this be not so, that a Court of Chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

We will consider, 1: The effect of the power of attorney.

This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another depends on the will and license of that other, the power ceases when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. 2 Esp. N. P. Rep. 565. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in Littleton (Sect. 66), by Lord Coke, in his commentary on that section (52 b.), and in Willes' Reports (105, note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in Coombes' case, 9 Co. 766. In that case it was resolved, that "when any one has authority as attorney to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can regularly pass out of the person in whom it is vested only by a conveyance in his own name; and this cannot be executed by another for him, when it could not in law be executed by himself. A conveyance in the name of a person who was dead at the time would be manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make and execute a regular bill of sale in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death; for the attorney is in the place of the principal, capable of doing that alone which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death.

As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, "a power coupled with an interest"? Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

The words themselves would seem to import this meaning. "A power coupled with an interest" is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the court on this point is found in the legal reason of the principle. The interest or title in the thing, being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle.

This idea may be, in some degree, illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term "power coupled with an interest." If the word "interest" thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A to sell for his own benefit would be a power coupled with an interest; but a power to A to sell for the benefit of B, would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for a power to A to sell for the benefit of B may be as much a part of the contract on which B advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A to sell for the use of B, inserted in a conveyance to A of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised after the death of the person making it; while a power to A to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us that the law is not as the first case put would suppose. We know that a power to A to sell for the benefit of B, engrafted on an estate conveyed to A, may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time or on a future contingency, and, in the mean time, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death. The conveyance made by the person to whom it is given takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death.

It remains to inquire whether the appellant is entitled to the aid of this court, to give effect to the intention of the parties, to subject the interest of Rousmanier in the "Nereus" and "Industry" to the payment of the money advanced by the plaintiff on the credit of those vessels, the instrument taken for that purpose having totally failed to effect its object.

This is the point on which the plaintiff most relies, and is that on which the court has felt most doubt. That the parties intended, the one to give, and the other to receive, an effective security on the two vessels mentioned in the bill, is admitted; and the question is, whether the law of this court will enable it to carry this intent into execution, when the instrument relied on by both parties has failed to accomplish its object.[1] . . .

In this case, the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that "the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels."

We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief.

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[1] Passages discussing this question have been omitted. — ED.

The decree of the Circuit Court is reversed; but as this is a case in which creditors are concerned, the court, instead of giving a final decree on the demurrer in favor of the plaintiff, directs the cause to be remanded, that the Circuit Court may permit the defendants to withdraw their demurrer, and to answer the bill.[1]

KNAPP *v.* ALVORD.

COURT OF CHANCERY OF NEW YORK. 1843.

[10 *Paige*, 205.]

THIS case came before the court upon exceptions to the report of a master, to whom it was referred to take and state the account of the defendant, as the administratrix of W. Alvord, deceased, and to report the amount due to the complainant and to the other creditors of the decedent. And the only question was as to the right of J. Meads to retain, out of the estate of the decedent, the amount of two notes upon which he was endorser; the estate of the decedent being insufficient to pay all his debts. The master decided in favor of the right of Meads to retain, and allowed to the administratrix the amount retained by Meads out of the proceeds of the property of the decedent, and which had been so retained with her assent. Rathbone and Smith, two of the creditors who had come in and proved their debts under the decree, excepted to that part of the report. The facts on which the question arose were as follows:

The decedent, W. Alvord, for some time previous to his death, carried on the business of a cabinet maker in the city of Albany. In the fall of 1837, Alvord being in bad health, Meads, who had formerly been his copartner, consented to assist him gratuitously in the care and management of his business. In the latter part of November in that year, the decedent having determined to spend the winter at the south on account of his health, applied to Meads to take the general charge of his business during his absence; to which Meads consented. At that time a note of $1800, drawn by Alvord and endorsed by Whitney and Van Vechten, as his sureties, was held by the Mechanics & Farmers Bank, and was payable on the 9th of December. Alvord also owed another note to H. Rector, for $428.34, endorsed by Meads, and which was payable on the 12th of December, 1837. To provide for the payment of these notes, or others which might be given in renewal thereof, and to enable Meads the better to manage his business during his anticipated absence, Alvord executed an instrument, bearing date the 22d of November, 1837, constituting Meads his agent and attorney to carry on, conduct, and manage his business as a cabinet maker in his absence; to purchase and procure stock and materials; to hire, pay, and discharge workmen; to collect and receive moneys, etc., and to apply the same in his said business, or to the support of the decedent's family, or to the payment or security of his debts and liabilities. That instrument or power also contained the following clause: "And I hereby expressly authorize and empower the said Meads to sell, assign, transfer and dispose of, at any time or in any manner which he may deem necessary or advisable, all or any furniture, stock, property, notes, claims, or other effects whatsoever, which now are or may at any time be in his hands, belonging to me, and to apply the same and the proceeds thereof to the security or payment, in whole or in part, of a certain note for about the sum of $1800 drawn by me and endorsed by S. Whitney and J. T. B. Van Vechten, and discounted at the Mechanics and Farmers Bank; or any note or notes which may be given in lieu or renewal thereof or of any part thereof; and to the payment or security of any note or notes drawn by me, and endorsed or which may have been endorsed by the said Meads, or for which he may become responsible." The day after the execution of this instrument the decedent attended at his shop and delivered over his account books, etc. to Meads, and put him into actual possession and charge of the shop and business and the property therein; and Meads then opened or caused to be opened a new cash book in the presence of Alvord. On the same day Alvord gave to Whitney, one of the endorsers upon the $1800 note, a mortgage upon the furniture, lumber, and stock in trade of the said cabinet maker's business, to secure him as the endorser of that note or of any other note which might be given in lieu or renewal of it; which mortgage was filed in the clerk's office on the 26th of December thereafter. Alvord left for the south a day or two after the date of these instruments, having left his signatures in blank with Meads to enable him to renew the notes if necessary; and he died at Savannah, in Georgia, on the 18th of December, 1837.

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[1] The plaintiff ultimately failed. See Hunt *v.* Rousmanier, 1 Pet. 1 (1828).

"If a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed, before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed, the right of these tenements is forthwith in his heire, or in some other." Littleton's Tenures, sect. 66.

In Watson *v.* King, 4 Camp. 272 (1815), Lord ELLENBOROUGH, charging the jury, said: "A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?" — ED.

When the $1800 note became due, on the 9th of December, Meads wrote a new note for the same amount over one of the blank signatures, payable in ninety days, which was also endorsed by Whitney and Van Vechten, and given to the bank in renewal of the note. And as the bank required further security, Meads put his name upon the note as a subsequent endorser. On the 12th of December, when the note of Rector became due, Meads filled up another note over one of Alvord's blank signatures, and endorsed the same himself and gave it in renewal of the old note; which note was also made payable in ninety days. Both of these renewal notes were duly protested for non-payment, and were afterwards taken up by Meads as endorser. After the death of Alvord, Meads claimed a lien upon the property and assets of the cabinet making business, in his hands, for all responsibilities which he had incurred, as endorser upon these notes or otherwise; and he continued in the possession and control of the property, with the assent of the administratrix, until April, 1838, when the property was sold at auction, under his direction, and with her assent. The amount of the notes was retained by him out of the proceeds of the sale, and the residue of the proceeds was accounted for to the administratrix.

Ira Harris, for the creditors Rathbone and Smith.

S. Stevens and *O. Meads*, for the administratrix.

The CHANCELLOR. The personal mortgage to Whitney not being filed till after the death of Alvord, and not being accompanied by an immediate delivery and continued possession of the property, it may be doubted whether it was sufficient to give Whitney, who was liable to Meads as the last endorser of the note of $1800, a preference in payment over the other creditors of Alvord. This case, however, does not turn upon that question; as I am satisfied that an equitable lien upon the property was created by the special clause in the power, in reference to the $1800 note and to notes drawn by Alvord and endorsed by Meads. And as that instrument was accompanied by an actual delivery and continued change of possession of the property, until it was converted into money and applied in payment of the two several notes, it was not necessary that the instrument which created that lien should be recorded, under the act of 1833. It is the duty of the court to give such a construction to the language of a written instrument as to carry into effect the intention of the parties, so far as that intention can be collected from the whole instrument and the situation of the parties at the time the writing was executed. And I think no one who reads this special clause, in connection with the evidence, or rather the admissions, of extrinsic facts which are proper to be taken into consideration, can believe that Alvord did not intend to give to the endorsers of the $1800 note, and to Meads, as the endorser of the Rector note and other notes which he might thereafter endorse, a beneficial interest in the execution of this power, for their security and indemnity. It clearly shows that Alvord anticipated that it would probably be necessary for Meads to incur further responsibility as his endorser, in the discharge of the duties of his agency, and that something more than an ordinary power of attorney was necessary to protect him from loss. And as the possession of the property was delivered to Meads, in connection with this power to dispose of it for the security and protection of himself and the other endorsers, the property must be considered as pledged to him for that purpose. The power to sell, therefore, was coupled with an interest in the property thus pledged, and survived. Bergen *v.* Bennet, 1 Caines' Cas. in Err. 1; Raymond *v.* Squire, 11 John. Rep. 47. In the case decided by the Supreme Court of the United States, Hunt *v.* Rousmanier, 8 Wheat. Rep. 174, there was no actual pledge of the property. But a mere power of attorney was executed authorizing the plaintiff to transfer it in the name of Rousmanier. It was upon that ground, as I understand the case, that C. J. MARSHALL held that the power was not coupled with any interest in the vessels. And I presume his opinion upon that point would have been different if the power had been accompanied by an actual delivery of the vessels as a pledge for the payment of the debt. But even in that case the court protected the rights of Hunt as an equitable mortgagee of the vessels; though the decision was placed on the debatable ground that a party may be relieved in equity against a mistake of law merely.

Being satisfied that Meads had a lien upon the property in his hands, and a right to retain for the amount of these notes, under the special clause in the written power executed by Alvord, it is not necessary to inquire whether he is not also to be considered as the factor of Alvord; so as to entitle him to retain for his advances and liabilities, entirely independent of this special provision in the power of attorney to him. If the arrangement between Alvord and Meads gave to the latter the character of a factor, there can be no doubt as to his lien upon the property in his hands, and his right to retain for all his advances and responsibilities in the business with which he was intrusted by his principal. Although it was doubted, previous to the case of Kruger *v.* Wilcox, Amb. Rep. 252, it is now well settled that a factor has a lien and may retain for a general balance; including responsibilities incurred in the execution of his agency. Whit. on Lien, 103; 2 Kent's Com. 640; Story on Agency, 34, § 34. And the case of Foxcraft *v.* Wood, 4 Russ. Rep. 487, was probably decided upon the ground that the arrangement under which the business at Birmingham was carried on constituted Foxcraft the factor of Lanning, although he received a fixed salary instead of the usual mercantile commissions for his services.

The decision of the master was right in allowing to the administratrix the amount retained by Meads for the two notes.

The exceptions are therefore overruled with costs, and the report of the master is confirmed.

KINDIG *v.* MARCH.

SUPREME COURT OF INDIANA. 1860.

[15 *Ind.* 248.]

APPEAL from the Elkhart Common Pleas.

PERKINS, J. Kindig gave a power of attorney to Chamberlain, to confess a judgment in favor of March, for a debt due to him.

The power was duly executed and proved. We are satisfied of this from an examination of the record.

When judgment was about to be entered in execution of the power, Kindig presented to the court a revocation of it, on the ground that it was for too large an amount. The court disregarded the revocation, and directed the judgment to be entered.

A power of attorney to confess judgment is not revocable by act of the party. See Story on Agency, § 477; 2 Archbold's Pr. p. 21. But if any fact affecting its validity be alleged, the court will permit an issue to be formed and tried, and act in the premises accordingly, annulling the warrant or reducing the amount of judgment upon it, as the case proved may require. In this case the defendant may yet have the judgment corrected, on complaint filed and heard, as in other cases. Archbold, *supra;* 15 Petersdorf, pp. 366, 367, 368.

PER CURIAM. The appeal is dismissed, with costs.

R. Heath, for appellant.

E. M. Chamberlain, for appellee.

BLACKSTONE *v.* BUTTERMORE.

SUPREME COURT OF PENNSYLVANIA. 1867.

[53 *Pa.* 266.]

ERROR to the Court of Common Pleas of Fayette County.

This was an action of ejectment, by Henry Blackstone against George Buttermore, for a tract of land in Fayette County.

The foundation of Blackstone's claim was as follows: —

Buttermore, being the owner of the land in controversy, on the 15th day of February, 1864, gave a power of attorney to Daniel R. Davidson to sell it for $25,000, on terms mentioned in the power, which concludes, "and I hereby ratify and confirm whatever contract he may make in accordance with the above authority, and hereby bind myself for its execution. This authority is irrevocable before the 1st day of May next.'

Davidson, as attorney of Buttermore, on the 19th day of April, 1864, entered into an article of agreement with Blackstone for the sale of the land, which Buttermore refused to carry out. There was evidence that Buttermore had revoked the power of attorney and Blackstone had notice of the revocation before he entered into the article with Davidson.

The court (STERRETT, P. J.) charged: —

"It is claimed by the plaintiff's counsel that the power of attorney to D. R. Davidson, being in terms 'irrevocable,' &c., could not be revoked by the defendant Buttermore; and more especially so, when taken in connection with the testimony as to the compensation which Davidson was to receive for selling the land.

"We cannot so instruct you. On the contrary we are of opinion that there is nothing in the power of attorney itself, or in the other evidence, or in both considered together, that could prevent Buttermore from revoking the power to sell the land. And, if you find that he did revoke the power of attorney and that the plaintiff Blackstone had notice of the revocation before he entered into the articles of agreement for the purchase of the land, your verdict should be for the defendant."

The verdict was for the defendant, and the charge of the court was assigned for error.

A. Patterson, for plaintiff in error.

D. Kaine and *C. E. Boyle*, for defendant in error.

AGNEW, J.[1] A power of attorney constituting a mere agency is always revocable. It is only when coupled with an interest in the thing itself or the estate which is the subject of the power, it is deemed to be irrevocable, as where it is a security for money advanced or is to be used as a means of effectuating a purpose necessary to protect the rights of the agent or others. A mere power like a will is in its very nature revocable when it concerns the interest of the principal alone, and in such case even an express declaration of irrevocability will not prevent revocation. An interest in the proceeds to arise as mere compensation for the service of executing the power will not make the power irrevocable. Therefore it has been held that a mere employment to transact the business of the principal is not irrevocable without an express covenant founded on sufficient consideration, notwithstanding the compensation of the agent is to result from the business to be performed and to be measured by its extent: Coffin *v.* Landis, 10 Wright, 426. In order to make an agreement for irrevocability contained in a power to transact business for the benefit of the principal binding on him, there must be a consideration for it independent of the compensation to be rendered for the services to be performed. In this case the object of the principal was to make a sale solely for his own benefit. The agreement to give his agent a certain sum and a portion of the proceeds, was merely to carry out his purpose to sell. But what obligation was there upon him to sell, or what other interest beside his own was to be secured by the sale? Surely his determination to sell for his own ends alone was revocable. If the reasons for making a sale had ceased to exist, or he should find a sale injurious to his interests, who had a right to say he should not change his mind? The interest of the agent was only in his compensation for selling, and without a sale this is not earned. A revocation could not injure him. If he had expended money, time, or labor, or all, upon the business intrusted to him, the power itself was a request to do so, and on a revocation would leave the principal liable to him on his implied assumpsit. But it would be the height of injustice if the power should be held to be irrevocable merely to secure the agent for his outlay or his services rendered before a sale. The following authorities are referred to: Hunt *v.* Rousmanier, 8 Wheat. 174; Story on Agency, §§ 463, 464, 465, 468, 476, 477; Paley on Agency, 155; 1 Parsons on Contracts, 59; Irwin *v.* Workman, 3 Watts, 357; Smyth *v.* Craig, 3 W. & S. 20.

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[1] After citing Hartley and Minor's Appeal, 53 Pa. 212 (1866). — ED.

The judgment is therefore affirmed.[1]

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[1] *Acc.*: Walker *v.* Denison, 86 Ill. 142 (1877); Chambers *v.* Seay, 73 Ala. 372 (1882). — ED.

CHAPTER X.

RATIFICATION.

SECTION I.

Early Authorities.

SERLE DE LANLARAZON'S CASE.

NISI PRIUS. 1302.

[*Y. B.* 30 *Ed.* I. (*Rolls Series*), 126.]

THE Dean and Chapter of Exeter brought an assise of novel disseisin against Serle de Lanlarazon, and complained that they were disseised of a hundred shillings of rent in N. Serle and the others came not, and the assise was awarded by reason of their default. THE ASSISE being sworn, said that Serle and the Dean had made an exchange of certain tenements, and that Serle had charged the tenements which the Dean had put in his view, with a hundred shillings yearly, and had granted that whenever the rent should be in arrear the Dean should be at liberty to distrain; that the Dean came within the period of summons of the Eyre and distrained for the rent, and that all those named in the writ, except Serle and two others, rescued, &c. BRUMPTON, [J.]. Was he assenting in any manner to the rescue which the others made? THE ASSISE. The Dean and Chapter and Serle appointed a day for a compromise, but could not agree; and so it seems that he was assenting to the rescue. BRUMPTON [J.]. Inasmuch as the rescue was made in Serle's name, and he assented to the act, we consider him as a principal disseisor. (The reason is, as BRUMPTON [J.] then said, *quia ratihabitio retro trahitur et mandato comparatur.*) And so the Court adjudges that the Dean do recover his seisin and his arrears (amounting to so much), and his damages of a hundred shillings; and that Serle and the others be taken, &c., and that the Dean, &c., be in mercy for their false plaint in respect of the two others.[1]

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[1] In the Digest, lib. 43, tit. 16, l. 1, § 14, Ulpian speaks of Sabinus and Cassius, "qui rati habitionem mandato comparant," and says "rectius enim dicitur, in maleficio

ANONYMOUS.

NISI PRIUS. 1405-6.

[*Y. B.* 7 *H.* IV. 34, *pl.* 1.]

AN inquest was charged between two parties on a writ of trespass of certain cattle taken against the peace, in which the defendant had justified as bailiff for services arrear to his lord; whereas the plaintiff said that he was not bailiff of his lord at the time of the taking. And the plaintiff said in evidence, that the defendant took the beasts claiming heriot for himself, so that he could not at that time be bailiff to another. And after their charge, GASCOIGNE [C. J.] said to them, that if the defendant took them claiming property in himself by way of heriot, although the lord afterwards agreed to that taking for the services due to him, still he could not be said to be his bailiff for that time. But if, without command, he had taken (the cattle) for services due to the lord, and the lord had afterwards agreed to the taking, he should be adjudged as bailiff, although he was not his bailiff in any place before the taking, *Quod nota*.[1]

ANONYMOUS.

COMMON PLEAS. 1586.

[*Godbolt*, 109, *pl.* 129.]

IN trespass, the defendant did justify as bailiff unto another. The plaintiff replied that he took his cattle of his own wrong, without that

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ratihabitionem mandato comparari." Again, in lib. 46, tit. 3, l. 12, § 4, Ulpian says: "Rati enim habitio mandato comparatur." And see Story on Agency, § 239.

In Bracton de Legibus, f. 171 b, it is said: "Ratihabitio in hoc casu comparatur mandato."

Among the rules appended to the Sext are these: "IX. Ratum quis habere non potest quod ipsius nomine non est gestum. X. Ratihabitionem retrotrahi, et mandato non est dubium comparari. . . . XXI. Quod semel placuit amplius displicere non potest. . . . XXXIII. Mutare consilium quis non potest in alterius detrimentum. . . . XLIII. Qui tacet, consentire videtur. XLIV. Is, qui tacet, non fatetur; sed nec utique negare videtur. . . . LV. Qui sentit onus, sentire debet commodum, et e contra. . . . LXXVII. Rationi congruit, ut succedat in onere, qui substituitur in honore." Sexti Decretalium, lib. v. tit. xii., De regulis juris. See *ante* p. 1, n. 1.

In Co. Lit. 207 a, it is said: "Omnis ratihabitio retro trahitur et mandato æquiparatur." — ED.

[1] Reprinted from 6 M. & G. 239, note (*a*), where the reporters say: "With respect to the last part of the Chief Justice's statement, it is, however, observable that Lord Brooke, after abridging or rather transcribing this case, adds, '*Quod quære inde*; for if he was once a trespasser without authority, the agreement cannot help him, for an action was vested before.' Bró. Trespass, pl. 86. In T. 22 E. IV. Fitz. Bayllye, pl. 4, a distinction is taken between a person acting as bailiff and a person acting as servant, a precedent authority being said to be necessary for the latter, though not for the former. *Vide* Chambers *v.* Donaldson, 11 East, 65." — ED.

that he was his bailiff. ANDERSON, C. J. If one have cause to distrain my goods, and a stranger of his own wrong, without any warrant or authority given him by the other, take my goods not as bailiff or servant to the other, and I bring an action of trespass against him; can he excuse himself by saying that he did it as my bailiff or servant? Can he so father his misdemeanors upon another? He cannot; for once he was a trespasser, and his intent was manifest. But if one distrain as bailiff, although in truth he is not bailiff, if after, he in whose right he doth it doth assent to it, he shall not be punished as a trespasser, for that assent shall have relation unto the time of the distress taken; and so is the book of 7 Hen. IV. And all that was agreed by PERIAM [J.]. *Shuttleworth.* What if he distrained generally, not showing his intent, nor the cause wherefore he distrained? &c. *Ad hoc non fuit responsum.* RODES [J.], came to ANDERSON [C. J.], and said unto him, If I, having cause to distrain, come to the land and distrain, and another ask the cause why I do so; if I assign a cause not true or insufficient, yet when an action is brought against me, I may avow or justify, and assign any other cause. ANDERSON [J.]. That is another case; but in the principal case clearly the taking is not good; to which RODES [J.] agreed.

LORD AUDLEY *v.* POLLARD.

QUEEN'S BENCH. 1597.

[*Cro. Eliz.* 561.]

EJECTIONE FIRMÆ. — It was held by all the justices, that where a fine was levied with proclamation, and a friend of him who had the right entered to his use, to avoid this fine without his appointment, and the conusee re-entered, and the five years passed, that this fine is not avoided, but shall bind; for by the express words of the 4 Hen. VII. c. 24, a fine shall bind, unless it be avoided by entry, claim, or action of him who hath right thereto, within the five years; and it is not sufficient for a stranger to enter, unless it be by his command who hath the right. But GAWDY said, that the agreement peradventure of him who had the right, within the five years after such an entry made in his name, would serve; but an agreement afterwards would not serve. *Quære.* — Note. POPHAM said, that he demanded the opinion of all the justices in Serjeants-Inn about the principal case, and they were of the same opinion.

SECTION II.

The Requisites of Ratification.

SMITH AND OTHERS *v.* COLOGAN AND OTHERS.

NISI PRIUS. 1787.

[2 *T. R.* 188 *n.* (*a*).]

THIS was an action on the case for neglecting to make an insurance on goods. The question was, whether the defendants had done their duty properly in the manner in which the insurance had been procured? BULLER, J. The foundation of this action is negligence in the defendants, by which the plaintiffs have been injured. The defendants were the correspondents of the plaintiffs. As to the orders for insurance having been received and accepted, there is no doubt. The only question is, whether the defendants have been guilty of negligence at any period of time which will make them liable? The defendants received the orders in 1782, and they sent Anderson, their broker, to Lloyd's Coffee-house, to get the insurance effected, but he could not get it done from five to six guineas, which was the premium which he offered. This was not because the premium offered was too low for such a risk, but because the underwriters would not engage in the risk at all, on account of the ship's not being registered at Lloyd's. Now if the defendants, who lived in London, had gone no further, and done nothing else, it might have been a considerable doubt whether they would have been liable; for if a person to whom such orders are sent do what is usual to get the insurance made, that is sufficient, because he is no insurer, and is not obliged to get insurance at all events. But whether, by usage, it were incumbent on the defendants in this case to apply to the public offices, is not material to be considered, because they went further, and the plaintiffs have adopted their acts. The next step they took (as it was now a forlorn hope) was to write to G. K. and Co. who were the ship-owners, living at Newcastle, thinking them the most likely persons to be able to get the insurance done; which they accordingly did on the 5th of October, 1782. So far from being to blame in this, the defendants acted very meritoriously. When the loss was known, they endeavored to get the policy out of the hands of G. K. and Co. and they applied repeatedly, but could not succeed; no diligence was wanting on their parts; but the answer was, that G. K. and Co. had other sums to recover upon the same policy, and therefore could not let it out of their hands. Fresh application was made in 1782, to which G. K. and Co. sent an answer, which is indeed an evasive one; but the defendants had no means of obliging them to give it up, but by bringing an action, and it can hardly be said that not doing so is negligence in them. If the defendants had made a blunder in the insurance which would have avoided the policy, that would have been negligence; but the policy is a good one; and it was only owing to the knavery and failure of G. K. and Co. that the plaintiffs have lost the benefit of it, for the underwriters have actually paid the loss to G. K. and Co. In the midst of these transactions, one of the plaintiffs came home; all the business was laid before him by the defendants; he approved of their conduct; he took up the affair, and considered Anderson as his agent. Now if, with a knowledge of all the circumstances, he adopted the defendant's acts for a moment, he ought to be bound by them. If he had intended to insist on his right to recover the money from the defendants, he should never have looked to others at all. But afterwards, when G. K. and Co. were likely to fail, then he considers the defendants as his debtors.[1] *Verdict for the defendants.*

MILLIKEN AND OTHERS *v.* COOMBS AND OTHERS.

SUPREME COURT OF MAINE. 1821.

[1 *Me.* 343.]

DEBT on an arbitration bond, dated March 1, 1815. There were several issues in the case, among which was that of *non est factum.*

To prove this issue on their part the plaintiffs produced the bond declared on, which appeared to be executed by James D. Wheaton as the agent and attorney of the defendants, and to be made in virtue of a power given by the defendants to the attorney, dated January 9, 1815. To prove the attorney's authority, the plaintiffs gave in evidence a written power of attorney from the defendants to Wheaton, under seal, dated February 1, 1815, but which, it appeared, was executed on or about March 16, 1815.

It further appeared that the arbitrators, after having given due notice, met and fully heard the parties, April 19, 1815, on which day they made and published their award. Several of the defendants were present before the arbitrators at the trial, and they all appeared by their agent, regularly constituted, who managed the cause on their part, but no objection was made by any person to the authority of Wheaton to enter into the submission in behalf of the defendants.

The counsel for the defendants objected to this evidence as insufficient to support the bond as their deed; and in support of this objection, they gave in evidence a written power of attorney, under seal, from eight of the defendants to Wheaton, dated January 9, 1815, in which all the defendants' names were recited, but four of them never executed it. This power embraced the same subject-matter as the power dated February 1.

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[1] *Acc.*: Jones *v.* Atkinson, 68 Ala. 167 (1880). — ED.

The judge overruled this objection, and thereupon a verdict was returned for the plaintiffs, subject to the opinion of the whole court upon the facts above stated.

Orr and *Thayer*, for the defendants.

Greenleaf and *Wheeler*, for the plaintiffs.

WESTON, J. The only question in this case arises from the objection made to the sufficiency of the power of attorney under the authority of which the arbitration bond was executed. It is urged that the power recited in the bond being described as bearing date January 9, 1815, that which was produced in evidence by the plaintiffs, bearing date February 1, 1815, can have no tendency to give effect to the bond.[1] . . .

It is further contended that the power relied upon, not having been executed until after the date and delivery of the bond, can give no validity to that instrument. The power was executed prior to the meeting of the arbitrators, and there can be no doubt that it was antedated that it might appear as a subsisting power at the time of the execution of the bond, and that the principals might thereby be concluded from questioning the authority of their attorney. In this point of view the date becomes material, and must have been so considered by the parties. The defendants are therefore estopped by their deed to aver, or to prove, that it was in fact executed at a subsequent period. In the case of Cady *v.* Eggleston *et al.*, 11 Mass. 282, cited by the counsel for the plaintiffs, which was debt upon a replevin bond which bore date at the time of the service of the writ, but was not in fact executed by Eggleston, the principal, until after the entry of the replevin suit, PARKER, C. J., in delivering the opinion of the court, observes, speaking of the bond executed by Eggleston, the principal: "He is estopped to say that it was made on a day different from its date, and must be considered as having given force and effect to it on the day of the service of the writ of replevin." The analogy in this particular between the case cited and the case at bar is very striking.

But if the defendants are not estopped from showing the true time of the execution of their power, it may well be considered a confirmation of the authority assumed by their attorney, — it being very apparent that the power was antedated that it might have that effect. That a subsequent assent is tantamount to a precedent authority is a familiar and well settled principle as to all acts done for another in which a parol power only is necessary. There seems to be no good reason why the same principle should not be extended to cases in which an authority, under seal, is essential, provided the subsequent assent or recognition be proved by an instrument of equal solemnity, and provided, as in this case, it be dated back to a period anterior to the execution of the deed or obligation it is intended to ratify.

The defendants having first authorized their attorney to submit the matters in controversy between the parties to arbitration, with a full knowledge that this had been done, were present, either in person or by their agent, at the hearing before the arbitrators, managing and conducting the business, and making no objection to their authority. Had the result been in their favor, the plaintiffs must have been bound by it; and we can discern no reason, either in law or equity, why the defendants should not be equally bound.

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[1] Passages dealing with this contention have been omitted.— ED.

Judgment must therefore be entered upon the verdict.

STETSON *v.* PATTEN ET AL.

Supreme Court of Maine. 1823.

[2 *Me.* 358.]

This was an action of covenant upon an agreement under seal, signed by the defendants, and by "Simeon Stetson for Amasa Stetson," the plaintiff, by which the defendants agreed to enter upon certain unimproved lands of the plaintiff in the plantation of Stetson in this county, and make two farms thereof, and pay certain moneys to the plaintiff with interest annually; in consideration whereof the plaintiff was to make, execute, and deliver to them a sufficient warranty deed of the same lots. In the instrument declared on, the said Simeon was not named except in the signature as above, but the covenants were wholly in the name of the plaintiff.

In a case stated by the parties, it was agreed that said Simeon had not any authority under the hand and seal of the plaintiff to sign and seal the instrument declared on, but that, living in the vicinity of the plaintiff's lands in this county, he had been requested by the plaintiff, who is his brother, to superintend and manage his interests relative to said estate; and that pursuant to this request he made and executed the deed declared on, in behalf of the plaintiff, who resides in Massachusetts, and which he afterwards delivered to the plaintiff. It was further agreed that another deed of the same tenor and date was made and delivered to the defendants, who, in pursuance of the agreement, entered and made improvements upon the land; and that about three years after the date of the agreement they settled an account with the plaintiff, and applied a balance due to them on account towards payment of the interest due on said agreement, which the plaintiff accordingly indorsed thereon.

Hereupon the question was whether the plaintiff was bound by this agreement; and if not, whether it was obligatory on the defendants.

McGaw, for the plaintiff.

W. D. Williamson, on the other side.

Mellen, C. J. It is agreed that Simeon Stetson had not any authority under the hand and seal of the plaintiff, to execute the instrument declared on; and it therefore was not the deed of Amasa Stetson. No authorities need be cited to show that when an instrument under seal is executed by attorney, the attorney must be authorized by deed under the hand and seal of the principal. This is admitted by the counsel for the plaintiff, but he contends that in consequence of certain acts which have been done by the principal since the execution of the instrument, it has been sanctioned and adopted by him, and thereby has become his deed. The circumstances relied on as proof of such ratification are, his acceptance of the indenture from the hands of his brother after its execution, and the indorsement on the back of the instrument of money received from the defendants on account of the contract. With respect to these facts they cannot amount to anything more than a sanction and ratification made by parol; and such ratification could not be more availing than a parol authority given before the instrument was signed, which, as we have seen, is of no importance. The plaintiff, therefore, cannot prevail on this ground.

But it is farther contended that though the instrument is not the deed of Amasa Stetson, it is the deed of the defendants, and they are bound by it, though the plaintiff is not.[1] . . .

For these reasons we are of opinion that the action cannot be maintained, and a nonsuit must be entered, pursuant to the agreement of the parties.[2]

MACLEAN *v.* DUNN AND WATKINS, WHO SURVIVED AUSTIN.

COMMON PLEAS. 1828.

[4 *Bing.* 722.]

THIS was a special action of assumpsit for not accepting and paying for a quantity of Russian and German wool. At the trial before BEST, C. J., London sittings after Michaelmas term 1826, the facts of the case as far as they are material to the questions here noticed, were as follows: —

The defendants were carrying on business in London as druggists and dry-salters, when Ebsworth, a London wool-broker, met Watkins

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[1] Passages dealing with this contention are omitted. — ED.

[2] *Acc.*: Hanford *v.* McNair, 9 Wend. 54 (1832).

Contra: McIntyre *v.* Park, 11 Gray, 102 (1858), where METCALF, J., for the court, said: "The defendant contends that a sealed instrument, executed without previous authority, can be ratified only by an instrument under seal. However this may be elsewhere, by the law of Massachusetts such instrument may be ratified by parol. Cady *v.* Shepherd, 11 Pick. 400; Swan *v.* Stedman, 4 Met. 548. . . . The cases in which this doctrine has been adjudged were those in which one partner, without previous authority of his copartners, executed a deed in the name of the firm. But we do not perceive any reason for confining the doctrine to that class of cases." — ED at Manchester, near which place Watkins lived, and on the part of the plaintiff agreed to sell the defendants 165 bags of Russian and German wool, to be paid for partly by 145 bags of Spanish wool, which, on the part of the defendants, he agreed to sell to the plaintiff, and partly by acceptances or cash, on certain terms specified in the following bought and sold note, which he delivered to the plaintiff's clerk.

MANCHESTER, 28th March, 1825.

D. MACLEAN, ESQ.

Sir, — We have sold for your account, to Messrs. Dunn, Austin, Watkins, and Co. 166 bags of Russian and German wool, viz. [here followed a specification of the wools as in the note made out for the defendants, amounting to 165 bags only, the insertion of 166 having been admitted on the trial to have arisen by mistake in the casting], after deducting the amount of 145 bags of Spanish wool sold you, the balance to be paid for by an acceptance at four months, with 2½ per cent discount, or in cash with 5 per cent discount, at your option. — Commission for selling, 1 per cent.

EBSWORTH AND BADHAM.

MANCHESTER, 28th March, 1825.

D. MACLEAN, ESQ.

Sir, — We have bought for your account, of Messrs. Dunn, Austin, Watkins, and Co., 145 bags of Spanish wool, viz. [here followed a specification of 145 bags of wool], the amount of 145 bags to be deducted from the 165 bags of Russian and German wool bought of you this day, and the balance to be paid for by an acceptance at four months at 2½ per cent discount, or in cash, with 5 per cent discount, on the 1st July, at your option. — Commission for purchasing, ½ per cent.

EBSWORTH AND BADHAM.

This bought and sold note was written on one sheet of paper.

Corresponding bought and sold notes, *mutatis mutandis*, were made out by Ebsworth for the defendants. In these notes the 1st of July was specified as the day for cash with discount, at the end of the sold note as well as at the end of the bought note. They were never delivered to either of the defendants. Ebsworth, however, made out a memorandum of the contract in his broker's book, called a contract-book, which was not signed by him, and showed this memorandum to Watkins, on the day it was entered, March 28, 1825.

Watkins assented to the contract, provided Dunn's consent could be obtained. Ebsworth had had no previous communication with Dunn, but saw him about the beginning of the next month, when, as Ebsworth swore at the trial, Dunn assented to the bargain, and said he was perfectly satisfied with what was done.

On the 19th of that month Dunn told Ebsworth he would have nothing to do with the contract, which Ebsworth communicated to the plaintiff.

Plaintiff, nevertheless, in May addressed the defendants collectively on the subject of the delivery of the wool, when Watkins wrote and referred him to Ebsworth, who afterwards, with the assent of Watkins, and in the name of the defendants collectively, sold and delivered sixty-eight bags of the German wool to Williamson and Jones.

In July the plaintiff transmitted the invoice of the 165 bags of wool to Manchester, addressed to the defendants, and requested payment of what was due to him.

In September he requested them to receive and pay for the remainder of the wools undelivered, and gave notice that unless the account between him and the defendants were liquidated by the 1st of November, the wool remaining undelivered would be put up to public sale on that day, and the defendants held responsible for any loss.

The defendants having declined to receive them, they were sold at a loss; whereupon the present action was commenced.

It was objected at the trial, on behalf of the defendants, that there was no valid contract between the parties, the broker's book not having been signed, and the bought and sold notes not having been delivered to each party; that Ebsworth, having no authority from Dunn at the time of the bargain, was not an agent authorized within the meaning of the statute of frauds; that the bought and sold note given to the plaintiff varied from that made out for the defendants, the latter specifying the 1st of July as the day for cash with discount, at the end of the sold as well as of the bought note; the former specifying that day only at the end of the bought note; and that the plaintiff had rescinded the contract, by the delivery of part of the wool to Ebsworth, and the sale of the remainder.

A verdict was taken for the plaintiff, with leave for the defendants to move the Court upon these points.

Taddy, Serjt. accordingly obtained a rule *nisi* to enter a nonsuit or have a new trial, on these and sundry other questions of law and fact.

With respect to the alleged variance, the Court held that, as the plaintiff's bought and sold note was all written on the same sheet of paper, the 1st of July, specified at the end of the bought note, must be taken to apply equally to the contract in the sold note, and that therefore the instrument corresponded sufficiently with the bought and sold note made out for the defendants.

If the subsequent ratification by Dunn constituted Ebsworth, by relation, an agent duly authorized within the meaning of the statute of frauds, at the time of the contract, a bought and sold note having been made out and signed by him on the part of the defendants, his delivering it to them and his signing the contract-book would not be essential to the validity of the contract.

It is only necessary, therefore, to report what was said on the points, Whether a person who makes a contract for another, without due authority, becomes, on the ratification of the contract by the party to be charged, a sufficient agent to bind him, within the meaning of the statute of frauds, and Whether the disposal by the vendor, of goods sold, with a view to prevent further loss upon the vendee's refusing to receive them, be a rescinding of the contract.[1]

Wilde and *Russell*, Serjts., for the plaintiff.

Taddy and *Spankie*, Serjts, *contra.*

Best, C. J. It has been argued, that the subsequent adoption of the contract by Dunn will not take this case out of the operation of the statute of frauds; and it has been insisted, that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly; but the statute only requires some note or memorandum in writing, to be signed by the party to be charged, or his agent thereunto lawfully authorized; leaving us to the rules of common law, as to the mode in which the agent is to receive his authority. Now, in all other cases, a subsequent sanction is considered the same thing in effect as assent at the time. *Omnis ratihabitio retrotrahitur et mandato æquiparatur:* and in my opinion, the subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent; if it be subsequently to the contract, the party knows that all has been done according to his wishes. But in Kinnitz *v.* Surry, where the broker, who signed the broker's note upon a sale of corn, was the seller's agent, Lord Ellenborough held that, if the buyer acted upon the note, that was such an adoption of his agency as made his note sufficient within the statute of frauds; and in Soames *v.* Spencer, 1 D. & R. 32, where A. and B., being jointly interested in a quantity of oil, A. entered into a contract for the sale of it, without the authority or knowledge of B., who, upon receiving information of the circumstance, refused to be bound, but afterwards assented by parol, and samples were delivered to the vendees; it was held, in an action against the vendees, that B.'s subsequent ratification of the contract rendered it binding, and that it was to be considered as a contract in writing within the statute of frauds. That is an express decision on the point, that under the statute of frauds the ratification of the principal relates back to the time when the agent made the contract. . . .

Rule discharged.[2]

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[1] The opinion has been shortened by omitting the discussion as to the resale. — Ed

[2] See McDowell *v.* Simpson, 3 Watts, 129 (1834). — Ed.

WILSON AND ANOTHER *v.* TUMMAN AND FRETSON.

COMMON PLEAS. 1843.

[6 *M. & G.* 236.]

TRESPASS, *de bonis asportatis.* Plea, by each defendant separately, not guilty.

At the trial before PARKE, B., at the last assizes for the county of York, the following facts appeared.

In November, 1842, the plaintiffs took possession of the goods in question, under a deed of assignment from Jeremiah New, to whom the goods had previously belonged, and in whose house they still were.

On the 3d of December, 1842, these goods were seized and taken away under some process directed to the sheriff in respect of a debt due from New to Tumman. Neither of the defendants authorized this seizure before, or at the time, it was made. Both the defendants were, on the same day, served with notice that the plaintiffs claimed the goods.

On the 3d of December, the defendant Fretson, who was Tumman's attorney, gave a notice in writing to Mrs. Fearn, — to whose house the goods had been removed the day before, — in which he said, "I am coming about the goods which were seized," and desired her not to part with the goods to any person except Tumman. On the 5th of December Fretson sent her a written indemnity for retaining them.

On the 19th of January, 1843, notice was given to the defendants that an action would be brought against them and the sheriff and his officers for the seizure. The person who served Tumman with the notice asked if he had any claim on the goods; to which he answered, "Yes, I have; and a just claim, I consider."

Upon this evidence the learned judge directed the jury, that as the order given by Fretson had not been acted upon by any refusal on the part of Mrs. Fearn to deliver the goods to the plaintiffs, the only question for their consideration was, whether the seizure on the 3d of December was made by order of the defendants or either of them. That an order to seize the goods was in this case necessary, to charge the defendants with the trespass; that although the subsequent assent and ratification by B of an act done by A, professing to act for and on account of B is sufficient to make that act the act of B, by relation, here, the sheriff's officers acted as ministers of the law, without any intention to act as agents of the party suing out the process; that as to Fretson, the question of ratification did not arise, inasmuch as the seizure could not be for his benefit. The learned judge therefore asked the jury to find, whether the defendants, or either of them, gave any previous authority for making the seizure, and whether the defendant Tumman had authorized or had merely given a subsequent assent to a seizure. The jury found that neither of the defendants had originally authorized the seizure, but that Tumman had subsequently sanctioned and authorized such seizure. The learned judge directed the verdict to be entered for both of the defendants, reserving leave to the plaintiffs to move to enter a verdict for £2 16*s*. against Tumman, if the court should be of opinion that his ratification made him liable as a trespasser.

Bompas, Serjt., in the following term moved to enter a verdict for £2 16*s* against Tumman, or for a new trial on the ground of misdirection.

TINDAL, C. J. You may take a rule for entering a verdict against Tumman; there is no pretence for making Fretson a trespasser.

Byles, Serjt., now showed cause.

Bompas, Serjt. (with whom was *Cleasby*), in support of the rule.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court. This case comes before us on a rule obtained by the plaintiffs, by leave of the learned judge at the trial, to enter a verdict for them against the defendant Tumman, for £2 16*s*., if the court should think that his subsequent ratification made him liable, as a trespasser, for the original seizure.

The seizure of the plaintiffs' goods was made by some officers of the sheriff, without any precedent authority from Tumman, who appeared upon the evidence at the trial to be a plaintiff in some suit, the nature of which did not transpire, but who is found by the jury not to have given any precedent authority to take the goods of the plaintiffs, but to have ratified the taking after it was made. The question, therefore, is a dry question of law, whether the subsequent ratification by this defendant, of a taking under such circumstances, is the same, in its consequences, as a precedent command of the defendant. And we think, under the authorities, and upon the reason of the thing itself, that it is not.

That an act done, for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Such was the precise distinction taken in the Year-Book, 7 Hen. 4, fo. 35,[1] that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority, as bailiff at the time; but if he took it, at the time, as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by Anderson, C. J., in Godbolt's Reports, 109: "If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot; for once he was a trespasser, and his intent was manifest."

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[1] *I. e.*, H. 7, H. 4, fo. 34, pl. 1. — REP.

In the present case the sheriff's officers, who were the original trespassers by taking the goods of the plaintiffs, were not servants or agents of the defendant Tumman, but the agents of a public officer or minister, obeying the mandate of a court of justice. They did not assume to act, at the time, as agents or bailiffs of the then plaintiff Tumman, but they acted as the servants of another, viz., the sheriff, by virtue of the process directed to him by the court. And this forms the distinction between the present case and that of Parsons *v.* Lloyd relied upon in the argument. In the present case the sheriff, or the sheriff's officers, seized under process, which is not suggested to have been void or irregular, but must be taken to be valid process. In the case in Wilson, the writ had been set aside as irregular; and, consequently, the arrest had been made without any authority. In that case, therefore, the sheriff had acted, not under any authority of the court, but under the direction of the plaintiff in the original action, who, by suing out void process, was in the same situation as if he had orally desired the sheriff or his officer to make the arrest. And on the latter supposition, where a *ca. sa.* or *fi. fa.* has been set aside for irregularity, it becomes a nullity, and no doubt the sheriff acts as the servant, and by the command of the plaintiff who sued it out, and who is consequently liable, as a principal, for the act of his agent.

If the defendant Tumman had directed the sheriff to take the goods of the present plaintiffs, under a valid writ, requiring him to take the goods of another person than the defendant in the original action, such previous direction would undoubtedly have made him a trespasser, on the principle that all who procure a trespass to be done are trespassers themselves, and the sheriff would be supposed not to have taken the goods merely under the authority of the writ, but as the servant of the plaintiff. But where the sheriff, acting under a valid writ by the command of the court and as the servant of the court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, cannot, upon the distinction above taken, alter the character of the original taking, and make it a wrongful taking by the plaintiff in the original action.

On the ground of this distinction, we think the defendant Tumman is not shown to be a trespasser, and that the rule must be discharged.

Rule discharged.[1]

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[1] See Saunderson *v.* Griffiths, 5 B. & C. 909 (1826); Western Publishing House *v.* District Township of Rock, 84 Iowa, 101 (1891). — Ed.

FOSTER, ADMINISTRATOR, *v.* BATES AND OTHERS.

EXCHEQUER. 1843.

[12 *M. & W.* 226.]

ASSUMPSIT by the plaintiff, as administrator of E. Pollard, deceased, for goods sold and delivered by the intestate, and also for goods sold and delivered by the plaintiff after his death, and before administration granted, and on an account stated with the plaintiff.

Plea, *non assumpsit.*

At the trial before ROLFE, B., at the London Sittings after last Trinity Term, it appeared that the defendants were partners in a company called the West African Company, trading to the coast of Africa, and that one Oldfield was their agent at Fernando Po. The goods in question had been sent by Pollard from this country to Africa for sale; he afterwards died intestate; and after his death, Oldfield, the defendants' agent, purchased the goods from the agent of the intestate there, who sold them for the benefit of the intestate's estate. Subsequently to the sale, the plaintiff took out letters of administration to Pollard, and brought this action for the price of the goods. It was objected at the trial, that the plaintiff was not entitled to recover, as the letters of administration did not relate back to the time of the death of the intestate, so as to vest in the administrator the right to sue on a contract made after his death. The learned judge, however, left the case to the jury, who found a verdict for the plaintiff, leave having been reserved to the defendants to move to enter a nonsuit.

Kelly having in the early part of this term obtained a rule accordingly,

W. H. Watson and *Greenwood* showed cause.

Hoggins (*Kelly* with him), in support of the rule.

Cur. adv. vult.

PARKE, B. In this case, which was argued a day or two ago, we delayed giving our judgment, not on account of any doubt we entertained at the time, but in order that we might refer to the several authorities cited at the bar. We are of opinion that the rule to enter a nonsuit must be discharged. The only question is, whether the plaintiff could sue for goods sold and delivered by him as administrator of one Pollard, upon the facts which were in evidence on the trial. It appeared that the goods were sold after the death of the intestate, and before the grant of letters of administration, by one who had been the agent of the deceased on the coast of Africa; and that they were there sold avowedly on account of the estate of the intestate.

It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrong doer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover. All the authorities on this subject were considered by the Court of Common Pleas, in the case of Tharpe *v.* Stallwood,[1] where an action of trespass was held to be maintainable. The reason for this relation given by Rolle, C. J., in Long *v.* Hebb, Styles, 341, is that otherwise there would be no remedy for the wrong done. The relation being established for the benefit of the intestate's estate, against a wrongdoer, we do not see why it should not be equally available to enable the administrator to obtain the benefit of a contract intermediately made by suing the contracting party; and cases might be put in which the right to sue on the contract would be more beneficial to the estate than the right to recover the value of the goods themselves. In the present case there is no occasion to have recourse to the doctrine that one may waive a tort and recover on a contract; for here the sale was made by a person who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate; and it was ratified by the plaintiff, after he became administrator: and, when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown, at the time, to the person who intended to be the agent, the case of Hull *v.* Pickersgill, 1 Bro. & B. 282, cited by Mr. Greenwood, being an authority for that position. We are, therefore, of opinion that the plaintiff is entitled to recover. *Rule discharged.*[2]

LEWIS *v.* READ AND OTHERS.

EXCHEQUER. 1845.

[13 *M. & W.* 834.]

CASE. The first count was for illegally distraining and selling the cattle of the plaintiff for rent due to the defendant Read from one John Lewis, without duly appraising the same; the second count was in trover; the third was for selling them for less than the best price. Plea, not guilty, by statute. At the trial, before COLERIDGE, J., at the last assizes for Montgomeryshire, it appeared that the plaintiff's brother, John Lewis, was tenant from year to year to the defendant Mr. Crewe Read, of a mill and farm called Aberborthen, and a mountain sheep-walk called Penybryn; and that, being in arrear with his rent, the other defendants, by the verbal direction of a Mr. Owens, who was Mr. Read's general agent for the management of his estate, on the 11th May, 1844, distrained about forty sheep belonging to the plaintiff to satisfy the rent, which were sold, under Mr. Owens's directions, for £14 15*s.* Mr. Owens had expressly directed the defendants not to take anything but what they should find on Aberborthen or on

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[1] 12 Law J. N. S. 241. See also Brooke's Abr., Relation, 15. — REP.

[2] See Lyell *v* Kennedy, 14 App. Cas. 437 (1889). — ED.

Penybryn. The main questions in the cause were, first, whether the sheep (which were clearly shown to be the property of the plaintiff, and not of John Lewis) were or were not distrained upon the sheep-walk of Penybryn, or beyond its boundary; and, secondly, whether, at the time of the distress, John Lewis's tenancy in, or possession of the farm and sheep-walk continued: on both which points there was conflicting evidence. It appeared that the defendants had in the first instance seized about a dozen sheep, which they found on the Penybryn mountain, and that, while they were driving them down, and somewhere very near the boundary of the Penybryn sheep-walk, these were joined by the other sheep, which had been straying upon an adjoining sheep-walk belonging to another farm. Mr. Owens received the proceeds of the sale of the sheep, and accounted for the money to Mr. Read; but there was no direct evidence that either Mr. Owens or Mr. Read was informed where the sheep were taken, or had any distinct knowledge that the distress was not made on the Penybryn sheep-walk. The learned judge, in summing up, told the jury, that, if the sheep were distrained off the Penybryn sheep-walk, although it might be so near the boundary as to amount to a mere irregularity in the bailiffs; or if, at the time of the distress, the tenancy of John Lewis in Penybryn had determined, and he did not continue in possession of it, the defendants were all liable on the count in trover. The jury found that the first lot of sheep were taken on Penybryn, but that there was no evidence to satisfy them where the others were taken; and that, at the time of the distress, John Lewis had ceased to be the tenant, and did not continue in possession of Penybryn; and thereupon, under the direction of the learned judge, a verdict was entered for the plaintiff against all the defendants on the count in trover, damages £14 15*s*.

Welsby, in Michaelmas Term last, obtained a rule *nisi* for a new trial, on the ground of misdirection; contending that, without evidence of the ratification by the defendant Read of the irregularity in the execution of the distress, with knowledge of such irregularity, he could not be liable in trover; that there was no evidence of such ratification, or, if there were, that the question had not been left to the jury.

W. Yardley and *E. Beavan* (with whom were *Jervis* and *Wilkin*) now showed cause.

Welsby (with whom was *Townsend*), in support of the rule.

PARKE, B. I am afraid the rule must be absolute. There is no doubt that the acts of the defendant Read, in directing, through his agent Owens, the sale of the sheep, and receiving the proceeds, were a sufficient ratification of the act of the bailiffs in making the distress, as to such of the sheep as were taken on the Penybryn sheep-walk, because the taking of them was within the original authority given to the bailiffs by Owens as the agent of Read. But as to the others, which were not proved to have been taken on Penybryn, and as to which, therefore, the authority was not followed, Mr. Read could not be liable in trover, unless he ratified the act of the bailiffs, with knowledge that they took the sheep elsewhere than on Penybryn; or unless he meant to take upon himself, without inquiry, the risk of any irregularity which they might have committed, and to adopt all their acts. There appears to have been evidence quite sufficient to warrant the jury in coming to the conclusion that he did, in this sense, ratify the acts of the other defendants; but, as this question was not left to the jury, the defendant is entitled to a new trial.

Alderson, B., **Rolfe**, B., and **Platt**, B., concurred.

Rule absolute.[1]

WHITE ET AL *v.* SANDERS ET AL.

SUPREME COURT OF MAINE. 1850.

[32 *Me.* 188.]

Exceptions. Trover for a lot of goods.

In 1848 the plaintiffs consigned the goods to one James Getchell, with private verbal orders to sell at retail and for cash only. Before the delivery of the goods to him, Getchell paid the plaintiffs $35 toward them, and promised $15 more, but did not pay it. He gave what was intended for security, by an absolute deed of a store. After retailing fifteen dollars worth of the goods, he sold all the residue to the defendants, at the invoice prices, taking in payment fifty dollars in cash, a horse, wagon, and harness, and the defendants' notes at six and nine months for the balance. He exhibited the plaintiffs' invoice to the defendants, and receipted his bill of sale to defendants, as agent for plaintiffs. After plaintiffs knew of the sale, they received of Getchell some store furniture, which they immediately sold, and also $13.55 in money, but whether it was a part of the $50 received of defendant was not shown. The plaintiffs also received about $25 for the rent of the store.

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[1] In Freeman *v.* Rosher, 13 Q. B. 780, 789 (1849), **Patteson**, J., for the court, said: "The intention to adopt the act at all events is the same as adopting with knowledge."

In Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43, 58 (1871), **Willes**, J., said: "With respect to those who did not think proper to seek information, the fact that they did not choose to inquire is strong evidence that they were satisfied to adopt the acts of the directors at all events and under whatever circumstances."

In Meehan *v.* Forrester, 52 N. Y. 277, 279-280 (1873), **Rapallo**, J., for the court, said: "The agency of Pinkney was to collect the debt, not to purchase lands. When, under those circumstances, Pinkney delivered to Bertine the deed obtained from the plaintiff, it was the duty of Bertine to inquire and of Pinkney to communicate under what arrangement the deed had been obtained. In the absence of any evidence to the contrary, the presumption is that these duties were performed. (2 Hill, 464.) If not, and Bertine received the deed blindly without receiving or making any inquiry, he must be deemed to have confided the whole matter to his attorney, and adopted whatever arrangements the latter may have made to obtain the deed."

And see Fitzmaurice *v.* Bayley, 6 E. & B. 868 (1856). — **Ed.**

At the time of purchasing, the defendants knew of the private instructions to Getchell to sell for cash only. This action was brought after a demand upon the defendants of "the goods which they purchased of James Getchell."

Shepley, C. J., presiding, instructed the jury that the demand was sufficient, if they were satisfied that defendants purchased the goods of Getchell, and took a bill of them.

The counsel for the defendants requested the judge to instruct the jury, that if they believed that plaintiffs, since their knowledge of the sale to defendants, had accepted money, property, or security from the agent on account of the goods sold, this might be regarded as a ratification of the sale to defendants, notwithstanding the agent exceeded his authority in making it.

The judge declined giving said instructions, but did instruct the jury that, if the plaintiffs received of Getchell, after he sold the goods to the defendant, money, or other property, which they would not be entitled to receive unless the sale was regarded as valid, the sale would thereby be ratified; but if they would be entitled to receive the same from Getchell, if the sale were regarded as unauthorized, the sale would not thereby be ratified.

To the instructions and rulings the defendants except, after verdict against them.

Tenney, J., orally: The instruction as to the demand was correct.

The defendants' counsel requested certain instructions. But the mere knowledge by the plaintiffs of the sale to the defendants, and their receipt from Getchell of money on account of the goods, would not necessarily be a ratification. The modification of requested instruction was rightfully made by the judge. *Exceptions overruled.*[1]

DORD *v.* BONNAFFÉE & CO.

Supreme Court of Louisiana. 1851.

[6 *La. Ann.* 563.]

Appeal from the Fourth District Court of New Orleans, Strawbridge, J.

A. N. Ogden, for plaintiff.

W. C. Hanmer, for defendants.

Eustis, C. J. This suit was commenced by attachment. The appeal is taken by the plaintiff, from a judgment of the court of the fourth district of New Orleans, dismissing his petition, on the ground that no property of the defendants was attached. The plaintiff attached certain assets in the hands of Eugene Rousseau, under process of garnishment. The garnishee claims to hold the assets, as assignee of the defendants, for the use of their creditors. The plaintiff traversed the answers of the garnishee, and alleged that the assignments under which he claims to hold are, on their face, fraudulent, null, and void as to creditors; and that no title to the property was thereby vested in the assignee, which can prevail against his attachment. The argument before us is on the validity and effect of the assignments.

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[1] See Thacher *v.* Pray, 118 Mass. 291 (1873). — Ed.

Edward Bonnaffée and Charles Bonnaffée were merchants, residing in Havre, France, and there trading under the name of Bonnaffée & Co. The assignment purports to be made by them in favor of Eugene Rousseau, by their attorney in fact, Charles Bonnaffée, in the city of New York, on the 11th of December, 1847. It purports to transfer to the assignee all the property of the firm of Bonnaffée & Co., all the assets, etc., originating from or connected with a bankrupt banking concern in the State of Mississippi; and to be in furtherance of a certain other assignment, bearing the same date, made by the said Bonnaffée & Co., to Victor Delannay & Charles Sagony, of the city of New York. This assignment is also signed by Charles Bonnaffée, as attorney in fact of Bonnaffée & Co., of Edward and Charles Bonnaffée. Both of these assignments were afterwards formally ratified by the principals in France.

The plaintiff is the holder of several bills of exchange, drawn by the agent in New York, in the name of the firm, on the house in Havre, protested for non-acceptance and non-payment. His residence is in the city of New York. In considering by virtue of what system of laws the rights of the respective parties, in relation to the assignment, are to be determined, the first question among those raised in argument, to be determined, is, as to the place in which the contracts were made in a legal sense. They were both signed in the city of New York, by Charles Bonnaffée, as agent. That in favor of Delannay and Sagony, so far as they are concerned, may be considered as having been executed in that city, as they both resided there and signed the assignment. That in favor of Rousseau, he at the time being a resident of Jackson, in the State of Mississippi, may be considered, so far as he is concerned, as executed in that State; as the last consent may be held to be given by his acceptance of the assignment. But whether to be considered as executed there or in New York, as the laws in relation to instruments of this class are not supposed to be different, it is not material to inquire. The difficulty appears to be, the place in which the contracts were made by Edward Bonnaffée and Charles Bonnaffée, the parties of the first part to the assignments.

It is not insisted that the assignments, as made by the agent in New York, derive any validity from his signing them, as his authority to make them has not been shown. But the formal ratification of both instruments by the parties in Havre, is urged as supplying this original want of authority on the part of the agent. It is held that in cases of contracts, made between persons who are separated from each other in different countries, by written communication, the contracts are considered as made in the country, and subject to its laws, where the final assent has been given. This rule is laid down by Casaregis, in his one hundred and seventy-ninth discourse, and was recognized by the Supreme Court in the case of Whiston *v.* Stodder, 8 Mart. 95 [13 Am. Dec. 281]. In case of a contract made in a foreign country, by an agent without authority, which the principal at home afterwards ratifies, the contract is considered as made in that foreign country, because the ratification relates back *tempore et loco*, and is equivalent to an original authority: 2 Casaregis, p. 310, discourse 179, sec. 20. The property upon which the assignments were to operate, so far as this case is concerned, must be considered at the time as being in the State of Mississippi or of New York; therefore, there can be no question as to the laws by which the effect of the assignments, in relation to the attaching creditor, is to be tested.

Neither of the assignments purports to have any other object than an equal distribution of the property of the firm in the United States among their creditors, without discrimination, or to make any appropriation of it, except that which the law of France and of Louisiana would itself make. Their purpose was laudable in every point of view, and one which the laws of every State must approve and encourage. We think, from the authorities adduced, that the assignments are unquestionably valid under the laws of New York. We are bound to consider the decisions of the courts of the last resort of that State as evidence of what the law is.

The case of Cunningham *v.* Freeborn, 11 Wend, 241, appears to afford a complete answer to the objections taken by the counsel of the plaintiff, to the validity of the assignments. The district judge, in his written opinion, has given his conclusions on the law of the case, in which we fully concur. The several grounds of objection to the assignments have been examined in detail, in the written argument of the counsel for the assignee. As the questions raised involve points in a jurisprudence which is not our own, we do not feel ourselves called upon to do more than give the result of our investigations, which is in favor of the validity of the assignments under the law by which they are to be tested; and that they vest the property conveyed in the assignee, subject to the trusts, for the benefit of all the creditors. The interest thus created can not be defeated by the attaching creditor, in the case presented to us.

The judgment of the District Court is therefore affirmed, with costs.[1]

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[1] *Contra:* Shuenfeldt *v.* Junkermann, 20 Fed. R. 357 (U. S. C. C., N. D. Iowa, 1884.) — ED.

THE RUTLAND AND BURLINGTON RAILROAD CO. *v.* THE ESTATE OF WILLIAM LINCOLN, APPELLANT.

SUPREME COURT OF VERMONT. 1857.

[29 *Vt.* 206.]

ASSUMPSIT to recover assessments upon the alleged subscription of the intestate for ten shares of the capital stock of the Rutland and Burlington Railroad Company. The case came to the county court by appeal from the allowance of commissioners, and was tried by jury upon the general issue, with notice that said subscription was not made by the intestate nor by his authority, at the March Term, 1856. — PIERPOINT, J., presiding. The plaintiffs introduced the subscription book of the Rutland and Burlington Railroad Company, which was according to the only form of subscriptions for stock ever circulated by said company, whereon was written at the foot of the contract for the taking of stock the name of the intestate, as follows: "1845, July 3, William Lincoln — Ten Shares," and it appeared that the same was so written by one John Buckmaster. The plaintiffs claimed that the intestate had ratified the act of Buckmaster in so signing his name, and to prove this offered the testimony of sundry witnesses, not officers or agents of said railroad company, that the intestate, after such signature by Buckmaster, had said to them, but not to or in the presence of Buckmaster, or of any officer or agent of the company, that he, the intestate, had taken one thousand dollars of stock in said railroad company, with other evidence that the name of the intestate appeared in no other place on their subscription books. The defendant objected to the admission of this testimony, but the court admitted it. The defendant thereupon requested the court to charge the jury that if they should find that Buckmaster had no authority to sign the name of the intestate at the time of signing, the mere declaration of the intestate as above, made subsequently, did not amount to a ratification or confirmation of the act of Buckmaster in making such signature. The court declined so to charge the jury, but charged them that although they should find that Buckmaster had no authority to sign the name of the intestate at the time it was signed, yet the intestate could afterwards confirm and ratify the act of Buckmaster so as to make him, the intestate, liable as a subscriber; and that if the jury should find from the evidence that the intestate, after such signing, spoke of the stock as his own and claimed it as his, it was a sufficient ratification and confirmation of the act of Buckmaster in making the subscription to entitle the plaintiffs to recover in this action. The defendant offered as a witness in his behalf Mrs. Anna Bucklin, wife of William Bucklin. It appeared that Mrs. Bucklin was an heir at law of the estate of the intestate, and interested in the suit, and that William Bucklin, her husband, had signed the bond with the administrator to the probate court which was given on the appeal to this court, and that the administrator had abandoned the defence of the suit and that it was defended by the heirs, and that the said William Bucklin had given a bond to the administrator to indemnify him against any liability on account of the suit. The plaintiffs objected to the admission of the witness and she was excluded by the court. Verdict for the plaintiffs. Exceptions by the defendants.

Roberts & Chittenden, for the defendants.

S. H. Hodges, for the plaintiffs.

The opinion of the court was delivered by

Redfield, C. J. This case seems to have been tried in such a manner as to be practically about as advantageous to the defendant, perhaps, as if the charge had been strictly and technically correct. The testimony no doubt tended very strongly to show either an original authority in Buckmaster to make the subscription in the defendant's name, or that he had consented to assume it. But the specific question raised, and upon which the court were requested to charge was, whether Lincoln's declaration to mere strangers that he had such an amount of stock in the defendant's company amounted to such a ratification of the subscription. And it is not claimed in argument that it did. We think it impossible, therefore, to affirm the charge without making presumptions so remote that they seem to us somewhat unnatural.

And treating the trial as coming under the present statute, as we must, the testimony of Mrs. Bucklin is not objectionable on the ground either of her interest or that of her husband. And there is nothing in the case to show that her testimony tended to violate any confidence between husband and wife. We see no reason, therefore, why she was not a competent witness.

Judgment reversed and case remanded.

THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD CO. *v.* COWELL.

Supreme Court of Pennsylvania. 1857.

[28 *Pa.* 329.]

Error to the District Court of Philadelphia.

This was an action brought on the 17th December, 1855, by John W. Cowell, to recover from The Philadelphia, Wilmington, and Baltimore Railroad Company the sum of $1700, being the dividends declared by the defendants on four hundred shares of stock in the company held by the plaintiff. The plaintiff resided in England, and on the stock owned by him the company declared dividends, which were payable as follows: 1st October, 1849, $600; 1st April, 1850, $300; 1st October, 1850, $400; 1st April, 1851, $400. The dividends thus declared were applied to the payment of a subscription to forty shares of stock, made by C. H. Fisher for and on account of the plaintiff Cowell.

The authority, under which the subscription was made, and the dividends appropriated to the payment of the stock subscription, is set forth in the following offer of testimony: —

"1. That C. H. Fisher, Esq., had before the year 1848, through Horace Binney, Esq., an acquaintance of the plaintiff, and with whom he consulted as to his affairs and investments, communicated with the plaintiff, then a stockholder to the amount of four hundred shares, in respect to the condition and affairs of the company; and, that in his replies, the plaintiff had expressed his thanks for the information so received.

"2. That the condition and prosperity of the defendants made it imperatively necessary for the protection of the interests of the stockholders and the preservation of the property of the company, that the plaintiff should, with the other stockholders, subscribe for new stock of the company, authorized to be issued to the extent of ten per cent upon the amount then held by each stockholder, and thus to raise a sum necessary to meet impending liabilities.

"3. That C. H. Fisher, Esq., acting in good faith for the plaintiff, and after consultation with Horace Binney and Clement C. Biddle, Esqrs., acquaintances and friends of the plaintiff, did subscribe for him to forty shares of the new stock so to be issued, and by reason thereof, together with the subscription of other stockholders, the affairs of the company were retrieved, and the earnings of the road were rendered applicable to the dividends sued for. That having so subscribed, he did, upon the 16th day of December, 1848, address the plaintiff, advising him of what had been done, and in the manner as by said letters will appear.

"4. That the said letters were received in due course of mail by the plaintiff, on or about the 29th day of December, 1848. That the plaintiff made no reply thereto, and took no step and gave no notice of any kind whatever, in disaffirmance of the act of said Fisher until on or about the 17th day of November, 1855.

"5. That the dividends sued for in this action, were applied in pursuance of said subscription to the payment thereof, and the cash balance due was paid by the said Fisher, and the certificate for said forty shares was thereupon delivered to said Fisher on behalf of John W. Cowell, the plaintiff."

The court rejected the evidence so offered.

The defendants, having pleaded the Statute of Limitations, asked the Court to charge the jury that —

The dividend of October 1st, 1849, having been declared and made payable more than six years before the institution of this suit, the Statute of Limitations was a bar to plaintiff's recovery of the dividend of that date.

This the Court declined doing, but charged that the Statute of Limitations did not apply to the dividend declared by defendants so due on the 1st October, 1849; but that the plaintiff was entitled to receive the same, though more than six years had elapsed between the declaring of the said dividend and the institution of this suit.

The jury found for the plaintiff $1726.07. A rule for a new trial was refused, and judgment entered upon the verdict.

The defendants thereupon removed the cause to this court, and assigned for error —

1. That the court erred in rejecting the evidence submitted by the defendants as contained in their offer.

2. That the court erred in refusing the instruction prayed for, that the Statute of Limitations was a bar to the recovery of the amount of the dividend declared on the 1st October, 1849, being more than six years, before suit brought.

St. G. T. Campbell, for plaintiff in error.

H. J. Williams, for defendant in error.

WOODWARD, J. The question presented by the first error assigned, is not whether the evidence offered and rejected proved the plaintiff's ratification of Fisher's subscription; but whether it tended to prove it.

Suppose the court had admitted the evidence and the jury had found the plaintiff's assent and ratification, could he have expected us to reverse the judgment on the ground that a question of fact had been submitted and found without any evidence?

Could it have been said that the facts set down in the bill of exception, fully proved, were no evidence of ratification; that they were so entirely irrelevant as to be unworthy of consideration by rational minds in connection with such a question; that that question stood just as far from demonstration after such evidence as before?

Unless this could have been said, and must have been said in the event supposed, the judgment now before us must be reversed; for the question here is, in essence and substance, exactly the same as it would have been then.

If this evidence might have satisfied the jury; that is, if it were of a quality to persuade reasonable men that Cowell did assent to Fisher's assumed agency after he had full knowledge of what had been done, it should have been admitted. The question in the cause was for the jury, and not the court. But the fact to be inquired for, like all mental conditions and operations, could be established only inferentially. We judge of the mind and will of a party only from his conduct, and if he have done or omitted nothing which may fairly be interpreted as indicative of the mental purpose, there is indeed no evidence of it for either court or jury; but if his conduct, in given circumstances, affords any ground for a presumption in respect to the mental purpose, it is for a jury to define, limit, and apply the presumption.

The most material circumstance in the offer was the silence of Mr. Cowell. Fully informed about the last of the year 1848 as to what had been done in his name, and the motives and reasons for doing it, he did not condescend to reply for nearly seven years. It is insisted that this fact, even when taken in connection with the other circumstances in the offer, was no evidence of his intention to assent to the new subscription.

The argument admits that where the relation of principal and agent has once existed, or where the property of a principal has with his consent come into the hands and possession of a third party, the principal is bound to give notice that he will not sanction the unauthorized acts of the agent, performed in good faith and for his benefit; but it is said, and truly, that Mr. Fisher had never been an authorized agent of the plaintiff for any purpose, and that the plaintiff's property had never been entrusted to him It is on this distinction that the learned counsel sets aside the case of The Kentucky Bank *v.* Combs, 7 Barr, 546, and indeed all of the authorities relied on by the defendants.

I do not understand counsel to mean that there can be no valid ratification unless one of the conditions specified — either prior agency or possession of principal's property — has existed, but that silence after knowledge of the act done, is evidence of ratification only in such cases. It must be admitted that the act of a mere stranger or volunteer is capable of ratification, for all the authorities are so; but the argument is that the silence of the party to be affected, whatever the attending circumstances, cannot amount to ratification of the act of a stranger.

In Wilson *v.* Tumman, 6 M. & G. 242, C. J. Tindal, on the authority of several old cases, considered that the effect of a ratification was dependent on the question whether the person assuming to act, had acted for another and not for himself. The act, it would seem, cannot be ratified unless it was done in the name of the person ratifying. *Ratum quis habere non potest, quod ipsius nomine non est gestum.* And the general rule is thus expressed in the Digest, 50 — *Si quis ratum habuerit quod gestum est, obstringitur mandati actione.*

If, then, the principle of law be that I can ratify that only which is done in my name, but when I have ratified whatever is done in my name, I am bound for it as by the act of an authorized agent, it is apparent that my silence in view of what has been done is to be regarded simply as evidence of ratification, more or less expressive, according to the circumstances in which it occurs. It is not ratification of itself, but only evidence of it to go to the jury along with all the circumstances that stand in immediate connection with it. Among these, the prior relations of the parties are very important. If the party to be charged had been accustomed to contract through the agency of the individual assuming to act for him, — or had intrusted property to his keeping, — or if he were a child or servant, partner or factor, the relation, *conjunctionis favor*, would make silence strong evidence of assent.

On the other hand, if there had been no former agency, and no peculiarity whatever in the prior relations of the parties, silence — a refusal to respond to a mere impertinent interference — would be a very inconclusive, but not an absolutely irrelevant circumstance. The man who will not speak when he sees his interests affected by another, must be content to let a jury interpret his silence.

It is a clear principle of equity that where a man stands by knowingly, and suffers another person to do acts in his own name without any opposition or objection, he is presumed to have given authority to do those acts. *Semper, qui non prohibet pro se intervenire, mandare creditur:* Story's Agency, § 89.

We do not apply the full strength of this principle when we rule that the plaintiff's silence, in connection with the circumstances offered, was evidence fit for the consideration of a jury on the question of ratification. If mental assent may be inferred from circumstances, silence may indicate it as well as words or deeds. To say that silence is no evidence of it, is to say there can be no implied ratification of an unauthorized act — or at the least to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justifies such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself, and if the power to ratify be conceded to him, the fact of ratification must be provable by the ordinary means.

For these reasons the distinction on which the argument for the defendant in error rests seems to us to be too narrow.

The prior relations of the parties lend great importance to the fact of silence, but it is a mistake to make the competency of the fact dependent on those relations. I am aware that Livermore cites with approbation, p. 50, the opinion of civil law writers, that where a volunteer has officiously interfered in the affairs of another person, and made a contract for him without any color of authority, such other person is not bound to answer a letter from the intermeddler, informing him of the contract made in his name, nor is his silence to be construed into ratification. But it is to be remembered that such writers are not laying down a rule of evidence to govern trials by jury, but are declaring rather the effect upon the judicial mind of the party's silence.

It is one thing to say that the law will not imply a ratification from silence, and a very different thing to say that silence is a circumstance from which, with others, a jury may imply it. Because evidence does not raise a presumption so violent as to force itself upon the judge as a conclusion of law, is the evidence therefore incompetent to go to a jury as ground for a conclusion of fact? No writer with a common law jury before his eyes, has ever maintained the affirmative of this proposition. If it could be established it would abolish that institution entirely, and refer every question and all evidence to the judicial conscience.

But it is time now to remark that this case is far from being that of a mere volunteer or intermeddler. True it is that Mr. Fisher had not any proper authority to make the new subscription, but Messrs.

Binney and Biddle, the friends and correspondents of the plaintiff, had consulted him in reference to the plaintiff's interests in this railroad company, and as a director of the company he stood in some sort as a representative and trustee of the plaintiff, who was in a foreign country, and without any authorized agent here. The proposition that every stockholder should subscribe new stock to the extent of 10 per cent was designed; and as the event proved, was well designed, to retrieve the fortunes of the company, but it was necessary to its success that every stockholder should come into the arrangement. The emergency was pressing, and Mr. Fisher, manifestly acting in perfect good faith, made the subscription for the plaintiff, which he believed the plaintiff would not hesitate to make if personally present.

When the plaintiff was fully informed that a sagacious financier, to whom his chosen friends and correspondents had referred his interests, and who stood in the fiduciary relation of a director, had pledged him for a new subscription, which circumstances seemed to justify and demand, I say not that he was bound by it, nor even that he was bound to repudiate it, but that his delay for near seven years either to approve or repudiate, was a fact fit to be considered by a jury on the question of ratification. The subscription was made in the plaintiff's name, and accepted by the company as his, and it does not appear that they knew Fisher was acting without authority. The offer was to show that it was highly beneficial to the plaintiff. It was then such an act as is capable in law of being ratified. The plaintiff might make it his own by adoption. Did he adopt it? He did if he ever gave it mental assent. How could the company show assent by anything short of a written agreement, if not by evidence of the nature of that in the bill of exception? The medium of proof, where a mental purpose is the object of inquiry, must conform to the mode of manifestation. To say that you may prove assent, but may not give the circumstances in evidence from which it is to be implied, is to say nothing.

Strongly persuasive as we consider the offered evidence, we do not put our judgment so much upon the strength as upon the nature of it. We think it was calculated to convince a jury that the plaintiff did indeed assent to and approve of what Mr. Fisher had done in his behalf, and therefore it should have been received and submitted.

If they should find from it the assent and ratification of the plaintiff, the subscription became, as between him and the company, a valid contract, and on his failure to pay the instalments, the company had a right to apply thereto the accruing dividends on his old stock.

When he pays what remains unpaid upon the instalments, he will be entitled to his certificates of stock.

The defence under the Statute of Limitations was not well taken. It may be well doubted whether under our Acts of Assembly any incorporated company can set up the Statute of Limitations against a stockholder's dividends. It certainly cannot be done until after a demand and refusal, or notice to a shareholder that his right to dividends is denied. But here, so far from such notice having been given, the company recognize the plaintiff's right to the dividends, and claim to have applied them to his use. The statute can have no place in such a defence.

The judgment is reversed and a venire de novo awarded.[1]

ANCONA v. MARKS.

EXCHEQUER. 1862.

[7 *H. & N.* 686.]

THE first count of the declaration stated that the defendant, on, &c., by his check or order for the payment of money, directed to Messrs. Attwood and Co., bankers, required them to pay to bearer £100: and the plaintiff became the bearer of the check. And the said Messrs. Attwood and Co. have not paid the said check, whereof the defendant had due notice, but did not pay the same. Second count: that the defendant, on, &c., by his promissory note, now overdue, promised to pay to his own order £75 two months after date, and the defendant indorsed the said note to Herbert Wright, who indorsed the same to the plaintiff, but the defendant did not pay the same. The third count was on a promissory note for £100, made and indorsed by and to the same parties. The fourth count was on a bill of exchange drawn by H. Wright upon and accepted by the defendant for payment to the order of H. Wright of £100 three months after date, and indorsed by H. Wright to the plaintiff.

Pleas (*inter alia*). To first count: that the plaintiff never was the bearer or possessed of the said check before suit. To second count: that the said note was not indorsed to the plaintiff as alleged. To the same count: that the plaintiff was not at the commencement of this suit the lawful holder of the said note. To third count: pleas similar to those pleaded to the second count. To fourth count: that the bill was not indorsed to the plaintiff as alleged. To same count: that the plaintiff was not at the commencement of this suit the lawful holder of the said bill. Issues thereon.

At the trial, before MARTIN, B., at the London Sittings after last Trinity Term, it appeared that the defendant, who was a tradesman at Birmingham, had indorsed and delivered to one Herbert Wright, an attorney and money lender at Birmingham, the promissory notes, bill of exchange and check mentioned in the declaration, upon his discounting them for the defendant. Wright, in his evidence, stated that he came to London and saw Mr. Tucker, a member of the firm of Greville and Tucker, attorneys in London, who had occasionally acted as his agents. He had with him the check, promissory notes and bill of exchange, and he asked Tucker to find a client who would lend his name in an action upon them. Tucker said there was no difficulty, as he had the authority of Ancona (the plaintiff). Wright then said, "I wish you to receive these bills for Ancona and to bring an action upon them in his name;" and Wright then indorsed and delivered them to Tucker. On a previous occasion, Wright had a bill of the defendant's, and asked Tucker if he could find a client who would allow his name to be used in an action upon it, when Tucker mentioned Ancona, the plaintiff, and the action was brought in his name and the money recovered. Tucker corroborated Wright's statement, and said that at the time he had a general authority from Ancona to use his name for such purposes. The check, notes and bill were in his possession at the time the writ was issued. He afterwards communicated to the plaintiff the fact of the action having been brought in his name, and he adopted it. The plaintiff stated that Greville and Tucker had used his name before. He had no knowledge that his name was used in this action until after it was brought, but when he was told of it he was willing the action should go on. He did not know Wright, and had not instructed Greville and Tucker to bring the action.

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[1] See Prince v. Clark, 1 B. & C. 186 (1823); Ward v. Williams, 26 Ill. 447 (1861), Foster v. Rockwell, 104 Mass. 167 (1870); Peck v. Ritchey, 66 Mo. 114, 120 (1877); [illegible] v. [illegible] Co., 1 Ill. App. 273 (1878); Heyn v. O'Hagen, 60 Mich. 150 (1886). — ED.

It was objected, on behalf of the defendant, that the plaintiff was not at the time the action was brought the holder of, nor had he any interest in or possession of the documents sued upon, and therefore he could not have brought the action, and consequently his ratification after action brought could give no validity to the proceedings.

The learned judge refused to nonsuit, and told the jury that if they believed that, on a day anterior to the action being brought, Wright, the owner of the securities, gave them to Tucker, who received them as and for the plaintiff and to sue upon them in his name, and that the plaintiff subsequently assented to his name being used, and ratified the proceedings, then such ratification had relation back to the time when the securities were handed over by Wright to Tucker, and had the same effect as if the plaintiff had then stood by and given authority to sue in his name, in which case he would be entitled to recover. A verdict having been found for the plaintiff for £175, and interest.

Hawkins, in last Michaelmas Term, obtained a rule nisi for a new trial, on the grounds that there was no evidence to support (for the plaintiff) the issues on the above pleas; and that the learned judge misdirected the jury in holding that there was such evidence, and also in ruling that ratification after action brought was sufficient, and telling the jury that, if they believed the evidence for the plaintiff, he was entitled to recover.

Collier (with whom was *Macnamara*), showed cause.

The Court then called on

Hawkins and *Tindal Atkinson*, to support the rule.

Pollock, C. B. We are all of opinion that the rule ought to be discharged. There is no doubt that the plaintiff, at the time the action was brought, did not know that his name was used, but the question is whether. the securities having been delivered to Greville and Tucker (who on a previous occasion had the plaintiff's permission to use his name) for the purpose of the action being brought on them in the plaintiff's name, and the action having been so brought, and the plaintiff having subsequently ratified the proceedings, he is entitled to retain the verdict. I think he is. In my opinion it makes no difference whether the ratification is before action, or after.[1] . . . *Rule discharged.*[2]

KELNER *v.* BAXTER AND OTHERS.

Common Pleas. 1866.

[*L. R.* 2 *C. P.* 174.]

The declaration was for goods sold and delivered, goods bargained and sold, interest, and upon accounts stated.

The defendants pleaded, — first, never indebted, — secondly, payment, — thirdly, as to the claim for goods sold and delivered, and goods bargained and sold, that, by agreement in that behalf made by and between the plaintiff and the defendants on behalf of a joint stock company then proposed to be formed under the Joint Stock Companies Act, 1862, and to be called The Gravesend Royal Alexandra Hotel Company, Limited, the goods were sold to and bought and received by the defendants upon the terms that if the company, when registered, should adopt the said contract, and agree with the plaintiff to pay the agreed price of the said goods, the goods should become the property of the company, and the defendants should be exonerated and discharged from all further liability in respect thereof, and that such agreement of the company should be accepted by the plaintiff in full satisfaction and discharge of all such liability; that the company was registered by the name of The Gravesend Alexandra Hotel Company, Limited, and, when so registered, by agreement in that behalf made with the plaintiff, adopted the first-mentioned contract; and thereupon, and by and with the consent of the defendants, the goods became the property of the company, and the plaintiff and the company eventually agreed with each other to be bound by the first-mentioned contract, and the company agreed with the plaintiff to pay to the plaintiff the agreed price of the goods, and the plaintiff then before the action accepted the agreement so made with the company in full satisfaction and discharge of the claims therein pleaded to.

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[1] A passage not dealing with ratification has been omitted.

Channell, Wilde, and Martin, BB., delivered concurring opinions. — Ed.

[2] *Contra:* Wittenbrock *v.* Bellmer, 57 Cal. 12 (1880). — Ed.

Fourth plea, to the claim for goods sold and delivered, and goods bargained and sold, that, by agreement in that behalf made by and between the plaintiff and the defendants on behalf of a joint stock company then proposed to be formed under the Joint Stock Companies Act, 1862, and to be called The Gravesend Royal Alexandra Hotel Company, Limited, the said goods were sold to and bought and received by the defendants on behalf of the said intended company; that the said company was formed and registered under the said act by the name of The Gravesend Hotel Company, Limited; and that afterwards and before this suit, by agreement in that behalf made by and between the plaintiff, the defendants, and the said company, the goods were transferred to and became the property of the company, and the company agreed with the plaintiff to pay the price thereof, and the plaintiff accepted and received such agreement on the part of the company in full satisfaction and discharge of the claims therein pleaded to. Issue thereon.

At the trial before ERLE, C. J., at the sittings in London after last Trinity Term, the following facts appeared in evidence: The plaintiff was a wine merchant, and the proprietor of the Assembly Rooms at Gravesend. In August, 1865, it was proposed that a company should be formed for establishing a joint-stock hotel company at Gravesend, to be called The Gravesend Royal Alexandra Hotel Company, Limited, of which the following gentlemen were to be the directors, viz., Mr. L. Calisher, Mr. T. H. Edmands, Mr. M. Davis, Mr. Macdonald, Mr. Hulse, Mr. N. J. Calisher (one of the defendants), and the plaintiff. The plaintiff was to be the manager of the proposed company, and Mr. Dales (another of the defendants) was to be the permanent architect. One part of the scheme was that the company should purchase the premises of the plaintiff for a sum of £5,000, of which £3,000 was to be paid in cash, and £2,000 in paid up shares, the stock, etc., to be taken at a valuation; and this was carried into effect and completed, the other defendant (Baxter) being the nominal purchaser on behalf of the company. In December a prospectus was settled. On the 9th of January, 1866, a memorandum of association was executed by the plaintiff and the defendants and others.

Pending the negotiations the business had been carried on by the plaintiff, and for that purpose additional stock had been purchased by him; and on the 27th of January, 1866, an agreement was entered into for the transfer of this additional stock to the company, in the following terms: —

January 27th, 1866.

To John Dacier Baxter, Nathan Jacob Calisher, and John Dales, on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited.

GENTLEMEN, — I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of £900, payable on the 28th of February, 1866.

(Signed) JOHN KELNER.

Then followed a schedule of the stock of wines, etc., to be purchased, and at the end was written, as follows: —

To Mr. JOHN KELNER.

SIR, — We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed.

(Signed) J. D. BAXTER,
N. J. CALISHER,
J. DALES,
On behalf of the Gravesend Royal Alexandra
Hotel Company, Limited.

In pursuance of this agreement the goods in question were handed over to the company, and consumed by them in the business of the hotel; and on the 1st of February a meeting of the directors took place, at which the following resolution was passed: "That the arrangement entered into by Messrs. Calisher, Dales, and Baxter, on behalf of the company, for the purchase of the additional stock on the premises, as per list taken by Mr. Bright, the secretary, and pointed out by Mr. Kelner, amounting to £900, be, and the same is hereby ratified." There was also a subsequent ratification by the company, viz., on the 11th of April, but this was after the commencement of the action.

The articles of association of the company were duly stamped on the 13th of February, and on the 20th the company obtained a certificate of incorporation under the 25 & 26 Vict. c. 89.

The company having collapsed, the present action was brought against the defendants upon the agreement of the 27th of January.

On the part of the defendants oral evidence was tendered for the purpose of showing that it never was intended that they should be personally liable; but his lordship rejected it. It was then submitted that, inasmuch as the agreement was not entered into by the defendants personally, but only as agents for the hotel company, they thereby incurred no personal obligation to the plaintiff, who was himself one of the promoters.

For the plaintiff it was insisted that, there being no company in existence at the time of the agreement, the parties thereto had rendered themselves personally liable; and that there could be no ratification of the contract by a subsequently created company.

A verdict was taken for the plaintiff for £900, subject to leave reserved to the defendants (upon giving security) to move to enter a nonsuit, on the ground that the agreement of the 27th of January did not make them personally liable.

Nov. 6, 1866. *Seymour*, Q. C., obtained a rule *nisi* accordingly, and also for a new trial on the ground of misdirection on the part of the learned judge, "in not allowing witnesses to be called to contradict the plaintiff as to the defendants' personal liability."

Nov. 13, 14. *J. Brown*, Q. C., and *Thesiger*, showed cause.

Seymour, Q. C., in support of the rule.

Erle, C. J.[1] A difficulty has arisen because the plaintiff has at the head of the paper addressed it to the defendants, "on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited," and the defendants have repeated those words after their signatures to the document; and the question is, whether this constitutes any ambiguity on the face of the agreement, or prevents the defendants from being bound by it. I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed; but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made. The history of this company makes this construction to my mind perfectly clear. It was no doubt the notion of all the parties that success was certain; but the plaintiff parted with his stock upon the faith of the defendants' engagement that the price agreed on should be paid on the day named. It cannot be supposed that he for a moment contemplated that the payment was to be contingent on the formation of the company by the 28th of February. The paper expresses in terms a contract to buy. And it is a cardinal rule that no oral evidence shall be admitted to show an intention different from that which appears on the face of the writing. I come, therefore, to the conclusion that the defendants, having no principal who was bound originally, or who could become so by a subsequent ratification, were themselves bound, and that the oral evidence offered is not admissible to contradict the written contract.

Willes, J. I am of the same opinion. Evidence was clearly inadmissible to show that the parties contemplated that the liability on this contract should rest upon the company and not upon the persons contracting on behalf of the proposed company. The utmost it could amount to is, that both parties were satisfied at the time that all would go smoothly, and consequently that no liability would ensue to the defendants. The contract is, in substance, this: "I, the plaintiff, agree to sell to you, the defendants, on behalf of the Gravesend Royal Alexandra Hotel Company, my stock of wines;" and, "We, the defendants, have received your offer, and agree to and accept the terms proposed; and you shall be paid on the 28th of February next." Who is to pay? The company, if it should be formed. But, if the company should not be formed, who is to pay? That is tested by the fact of the immediate delivery of the subject of sale. If payment was not made by the company, it must, if by anybody, be by the defendants. That brings one to consider whether the company could be legally liable. I apprehend the company could only become liable upon a new contract. It would require the assent of the plaintiff to discharge the defendants. Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done, — by a person in existence either actually or in contemplation of law; as in the case of assignees of bankrupts and administrators, whose title, for the protection of the estate, vests by relation. The case of an executor requires no such ratification, inasmuch as he takes from the will. It is unnecessary, however, to pursue this further. In addition to the case cited at the bar, I would refer to Gunn *v.* London and Lancashire Fire Insurance Company, 12 C. B. N. S. 694, where this court, upon the authority of Payne *v.* New South Wales Coal and International Steam Navigation Company, 10 Ex. 283, held that a contract made between the projector and the directors of a joint-stock company provisionally registered, but not in terms made conditional on the completion of the company, was not binding upon the subsequent completely registered company, although ratified and confirmed by the deed of settlement: and Williams, J., said, that, "to make a contract valid, there must be parties existing at the time who are capable of contracting." That is an authority of extreme importance upon this point; and, if ever there could be a ratification, it was in that case. Both upon principle and upon authority, therefore, it seems to me that the company never could be liable upon this contract; and, as was put by my lord, construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable. Putting in the words "on behalf of the Gravesend Royal Alexandra Hotel Company," would operate no more than if a person should contract for a quantity of corn "on behalf of my horses." As to the suggestion that there should have been a special count, that is quite a mistake. There need not be a special count unless there was a person existing at the time the contract was made who might have been principal. The common count perfectly well represents the character of the liability which these defendants incurred. It is quite out of the question to suppose that there was any mistake. The document represents the real transaction between the parties. I think that the course taken at the trial was perfectly correct, and that the rule should be discharged.

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[1] After stating the case. — Ed.

Byles, J. I am of the same opinion. At first, I must confess, I entertained some doubt, the contract appearing on the face of it to have been entered into by the defendants on behalf of the company. The true rule, however, is that stated by Mr. Thesiger, viz., that persons who contract as agents are generally personally responsible where there is no other person who is responsible as principal. Suppose this company never came into existence at all, could it be doubted that these defendants must be held to have bound themselves personally? Then, was it contemplated that the liability was conditional only until the company should be formed? It is said that the contract was ratified by the company after it came into existence. There could, however, be no ratification. *Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur:* but the ratification must be by an existing person, on whose behalf the contract might have been made at the time. That could not be so here: a subsequent ratification by the company could only be with the assent of the plaintiff; and then it would be a new contract. Mr. Seymour contended that the contract might amount to a personal undertaking on the part of the defendants that the company shall pay. That would make them equally liable. Any objection on the score of the Statute of Frauds would be cured by the Mercantile Law Amendment Act 19 & 20 Vict. c. 97. In no way therefore, in which it can be put, could the company become responsible.[1] *Rule discharged.*[2]

GRANT *v.* BEARD ET AL.

Supreme Court of New Hampshire. 1870.

[50 *N. H.* 129.]

Assumpsit, to recover for repairs on two wagons. The plaintiff alleged that the defendants' father, who brought the wagons to be repaired, was their agent, and could and did bind them to pay for the repairs. Whether the father was the agent of the defendants, whether the defendants owned the wagons or received any benefit from the repairs, and whether the defendants subsequently assented to and ratified the contract, were questions in dispute on which the evidence was conflicting.

The plaintiff testified that the defendants' father told him that he was acting as agent for his two boys in the army (the defendants).

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[1] Keating, J., delivered a concurring opinion. — Ed.

[2] *Acc.*: Scott *v.* Lord Ebury, L. R. 2 C. P. 255 (1867); *In re* Empress Engineering Co., 16 Ch. D. 125 (C. A. 1881); *In re* Northumberland Avenue Hotel Co., 33 Ch. D. 16 (1886).

Contra: Whitney *v.* Wyman, 101 U. S. 392 (1879); Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430 (1894).

See Howard *v.* Patent Ivory Co., 38 Ch. D. 156, 164 (1888); McArthur *v.* Times Printing Co., 48 Minn. 319 (1892). — Ed.

The plaintiff further testified that he gave the credit to the defendants, though he charged the work on his book to the father, because he did not know the names of the defendants.

The plaintiff's evidence tended to show that the defendants, in their father's lifetime, some time after the repairs were made, said the plaintiff's bill was all right; that they paid part of it, and promised to pay the balance.

The jury were instructed, that if the father was the duly authorized agent of the defendants to make the contract and bind them, the defendants would be liable in this action.

The jury were also instructed that, in deciding whether the father was authorized by his sons (before the repairs were made) to make such a contract as their agent, the jury could consider the subsequent assent of the sons (if they found such assent) as evidence, from which, if the jury saw fit, they might find that the father was authorized to act as agent when he got the repairs done; and that, so far as this question of prior authority was concerned, the assent was evidence competent to be considered against the defendants, whether they owned the wagons or received any benefit from the repairs, or not.

Among other things the jury were further instructed that, if they found that the defendants did not authorize their father to make the contract as their agent, but afterwards assented to what he had done, their assent would not make them liable in this action unless they owned the wagons at the time they were repaired, or received some benefit from the repairs. To this last instruction the plaintiff excepted.

The plaintiff requested the following instruction: "If the jury find that the father procured the credit as the agent, either actual or assumed, of the defendants, and the credit was really given to them, then the subsequent ratification by the defendants will bind them, even though they may not have received the benefit of the credit."

The instruction was not given, and the plaintiff excepted. Verdict for the defendants.

Motion to set aside the verdict.

J. H. Benton, Jr., for the plaintiff.

Fletcher & Heywood, for the defendants.

FOSTER, J. The ratification, upon full knowledge of all the circumstances of the case, of an act done by one who assumes to be an agent, is equivalent to a prior authority. By such ratification the party will be bound as fully, to all intents and purposes, as if he had originally given express authority or direction concerning the act.

A parol contract may be ratified by an express parol recognition of the act, or by conduct implying acquiescence, or by silence when the party, in good faith, ought to speak. And so the principal may be estopped to deny the agent's original authority. Story on Agency, § 239; Metcalf on Contracts, 112; Hatch *v.* Taylor, 10 N. H. 538; Despatch Line *v.* Bellamy Manf. Co., 12 N. H. 232; Davis *v.* School District, 44 N. H. 399; Warren *v.* Wentworth, 45 N. H. 564; Forsyth *v.* Day, 46 Me. 194; Ohio & Mississippi R. Co. *v.* Middleton, 20 Ill. 629.

Such ratification relates back to and incorporates the original contract or transaction, so that, as between the parties, their rights and interests are to be considered as arising at the time of the original act, and not merely from the date of the ratification; and a suit to enforce the obligation assumed by the party who ratifies is, to all intents and purposes, a suit founded upon the original act or contract, and not on the act of ratification. Davis *v.* School District, before cited; Low *v.* Railroad, 46 N. H. 284; Doggett *v.* Emerson, 3 Story, 737; Mason *v.* Crosby, 1 Woodb. & M. 342; Clark's Executors *v.* Van Riemsdyk, 9 Cr. 153; Culver *v.* Ashley, 19 Pick. 301; Forsyth *v.* Day, before cited.

Therefore the original consideration applies to the ratification, thus made equivalent to an original contract, and supports the implied promise upon which the present action is founded.

The ratification operates directly, and not merely as presumptive evidence that the act was originally done by the authority of the defendants; and therefore it is unnecessary to consider whether or not the evidence tends to show an original authority. The subsequent assent is, *per se*, a confirmation of the agent's act; and there is no valid distinction between a ratification of the agent's act and a direct and original promise to pay for the services rendered by the plaintiff. Wherever there would have been a consideration for the original engagement if no agent or party assuming to act as agent had intervened, such original consideration is sufficient to sustain the act of ratification.

In none of the cases cited is the subject of a new consideration, to support the ratification, alluded to as necessary; but the logical deduction from the principle that the ratification relates back to and covers the original agreement, is wholly inconsistent with such a proposition; and the contrary doctrine is expressly held in numerous cases. Commercial Bank of Buffalo *v.* Warren, 15 N. Y. Rep. 583, and cases cited.

There was abundant evidence, in the present case, from which the jury might have found that the defendants owned the wagons and received a positive benefit from the repairs; but such evidence and such finding were wholly unnecessary, because it is not material that the party making the promise should receive a benefit from the other party's act; it is sufficient if any trouble, prejudice, expense, or inconvenience accrued to the party to whom the promise is made. Metcalf on Contracts, 163; 1 Parsons on Contracts, 431.

We are therefore of the opinion that the instruction of the court to the jury "that if they found that the defendants did not authorize their father to make the contract as their agent, but afterwards assented to what he had done, their assent would not make them liable unless they owned the wagons at the time they were repaired, or received some benefit from the repairs," was erroneous; and for this reason the verdict must be set aside, and a

New trial granted.

BROOK *v.* HOOK.

EXCHEQUER. 1871.

[*L. R.* 6 Ex. 89.]

DECLARATION on a promissory note. Plea: traversing the making of the note. Issue.

At the trial before MARTIN, B., at the Bristol Summer Assizes, 1870, the following facts were proved: In July, 1868, Richard Jones, a brother-in-law of the defendant, applied to the plaintiff for a loan of £50. The plaintiff declined to lend the money unless a substantial name was given as security. Jones said that he thought the defendant would join him in a note, and one was soon afterwards given to the plaintiff, purporting to be signed by Jones and the defendant, which was renewed and eventually partly paid off by Jones. On the 7th of November, 1869, there was a balance of £20 remaining due, and on that day the plaintiff received by post from Jones the note now sued on, which was in these terms: —

Yatton, Nov. 7, 1869. Three months after date we jointly and severally promise to pay Mr. Brook, or his order, the sum of £28 for value received.

RICHARD HOOK.
RICHARD JONES.

On the 17th of December, 1869, whilst the note was still current, the plaintiff saw the defendant, who denied his signature. The plaintiff then said that it must be a forgery by Jones, and that he would consult a lawyer as to taking criminal proceedings against him. The defendant replied that he would rather pay the money than that Jones should be prosecuted, and, subsequently, at the plaintiff's instance, signed the following memorandum, at the same time again denying that he had ever signed, or given Jones authority to sign, the note: —

Memorandum; that I hold myself responsible for a bill, dated Nov. 7th, 1869, for twenty pounds, bearing my signature and Richard Jones', in favor of Mr. Brook. Huntspill, Dec. 17th, 1869.

RICHARD HOOK.

It was not disputed that the signature to the note was forged, or that the defendant had, in fact, signed this memorandum. The learned judge directed the jury that the plaintiff was entitled to the verdict, if the defendant had signed the memorandum, the construction of the document being, in his judgment, a question for him, and his opinion being that it amounted to a ratification of the contract professedly made in the defendant's name on the face of the note. A verdict was accordingly entered for the plaintiff. In Michaelmas Term, 1870, a rule was obtained by the defendant, calling on the plaintiff to show why there should not be a new trial, on the ground that the verdict was against the evidence, and for misdirection in this, that the learned judge directed the jury that the only question for them was, whether the memorandum of the 17th of December was signed by the defendant.

Kingdon, Q. C., *Collins*, and *R. D. Bennett* showed cause.[1]

Lopes, Q. C., and *Poole*, in support of the rule.[2]

Cur. adv. vult.

KELLY, C. B.[3] Upon this evidence it has been contended on behalf of the plaintiff that this paper was a ratification of the making of the note by the defendant, and, upon the principle *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, the jury were directed to find that the note was the note of the defendant, and that the plaintiff was entitled to the verdict.

I am of opinion that this verdict cannot be sustained, and that the learned judge should have directed a verdict for the defendant; or at least, have left a question to the jury as to the real meaning and effect of the memorandum and the conversation taken together; and this, first, upon the ground that this was no ratification at all, but an agreement upon the part of the defendant to treat the note as his own, and become liable upon it, in consideration that the plaintiff would forbear to prosecute his brother-in-law Jones; and that this agreement is against public policy and void, as founded upon an illegal consideration. Secondly, the paper in question is no ratification, inasmuch as the act done — that is, the signature to the note — is illegal and void; and that although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void.

Many cases were cited to show that where one sued upon a bill or note has declared or admitted that the signature is his own, and has thereby altered the condition of the holder to whom the declaration or admission has been made, he is estopped from denying his signature upon an issue joined in an action upon the instrument. But here there was no such declaration and no such admission; on the contrary, the defendant distinctly declared and protested that his alleged signature was a forgery; and although in the paper signed by the defendant he describes the bill as bearing his own signature and Jones', I am of opinion that the true effect of the paper, taken together with the previous conversation, is, that the defendant declares to the plaintiff: "If you will forbear to prosecute Jones for the forgery of my signature, I admit and will be bound by the admission, that the signature is mine." This, therefore, was not a statement by the defendant that the signature was his, and which, being believed by the plaintiff, induced him to take the note, or in any way alter his condition; but, on the contrary, it amounted to the corrupt and illegal contract before mentioned, and worked no estoppel precluding the defendant from showing the truth, which was that the signature was a forgery, and that the note was not his note.

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[1] In the course of this argument, KELLY, C. B., said: "The defendant could not ratify an act which did not profess to be done for him or on his account." — ED.

[2] In the course of this argument, CHANNELL, B., said: "The doctrine of estoppel is quite distinct from that of ratification, and is based on different premises." — ED.

[3] After stating the case. — ED.

In all the cases cited for the plaintiff the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here, if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced the plaintiff to take it. In that case, although there had been no previous authority, it would have been competent to the defendant to ratify the act, and the maxim before mentioned would have applied. But here Jones had forged the name of the defendant to the note, and pretended that the signature was the defendant's signature; and there is no instance to be found in the books of such an act being held to have been ratified by a subsequent recognition or statement. Again, in the cases cited, the act done, though unauthorized at the time, was a civil act, and capable of being made good by a subsequent recognition or declaration; but no authority is to be found that an act which is itself a criminal offence is capable of ratification. The decision at *nisi prius* of Mr. Justice Crompton referred to in argument is inapplicable, it being uncertain whether the plaintiff in that case knew that the alleged signature of the defendant was forged, and there being no illegal contract in that case to forbear to prosecute. The same observation may be made upon the case from Ireland cited upon the authority of Mr. Justice Burton. I am therefore of opinion that the rule must be made absolute for a new trial, and that upon this evidence the jury ought to have been directed to find a verdict for the defendant, or at all events (which is enough for the purpose of this rule) that if any question should have been left to the jury it ought to have been whether the paper and the conversation taken together did not amount to the illegal agreement above mentioned. My Brothers CHANNELL and PIGOTT concur in this judgment.[1] *Rule absolute.*[2]

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[1] The two decisions mentioned in the above opinion are a *nisi prius* case stated in Ashpitel *v.* Bryan, 3 B. & S. 474, 492–493 (1863); and a case in the Queen's Bench of Ireland, Wilkinson *v.* Stoney, 1 Jebb & S. 509 (1839).

MARTIN, B., delivered a dissenting opinion. — ED.

[2] *Acc.*: Workman *v.* Wright, 33 Ohio St. 405 (1878); Shisler *v.* Vandike, 92 Pa. 447 (1880).

Contra: Greenfield Bank *v.* Crafts, 4 Allen, 447 (1862), where DEWEY, J., for the court, said: —

"But it is now urged on the part of the defendants, that these signatures were incapable of such adoption or ratification.

"As to this objection, it is clear that it cannot be maintained upon the ground of the form of the signatures merely. This form of signature, though not the more usual manner of signing by an agent, does not prevent the person whose name is placed on the note from being legally holden, upon proof that the signature was previously authorized, or subsequently adopted. Various similar cases will be found, where the party has been charged, where the name of the principal appears upon the note accompanied with no indications of the fact of its having been signed by another hand. It was so in Watkins *v.* Vince, 2 Stark. R. 368, in Merrifield *v.* Parritt, 11 Cush. 591, and Brigham *v.* Peters, 1 Gray, 147. Wherever such signature by the hand of another was duly authorized, and also where a note was thus executed under an honest belief by the party signing the name that he was thus authorized, we apprehend that there can be no doubt that it would be competent, in the case first stated, to maintain an action upon the same, upon proof of the previous authority thus to sign the name, or, in the latter, upon proving that the signature, although at the time unauthorized, was subsequently adopted and ratified by the party whose name appears as promisor. Nor is it necessary, to establish a ratification, that there has been any previous agency created. An act wholly unauthorized may be made valid by a subsequent ratification. This may be so, although the actor was an entire stranger as to any business relations. Culver *v.* Ashley, 19 Pick. 301.

"The only question upon this part of the case is, whether a signature, made by an unauthorized person under such circumstances as show that the party placing the name on the note was thereby committing the crime of forgery, can be adopted and ratified by any acts and admissions of the party whose name appears on the note, however full, and intentionally made and designed to signify an adoption of the signature. The defendants insist that it cannot, by such evidence as would in other cases warrant the jury in finding an adoption ; and that nothing short of an estoppel, having the element of actual damage from delay or postponement, occasioned by the acts of the person whose name is borne upon the note, misleading the holder of it, will have this effect. As to the person himself whose name is so signed, it is difficult to perceive any sound reason for the proposed distinction, as to the effects of ratifying an unauthorized act, in the two supposed cases.

"In the first case, the actor has no authority any more than in the last. The contract receives its whole validity from the ratification. It may be ratified, where there was no pretence of agency. In the other case, the individual who presents the note thus signed passes the same as a note signed by the promisor, either by his own proper hand, or written by some one by his authority. It was clearly competent, if duly authorized, thus to sign the note. It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act. We are supposing the case of a party acting with full knowledge of the manner the note was signed, and the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopts the signature, and assumes the note as his own. It is difficult to perceive why such adoption should not bind the party whose name is placed on the note as promisor, as effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent, as indicated by the form of the signature, but who in fact had no authority.

"It is however urged that public policy forbids sanctioning a ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offence. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offence." — ED.

STRASSER *v.* CONKLIN.

SUPREME COURT OF WISCONSIN. 1882.

[54 *Wis.* 102.]

APPEAL from the Circuit Court for Outagamie County.

The facts in this case are substantially as follows: One Fisher sold and conveyed to one Craney two lots in the village of Seymour, on which was a hotel. Craney gave Fisher his promissory notes (presumably for purchase money) for $2,300, and executed to Fisher a mortgage on the lots to secure payment thereof. These securities are dated February 26, 1876. At the same time Fisher assigned to Craney two policies of insurance for $13,000 each, on the personal property in such hotel; and the policies, in case of loss, were made payable to Fisher as his interest might appear. March 13, 1876, Fisher sold and transferred the notes and mortgage of Craney to the plaintiff. April 1, 1876, Craney and wife conveyed the mortgaged premises to the defendant. The consideration expressed in the deed is $4,000. It contains the covenants usual in a warranty deed, with the following limitation or exception to the covenants of seizin and against incumbrances: "Except a mortgage thereon for the sum of $2,300, dated February 26, 1876." At the same time Craney assigned to the defendant both of said policies of insurance. About June 1st one of the policies expired, and the defendant procured its renewal. Without the direction of the defendant, the renewed policy also provided that the loss, if any, should be payable to Fisher as his interest might appear. The defendant paid Craney $1,700 on account of the purchase money, and it does not appear that he gave any note or written acknowledgment for the residue thereof. Soon after the transactions above stated, the hotel building and some or all of the insured property was destroyed by fire. The loss was afterwards adjusted between the defendant and the insurers at $795.27, and drafts for that amount, payable to the defendant and Fisher, were forwarded to the agent of the insurance companies at Appleton. Fisher had ceased to have any interest in the insurance money, but plaintiff claimed the money by virtue of the assignment to him of the Craney mortgage. The defendant claimed that the money belonged to him absolutely, and refused to assign the policies to the plaintiff upon request of the latter. July 3, 1876, the plaintiff gave one Herman Erb, of Appleton, a power of attorney authorizing him to collect and receive the money on said policies. Erb thereupon assumed to act as the agent of the plaintiff in respect to his whole business with the defendant, and entered into an agreement with the latter on behalf of the plaintiff, to the effect that the plaintiff should receive from the insurance agent $653.27 of the insurance money, and from the defendant a conveyance of the mortgaged premises in full payment and satisfaction of his claim against the defendant on the Craney mortgage. The plaintiff was soon after fully informed of what Erb had done in his behalf, and the terms of the settlement negotiated by him with the defendant. Having such information, the plaintiff received the above amount of insurance money from Erb, but, at the same time, denied his authority to make the settlement, and refused to accept the conveyance of the mortgaged premises which the defendant had duly executed and left with Erb. The plaintiff has not offered to return such insurance money to the defendant, but has applied it upon the Craney mortgage. This action was brought to recover the balance of the mortgage debt of $2,300, after deducting therefrom the insurance money received by the plaintiff. It is alleged in the complaint, and the testimony tends to prove, not only that the defendant purchased the mortgaged premises subject to the Craney mortgage, and that the amount of the mortgage debt was deducted from the price agreed to be paid for the premises, but also that he expressly agreed with Craney, by parol, to pay such debt. On the other hand, the defendant denies in his answer and in his testimony that he made any such agreement. He also alleges the settlement with Erb, the payment to the plaintiff of the insurance money, and the execution of the conveyance of the mortgaged premises to him, as an accord and satisfaction of the cause of action stated in the complaint. On the foregoing facts, which appear from the pleadings and proofs, the court directed the jury to find for the defendant, and they did so. The plaintiff appealed from the judgment entered pursuant to the verdict.

Barnes & Goodland, for the appellant.

Collins & Pierce, for the respondent.

LYON, J.[1] No rule of law is more firmly established than the rule that if one, with full knowledge of the facts, accepts the avails of an unauthorized treaty made in his behalf by another, he thereby ratifies such treaty, and is bound by its terms and stipulations as fully as he would be had he negotiated it himself. Also, a ratification of part of an unauthorized transaction of an agent is a confirmation of the whole. If authorities are desired to propositions so plain as these, they abound in the decisions of this court, many of which are cited in the briefs of counsel. Under the above rules it is entirely immaterial whether Erb was or was not authorized to make the settlement with the defendant. If not authorized, the plaintiff, by receiving the money with full knowledge of the terms of settlement, ratified and confirmed what he did, and cannot now be heard to allege his agent's want of authority.

It will not do to say that the plaintiff was entitled to the money he received, and might receive and retain it as his own without regard to the settlement. That was the very point of the controversy between the parties. Manifestly each claimed the money in good faith, and we cannot determine from the record before us which was entitled to it; and it is immaterial whether one or the other was so entitled, there being a real controversy between them on that question. It was therefore a very proper case for negotiation and compromise between them; and under the circumstances they must both be held bound by the settlement. The evidence of ratification is conclusive, and there was nothing for the jury to determine in that behalf. Hence, the court properly directed the jury to find for the defendant.

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[1] After stating the case. —ED.

The foregoing views dispose of the case, and render it unnecessary to determine the question, which was very ably argued by counsel, whether a parol agreement by the defendant to pay the mortgage debt (if he so agreed) is within the statute of frauds, and therefore invalid. We leave that question undetermined.

By the court. — The judgment of the circuit court is affirmed.[1]

DEMPSEY *v.* CHAMBERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[154 *Mass.* 330.]

TORT. Trial in the Superior Court, before THOMPSON, J., who allowed the following bill of exceptions: —

"This was an action to recover for an injury to the plaintiff's building, the injury consisting in the breaking of a light of plate glass in the front of said building. The plaintiff claimed that the glass was broken by the carelessness of the defendant's servant. It appeared at the trial, that the glass was broken by one McCullock, while he was engaged in delivering a load of coal to the plaintiff, which had been ordered by the plaintiff of the defendant, who was a dealer in coal. The defendant claimed, and offered evidence tending to show, that at the time of the delivery of the coal McCullock was not his servant or in his employ, and undertook to deliver the coal without his direction or knowledge. It appeared that McCullock was a member of the defendant's household, accustomed to be in and about the defendant's coal-yard, and that he took the coal from the defendant's yard and on one of the defendant's wagons. It also appeared at the trial, that, subsequent to the delivery of the coal and with a full knowledge of the accident and of the delivery of the coal by McCullock, the defendant presented a bill for the coal to the plaintiff, and claimed that the plaintiff owed him for the same. The court found as a fact that the glass was broken by the carelessness of McCullock in delivering the coal, and that at the time of the delivery of the coal McCullock was not in fact the agent or servant of the defendant, or in his employ, but found that the delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal. And the court ruled that the defendant, by his ratification of the delivery of the coal by McCullock, became responsible for his negligence in the delivery of the coal. To this ruling the defendant excepted, and now excepts, and prays that his exceptions may be allowed.

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[1] See also Jones *v.* National Building Association, 94 Pa. 215 (1880); Beidman *v.* Goodell, 56 Iowa, 592 (1881). — ED.

"The case was tried by the court without a jury, and the finding of the court was for the plaintiff."

The case was submitted on briefs in November, 1890, and afterwards, in September, 1891, was submitted on the same briefs to all the judges except FIELD, C. J.

W. S. Knox, for the defendant.

J. P. Sweeney and *H. R. Dow*, for the plaintiff.

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore, the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "fained to be all one person" by a fiction which is an echo of the *patria potestas* and of the English frankpledge. Byington *v.* Simpson, 134 Mass. 169, 170; Fitz. Abr. Corone, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381, 382; Fuller & Trimwell's Case, 2 Leon. 215, 216; Sext. Dec. 5. 12, De Reg. Jur., Reg. 9; D. 43. 26. 13; D. 43. 16. 1, § 14, gloss. See also cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. Y. B. 30 Ed. I. 1, 128 (Rolls ed.); 38 Lib. Ass. 223, pl. 9; s. c. 38 Ed. III. 18, Engettement de Garde. See Plowd. 8 *ad fin.*, 27, 31; Bract. fol. 158 b, 159 a, 171 b; 12 Ed. IV. 9, pl. 23. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might justify it also. Y. B. 7 Hen. IV. 34, pl. 1. This decision is qualified in Fitz. Abr. Bayllye, pl. 4, and doubted in Bro. Abr. Trespass, pl. 86; but it has been followed or approved so continuously, and in so many later cases, that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. Godbolt, 109, 110, pl. 129; s. c. 2 Leon. 196, pl. 246; Hull *v.* Pickersgill, 1 Brod. & Bing. 282; Muskett *v.* Drummond, 10 B. & C. 153, 157; Buron *v.* Denman, 2 Exch. 167, 188; Secretary of State in Council of India *v.* Kamachee Boye Sahaba, 13 Moore, P. C. 22, 86; Cheetham *v.* Mayor of Manchester, L. R. 10 C. P. 249; Wiggins *v.* United States, 3 Ct. of Cl. 412.

If we assume that an alleged principal by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the earlier cases (D. 46. 3. 12, § 4; D. 43. 16. 1, § 14; Y. B. 30 Ed. I., 128) has been changed to the dogma *æquiparatur* ever since the days of Lord Coke. 4 Inst. 317. See Bro. Abr. Trespass, pl. 113; Co. Lit. 207 a; Wingate's Maxims, 124; Com. Dig. Trespass, C. 1; Eastern Counties Railway *v.* Broom, 6 Exch. 314, 326, 327; and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to the case of a bare personal tort. Adams *v.* Freeman, 9 Johns. 117, 118. Anderson and Warberton, JJ., in Bishop *v.* Montague, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that, if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5. 11. 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit. Wilson *v.* Barker, 1 Nev. & Man. 409; s. c. 4 B. & Ad. 614 *et seq.*; Smith *v.* Lozo, 42 Mich. 6. As in other cases it has been on the ground that they did not amount to such a ratification as was necessary. Tucker *v.* Jerris, 75 Maine, 184; Hyde *v.* Cooper, 26 Vt. 552.

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present when the ratification is established. Perley *v.* Georgetown, 7 Gray, 464; Bishop *v.* Montague, Cro. Eliz. 824; Sanderson *v.* Baker, 2 Bl. 832; s. c. 3 Wils. 309; Barker *v.* Braham, 2 Bl. 866, 868; s. c. 3 Wils. 368; Badkin *v.* Powell, Cowper, 476, 479; Wilson *v.* Tumman, 6 Man. & G. 236, 242; Lewis *v.* Read, 13 M. & W. 834; Buron *v.* Denman, 2 Exch. 167, 188; Bird *v.* Brown, 4 Exch. 786, 799; Eastern Counties Railway *v.* Broom, 6 Exch. 314, 326, 327; Roe *v.* Birkenhead, Lancashire & Cheshire Junction Railway, 7 Exch. 36, 41; Ancona *v.* Marks, 7 H. & N. 686, 695; Condit *v.* Baldwin, 21 N. Y. 219, 225; Exum *v.* Brister, 35 Miss. 391; Galveston, Harrisburg & San Antonio Railway *v.* Donahoe, 56 Texas, 162; Murray *v.* Lovejoy, 2 Cliff. 191, 195; see Lovejoy *v.* Murray, 3 Wall. 1, 9; Story on Agency, §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions, McCullock took on himself to deliver the defendant's coal for his benefit and as his servant, and the defendant afterwards assented to McCullock's assumption. The ratification was not directed specifically to McCullock's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCullock's employment that the defendant would have been liable as master if McCullock really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See Coomes *v.* Houghton, 102 Mass. 211, 213, 214; Cooley, Torts, 128, 129. The ratification goes to the relation, and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In Gibson's Case, Lane, 90, it was agreed that, if strangers as servants to Gibson, but without his precedent appointment, had seized goods by color of his office and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the misusing which made him so. And this proposition is stated as law in Com. Dig. Trespass, C. 1. Elder *v.* Bemis, 2 Met. 599, 605. In Coomes *v.* Houghton, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

SECTION III

The Possibility of Ratification as affected by the Rights of Persons other than the Quasi-Principal.

RIGHT, d. FISHER, NASH, AND HYRONS, v. CUTHELL.

King's Bench. 1804.

[5 *East*, 491.]

This was an ejectment to recover possession of twelve certain messuages and the appurtenances in the parish of St. Botolph, Aldgate, in the county of Middlesex. The first count was on the demise of Fisher, Nash, and Hyrons; the second on the demise of Fisher and Nash only, which latter it was admitted could not be supported. The premises consisted of houses, formerly the property of one Moses Adams, and by him demised by a lease dated 20th of October, 1789, to one William Cuthell (since deceased, whose representative the defendant is), for a term of twenty-one years, commencing from Michaelmas then last past. In which lease was contained a proviso that in case either landlord or tenant, or their respective heirs, executors, etc., should be desirous at the expiration of the first seven or fourteen years of the term to determine the lease, and should give six months' previous "notice in writing under his or their respective hand or hands to or for the other or others, or for the heirs, executors, etc., of the other or others of them, then the term should cease." Adams afterwards died, having made his will, wherein he appointed Fisher, Nash, and Hyrons his executors,[1] who proved the will. Six months previous to the expiration of the first fourteen years (Hyrons, one of the executors, being at that time abroad), Fisher and Nash by a notice in writing dated 23d of March, 1803, reciting the indenture of lease of the premises to W. Cuthell for twenty-one years, and the proviso above mentioned; and reciting further that Moses Adams had in his lifetime made his will and appointed Fisher, Nash, and Hyrons his executors, and that they had proved the will and taken on themselves the execution thereof, and were still executors of the same, proceeded thus: "Now the said W. Fisher and S. Nash do on the part and behalf of themselves and the said J. Hyrons hereby give you (the defendant) notice that they are desirous and do intend at the expiration of the first fourteen years of the said term of twenty-one years to determine the said lease. And they do further for themselves and the said J. Hyrons require and demand of you the possession of all the premises at the expiration of the first fourteen years, etc., and give you notice to quit and deliver up the possession thereof at that time accordingly." Signed, "W. Fisher and S. Nash." At the trial of this case before Lord ELLENBOROUGH, C. J., at the last Westminster Sittings, the plaintiff proved his case by producing the original lease, with the proviso; the death of Adams; his will, whereby the lessors of the plaintiff were appointed his executors; the possession of the defendant under W. Cuthell, deceased; and the above-mentioned written notice to quit, signed by two only of the executors, the other being abroad; but no authority was proved from the latter to the other two, to enable them on his behalf to determine the lease, further than as it might be presumed by law from the circumstances of the notice itself, and the ejectment having been brought in the name of the three. It was objected, however, by the defendant's counsel that no such presumption could be made, and that as the executors were joint-tenants under the will, the two could not bind the third by such an act as this, without his concurrent assent at the time, and that no subsequent ratification of the third, even if such appeared (which was denied), would be sufficient to bind the defendant. His Lordship being of this opinion nonsuited the plaintiff. It was moved on a former day in this term to set aside the nonsuit, on the ground that the notice itself, purporting to be given by the authority of all three of the executors, must be taken to have been so until the contrary were proved. That it need not have been signed by either of them; for if delivered by a common agent or steward, as by their authority, it would have been sufficient, without proving specifically his warrant from each of them individually. But that if there were any doubt of the authority, the act of the two was recognized by the third, in his permitting the ejectment to be brought in his name without any complaint made on his behalf to the court, that his name had been used without his assent.

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[1] It was admitted that the messuages were freehold, and that the executors who had a power to sell took as joint-tenants in fee. — Rep.

Gibbs and *Espinasse* now showed cause.

Erskine and *Marryat*, in support of the rule.

Lord ELLENBOROUGH, C. J. This was a notice to quit given to the tenant under a proviso in a lease for twenty-one years, that in case either party wished to put an end to the term at the expiration of the first seven or fourteen years, six months' previous notice in writing should be given under his or their respective hands. Now this is a notice signed by two only of three joint-tenants, under whom the defendant held, purporting however to be given on behalf of themselves and the other. It is a notice to defeat an estate; the person therefore to whom it is given ought to be assured at the time he receives it, and when he is to act upon it, that if he deliver up possession at the end of the six months, he will be acquitted of all further claims in respect of the remainder of the term. But if two only of the three joined in the notice, how could the defendant be assured of this? How could he be assured that the third might not disavow the notice afterwards, and claim the defendant still as a tenant to him? But it is said, that Hyrons suffering the ejectment to be brought in his name is a ratification of the others' authority. But a ratification given afterwards will not do in this case; because the tenant was entitled to such a notice as he could act upon with certainty at the time it was given; and he was not bound to submit himself to the hazard whether the third co-executor chose to ratify the act of his companions or not, before the six months elapsed. Then the rule of law is relied on to show that the two joint-tenants who signed the notice had authority to bind the other in this case; and it is asked how the act appears to be prejudicial to the third? But it is not necessary for the defendant to show that it would be prejudicial to Hyrons. The rule of law is, that every act of one joint-tenant which is for the benefit of his co-joint-tenant shall bind him. And it is a condition on the part of those who set it up and would avail themselves of it as binding, to show that it was beneficial to Hyrons. For the two joint-tenants had no right to bind the third in his absence, unless the act done appear to have been for the benefit of all; and how does that appear? Subsequent acts cannot be brought in aid. It must be done under a competent authority at the time. And in order to satisfy the condition on which the lease was to be defeated, the notice ought to have been given under the respective hands of the three executors.

Grose, J. The tenant who took the entire lease of the whole was not bound to accept notice to quit a part only, but such notice only as was obligatory upon all the joint-tenants. Here there was a proviso in the lease, that in case either party wished to put an end to it at the expiration of the first seven or fourteen years, it should be lawful so to do upon giving the other six months' previous notice in writing under his or their respective hands. That was not done in this instance; for the notice was only signed by two out of three of the persons interested, and therefore the tenant was not bound by it.

Lawrence, J. I think there is great weight in the argument of the defendant's counsel, that for the notice to be good it ought to be binding on all the parties concerned at the time when it was given, and not to depend for its validity, in part, upon any subsequent recognition of one of them; because the tenant is to act upon the notice at the time, and therefore it should be such as he may act upon with security. But if it be to depend upon a subsequent ratification of one of the joint-tenants, landlords, whether or not it is to be binding upon him, the condition and situation of the tenant must remain doubtful till the time of such ratification. Now the intention of the parties to the lease was, that the tenant should not be obliged to quit without being apprised of it for a certain time, that he might have an opportunity to provide himself with another dwelling; but if a ratification will do, instead of six months, he might not know certainly for as many days or hours whether he must quit or not. The rule of law, that *omnis ratihabitio retro trahitur*, etc., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the mean time depend on whether there be a subsequent ratification. But here the intermediate acts of the tenant referable to the terms of his lease are to be affected by relation.

LE BLANC, J. I cannot satisfy myself that the nonsuit was wrong. Here is a power of determining a lease by the notice to quit of three persons; and two only give the notice: then I must be satisfied that they had authority to bind the third, before I can say that their notice was good. And when I see that by the terms of the proviso the notice is to be given under their respective hands, I cannot say that a notice under the hands of two only is good. Besides, the tenant is to act upon this notice at the time, and he must be satisfied that it is such a notice as will bind all the three. No evidence was offered to show that the two acted by the authority of the third; and if the defendant had yielded to it, and could not have proved the concurrence of Hyrons to it, the latter might afterwards have disavowed the act of his co-joint-tenants, and have come upon the defendant for his rent.

Rule discharged[1]

HAGEDORN *v.* OLIVERSON.

KING'S BENCH. 1814.

[2 *M. & S.* 485.]

ASSUMPSIT on a policy of assurance tried before Lord ELLENBOROUGH, C. J., at the London sittings after Michaelmas Term, when a verdict was found for the plaintiff for £200, the amount of the defendant's subscription, subject to the opinion of the court on the following case:

The policy was effected by the plaintiff[2] on or about the 2d of August, 1810, as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain, etc., in the usual form, upon the ship "Fiesco," valued at £2,300 at and from Gluckstadt, and any port and ports in the river Elbe, to any port or ports in the United Kingdom, with liberty to carry simulated papers, etc., sail under any flag, etc. The declaration averred the interest to be in F. S. Schroeder, and a loss by capture. At the time of effecting the policy Schroeder was and is a subject of the King of Denmark, then and now at war with Great Britain. In order to legalize the voyage the plaintiff had procured a license, which was granted to him, by the name of J. P. H. Hagedorn of London, on behalf of himself or other British or neutral merchants, permitting a vessel bearing any flag except the French to proceed with a cargo from within certain specified limits, within which Gluckstadt was, to any port of this kingdom north of Dover, etc. The ship was loaded at Gluckstadt in July, 1810, with a cargo on British and neutral account, and sailed from thence under Danish colors for London on the 26th of that month, and was captured by enemies, carried into a port of Holland, and condemned. The policy was effected for the benefit of Schroeder, but no letter or order was proved from Schroeder before the loss, but a letter from him to the plaintiff, dated the 26th of July, 1812, before the commencement of this action, was produced, wherein he adopted the insurance in the following terms: —

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[1] *Acc.*: Pickard *v.* Perley, 45 N. H. 188 (1864).

See Doe d. Mann *v.* Walters, 10 B. & C. 626 (1830).

Compare Chapman *v.* Keane, 3 Ad. & E. 193 (1835). — ED.

[2] It was stated upon the argument, and so taken, that the plaintiff gave the order to the broker to effect the insurance. — REP.

"I may now, I hope, expect that you have effected a final settlement with the underwriters per Fiesco, and request you to lay out the amount for me in coffee."

No other evidence was given of the connection of Schroeder with this policy. The question for the opinion of the court is whether the plaintiff is entitled to recover; if the court shall be of that opinion, the verdict is to stand; if not, a nonsuit is to be entered.

Taddy, for the plaintiff.

Scarlett, contra.

Taddy, in reply.[1]

Lord ELLENBOROUGH, C. J. The difficulty in this case arises from the situation of Schroeder, because he might, by refusing to adopt the policy in case the ship had arrived, have got clear of the premium, for if the plaintiff had brought an action against him to recover it, I do not see how he could have succeeded. That constitutes something of an anomaly, because in one event, namely, that of a loss, he might secure himself, and nevertheless might have avoided the payment of the premium, in the other event of the ship's arrival, by declaring that he chose to stand his own insurer. But I do not think that consideration governs the case now before us between this plaintiff and the underwriter. The plaintiff had a right to effect an insurance, on the chance of its being adopted, for the benefit of all those to whom it might appertain, which are the words of the policy. He might insure for those who were actually interested, and possibly for those who might be interested. Schroeder was interested, and might become privy to the benefit of this insurance by subsequent adoption, according to Lucena *v.* Craufurd and Routh *v.* Thompson. He has adopted it, and now it is made a question, whether he can become privy to the benefit of it. It appears to me upon those authorities that he may, and may make use of the name of the person at the head of the policy, as the person who had given the order to effect the insurance, which will satisfy the stat. 28 G. III. c. 56. It seems to me, therefore, that this action is maintainable for the benefit of Schroeder, who was interested at the time, and has become privy by adoption.

LE BLANC, J. The difficulty thrown in the way of the plaintiff has been this, that if Schroeder, in the event of the ship's arrival, had chosen to repudiate instead of adopt the contract, he might have done so, and there would have been no means of coming upon him for the premium. But this policy was effected for the benefit of all persons interested, and Schroeder was a person interested; and I take it, after the ship sailed on the voyage insured, the plaintiff was bound by the insurance, and could not have recovered back the premium from the underwriter, by averring that this was a policy without interest; the answer would have been, Schroeder is interested, and he may elect to adopt the insurance. I therefore conceive the underwriter would have had a right to retain the premium. Then Routh *v.* Thompson is, I think, an authority to show that Schroeder being interested might subsequently adopt the insurance made by the plaintiff. There the Crown adopted it after a loss; and the distinction taken in that case, that the party making the insurance was appointed by the captors who had no insurable interest, and therefore, that he stood in the relation of agent on the part of the Crown, whose agents the captors were, does not, I think, make any difference. Here the plaintiff was not unconnected with the insurance; he obtained a license and made insurance for the benefit of the owners, though without communicating with them. Schroeder, who is an owner, afterwards adopted it. That case is an authority to show that he might afterwards adopt it. This, it must be remembered, is a question between the plaintiff and the underwriter, and not Schroeder and the underwriter; and unless we saw that the underwriter would not have been entitled to retain the premium, we cannot say that the plaintiff is not entitled to his contract, unless it could be shown that this is a mere gaming policy.

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[1] Citing Lucena *v.* Craufurd, 1 Taunt. 325, s. c. 2 B. & P N. R. 269; Routh *v* Thompson, 13 East, 274. — ED.

BAYLEY, J. I think this is a case in which the defendant ought to pay, and the plaintiff ought to receive for a loss under the policy. A loss has happened, upon which the defendant undertook to pay, and if the premium could not have been recovered back from the defendant, there is not any circumstance here which should exonerate him from liability. I think the plaintiff never could have recovered back the premium from the underwriter, because of the uncertainty whether Schroeder would adopt the assurance, in respect of which the underwriter would have incurred the risk. While the contract was in *fieri*, there was not any disposition on the plaintiff's part to have the policy vacated, and if there had been, it would have been an answer to him, that Schroeder might have adopted it. Then comes the question whether Schroeder is entitled to take that benefit of this insurance. It is stated that it was effected for his benefit, therefore it was intended to cover his specific interest at the time. Schroeder had an interest at the time, and although there was not any specific communication at the time, yet as Schroeder was connected in the concern, it was reasonable for the plaintiff to expect that Schroeder would adopt an act which could be done with no other view than for his benefit. Schroeder must be considered as under a moral if not a legal obligation to adopt it although the ship arrived. Being under that obligation in all events, he thinks that he is warranted in adopting it even after a loss, and has adopted it. The case of Routh *v.* Thompson shows that if a policy be effected with reference to the benefit of a person interested, an adoption of it by such person after the loss will be sufficient.

Dampier, J. The plaintiff placed himself in an awkward situation by advancing his money for the premiums, upon the expectation that Schroeder would adopt his act, which Schroeder might have refused to do in the event of the ship's arrival; and if he had, I do not see that the plaintiff could have recovered back the premiums. The question then is whether Schroeder had an interest in the policy. He was owner of the ship, and the policy was effected for his benefit; that seems to me to give him an interest. If then he had an interest, his subsequent adoption will be good. Routh *v.* Thompson is a full and clear authority to that point; there the agency was only a constructive agency, and it does not appear to me to afford any distinction because the insurance did not come within the scope of his agency. Therefore it seems to me to govern this case; there is no distinction in reason though there may be a difference. All the averments in this declaration are certainly fully proved, and therefore the plaintiff is entitled.

Judgment for the plaintiff.[1]

BIRD AND OTHERS, ASSIGNEES OF CARNE & TELO, BANKRUPTS, *v.* BROWN AND OTHERS.

Exchequer. 1850.

[4 *Exch.* 786.]

This was an action of trover. In the first count of the declaration, the plaintiffs declared on the possession of the bankrupts before their bankruptcy; and in the second, on their own possession as assignees; and in both, the conversion was laid after the bankruptcy. The defendants pleaded first, not guilty. Secondly, to the first count, a denial of the possession of the bankrupts. Thirdly, to the same, a denial of the goods being the property of the plaintiffs as assignees. Fourthly, to the last count, a denial of the possession of the plaintiffs as assignees; on which pleas issues were joined. At the trial before CRESSWELL, J., at the Liverpool Summer Assizes 1848, a verdict was found for the plaintiffs, damages £10,142 7*s.* 4*d.*, subject to a case.[1]

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[1] See Stillwell *v.* Staples, 19 N. Y. 401 (1859).

In Williams *v.* North China Ins. Co., 1 C. P. D. 757 (C. A. 1876), Cockburn, C. J., said: "The ratification was not until after the loss had occurred and was known to the principals. The existing authorities certainly show that when an insurance is effected without authority by one person on another's behalf, the principal may ratify the insurance even after the loss is known. Mr. Benjamin asked us, as a Court of Appeal, to review those authorities. His contention was that there could only be a ratification when the principal could himself make the same contract as that ratified. Admitting that for general purposes this rule may be good, the authorities which we are asked to overrule are much too strong and of too long standing to be got over. When a rule has been accepted as the law with regard to marine insurance for nearly a century, I do not think we ought to overrule it lightly, because insurances have probably been effected on the basis of the law that has so become settled, and mischief might arise from the disturbance of it. Moreover, I think that this is a legitimate exception from the general rule, because the case is not within the principle of that rule. Where an agent effects an insurance subject to ratification, the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis of the contract. It seems to me that, both according to authority and the principles of justice, a ratification may be made in such a case." — Ed.

Cowling argued for the plaintiffs.

Crompton (*Heath* with him), for the defendants.

Cur. adv. vult.

ROLFE, B. This was an action of trover to recover the value of several cargoes of corn and other goods, sent from New York to this country.

It was tried at Liverpool, and a verdict was found for the plaintiffs, subject to our opinion on a case reserved. The case was argued before us last term, when the material facts appeared to be as follows: Carne & Telo, merchants at Liverpool, early in 1846 sent out extensive orders to Charles Illins, a merchant at New York, to purchase for them corn, flour, tallow, and other articles.

In pursuance of these orders, Illins made purchases to the amount of about £14,000, and shipped the goods by five vessels bound to Liverpool, namely, two vessels each called the *Ashburton*, and three others, called respectively the *Europe*, the *New York*, and the *Hottinguer*. These were all general vessels, and the goods were consigned to Messrs. Carne & Telo.

The shipments were all made in the month of March, 1846. The goods shipped by the *Hottinguer* were received by Carne & Telo before the 7th of April, 1846, on which day they stopped payment. Illins, pursuant to directions from Carne & Telo, had drawn bills for the goods, partly on Carne & Telo themselves, partly on a firm of Richards, Little & Co., with whom Carne & Telo had dealings. The defendants, who are merchants at Liverpool, and who also have a house of business at New York, purchased there several of the bills so drawn by Illins, to the amount of about £7,000; and those bills were remitted in regular course to them at Liverpool. The bills were all drawn at sixty days' sight, and were dated, some on the 28th of March, the rest on the 30th.

On the 8th of May a fiat in bankruptcy issued against Carne & Telo, and they were duly found bankrupts, and the plaintiffs are their assignees. The *Europe* arrived at Liverpool on the 3rd of May, one of the *Ashburtons* on the 5th, and the other on the 6th, and the *New York* on the 9th; and immediately on the arrival of each of these ships, and while the *transitus* of the goods on board continued, the defendants, on behalf of Illins, gave notice to the master and consignees of each ship, claiming to stop the goods *in transitu.* The defendants were not agents of Illins, nor had they received from him any authority to make this stoppage. On the 11th of May the plaintiff Bird, as official assignee of Carne & Telo, made a formal demand of the goods from the master and consignee of each of the four ships, at the same time tendering the freight. The goods were then still on board undelivered, but the master and consignee refused to deliver the goods to the plaintiffs, and on the same day, delivered the whole of them to the defendants.

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[1] The reporter's statement of the facts has been omitted. — ED.

On the next day the plaintiff Bird made a formal demand of the goods from the defendants, but they refused to deliver up the same, claiming title under the stoppage *in transitu.* On the 28th of April, Illins heard at New York that Carne & Telo had stopped payment, and on the next day he executed a power of attorney to Joseph Hubback of Liverpool, authorizing him to stop the goods *in transitu.* This was received by Hubback on the 13th of May, and he on that day adopted and confirmed the previous stoppage by the defendants. Illins afterwards, and long before the commencement of this action, adopted and ratified all which had been done both by Hubback and the defendants.

The only point for our decision is, whether the title of Carne & Telo had been divested by the stoppage *in transitu;* for if not, then undoubtedly, the goods belonged to the plaintiffs as their assignees; and as there was a clear conversion by the defendants, the plaintiffs would be entitled to recover. Mr. Crompton, for the defendants, made two points: first, that there was a good stoppage on the 13th, under the power to Hubback; and, secondly, if that be not so, still that the subsequent ratification by Illins made the previous stoppages by the defendants good.

As to the first point, we are of the opinion that there could be no valid stoppage *in transitu,* after the formal demand of the goods by Bird on the 11th of May, and the subsequent delivery of them to the defendants. The goods had then arrived at Liverpool, and were ready to be delivered to the parties entitled. Bird, on behalf of the assignees, demanded the goods, and tendered the amount due for the freight. Assuming that there had been no previous stoppage *in transitu,* the masters of the several ships were thereupon bound to deliver up the goods to Bird, as representing Carne & Telo, and they could not, by their wrongful detainer of them and delivering them over to other parties, prolong the *transitus,* and so extend the period during which stoppage might be made. The *transitus* was at an end when the goods had reached the port of destination, and when the consignees, having demanded the goods and tendered the amount of the freight, would have taken them into their possession but for a wrongful delivery of them to other parties.

On this part of the case we never entertained any doubt. The other point, namely, whether the several stoppages by the defendants, before the 11th of May, without any previous authority from Illins, were made good by his subsequent ratification of what had been done, appeared to us one of more nicety; but on full consideration, we are of opinion that here too the defendants must fail. In the first place, the power of attorney to Hubback, and his subsequent confirmation of the acts of the defendants, may be laid out of our consideration. The authority to Hubback was no doubt executed by Illins while the goods were *in transitu;* but that is not material, unless the stoppage itself took place pending the *transitus;* and, so far as Hubback is concerned, that certainly was not the case, for he did not receive his authority nor attempt to act in the matter till the 13th, that is, not till the day after the conversion complained of in this action. It is true that he then, so far as he lawfully could, adopted and ratified the acts of the defendants, but this was afterwards, and before the commencement of this action, done by Illins himself; and so if such ratification is good, there is no necessity for relying on the ratification of Hubback.

This, therefore, brings us to the real question, which is, whether the ratification by Illins, after a conversion by the defendants, can have the effect of altering retrospectively the ownership of the goods, so as to prevent the plaintiffs from saying that the goods were theirs at the time of the conversion, which, if no subsequent ratification had occurred, certainly were theirs at that time, and would have so continued. We are of opinion that the ratification by Illins had no such effect. The doctrine, *Omnis ratihabitio retrotrahitur et priori mandato æquiparatur,* is one intelligible in principle, and easy in its application, when applied to cases of contract. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; or, if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal, at his option, and has the same equities against me, if I sue, which he would have had against A. B.

In cases of tort, there is more difficulty. If A. B., professing to act by my authority, does that which *primâ facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser, unless I can justify the act, which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification even in cases of tort. The party ratifying becomes as it were a trespasser by estoppel; he cannot complain that he is deemed to have authorized that which he admits himself to have authorized.

But the authorities go much further, and show that in some cases where an act which, if unauthorized, would amount to a trespass, has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done, to take advantage of it and to treat it as having been done by his direction. But this doctrine must be taken with the qualification, that the act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies. Thus in Lord Audley's case. Cro. Eliz. 561; Moore, 457; Poph. 176, *nom.* Lord Awdeley's case, a fine with proclamation was levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine. After the five years, and not before, the party who had the right to the land ratified and confirmed the act of the stranger. This was held to be inoperative; though such ratification within the five years would probably have been good. Now the principle of this case, which is reported in many books, and is cited with approbation by Lord Coke, in Margaret Podger's case, 9 Rep. 104 *a*, appears to us to govern the present. There the entry, to be good, must have been made within the five years; it was made within that time, but till ratified it was merely the act of a stranger, and so had no operation against the fine. By the ratification, it became the act of the party in whose name it was made; but that was not till after the five years. He could not be deemed to have made an entry till he ratified the previous entry, and he did not ratify until it was too late to do so. In the present case, the stoppage could only be made during the *transitus.* During that period the defendants, without authority from Illins, made the stoppage. After the *transitus* was ended, but not before, Illins ratified what the defendants had done. From that time the stoppage was the act of Illins, but it was then too late for him to stop. The goods had already become the property of the plaintiffs, free from all right of stoppage.

We are therefore of opinion, that there must be judgment for the plaintiffs. *Judgment for the plaintiffs.*[1]

DODGE *v.* HOPKINS.

SUPREME COURT OF WISCONSIN. 1861.

[14 *Wis.* 630.]

APPEAL from the Circuit Court for Dane County.

Action commenced, February 25, 1860, to recover two instalments, with interest, alleged to be due on a land contract. The complaint alleges that on the 1st of May, 1857, at Madison, in Dane County, the plaintiff, by his duly authorized agent and attorney, W. F. Coolbaugh, entered into a written contract with the defendant, under their seals, by which the defendant agreed to pay the plaintiff $1880, viz., $470 at the sealing and delivery of said agreement (the receipt of which is therein acknowledged), and the remainder in three equal annual instalments, with interest, &c., which payments were to be made to the plaintiff, his agent or attorney, at the office of Williamson, Catlin, & Barwise, in Madison, and were to apply as the purchase money of lots 8 and 9, block 62, in said city of Madison; that by said agreement the plaintiff bound himself, his heirs, &c., that on payment of said sum of $1880, with interest, at the times and in the manner above specified, he would, on demand thereof, cause to be executed and delivered to the defendant a good and sufficient deed of the premises, free of all incumbrances except certain taxes, which the defendant agreed to pay; that the plaintiff had always been ready to perform the contract on his part; and that the defendant had made default in the payment of the instalments due on the 1st of May in the years 1858 and 1859 respectively, for the amount of which judgment was claimed.

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[1] *Acc.*: Wood *v.* McCain, 7 Ala. 800 (1845); Taylor *v.* Robinson, 14 Cal. 396 (1859); Pollock *v.* Cohen, 32 Ohio St. 514 (1877); Lyell *v.* Kennedy, 18 Q. B. D. 796 (C. A. 1887); S. C. reversed on another point, 14 App. Cas. 437 (H. L. 1889). — ED.

The defendant answered by a general denial.[1] . . . On the trial the plaintiff offered in evidence the contract mentioned in the complaint, which was signed "A. C. Dodge, by W. F. Coolbaugh, Atty.," with a seal attached to said signature, and also signed and sealed by the defendant. The plaintiff at the same time offered in evidence a sealed instrument, purporting to have been executed on the 6th of August, 1856, at Madrid, in the kingdom of Spain, by the plaintiff, Augustus C. Dodge, and his wife, Clara Ann Dodge, constituting William F. Coolbaugh their attorney for the sale and conveyance of certain lands. There was annexed to this instrument a certificate of its acknowledgment by the plaintiff and his wife, before the Secretary of Legation of the United States at Madrid, dated on the 9th of August, 1856, and also a certificate of its acknowledgment by the plaintiff alone, before a notary public in this State, dated July 23, 1859. The provisions of this power of attorney are sufficiently stated in the opinion of this court. The defendant objected to the introduction in evidence of the contract and power of attorney. "1. Because the execution of the contract was not proven. 2. Because the power of attorney did not authorize the attorney to sell the individual lands of A. C. Dodge, or to execute a contract in the name of the plaintiff alone. 3. Because the authority of Coolbaugh to make the contract was not shown." The court overruled the objection. After reading the contract and power of attorney, and presenting a computation of the amount due, the plaintiff rested. The defendant moved for a nonsuit on the ground that the power of attorney did not authorize Coolbaugh to make said contract, and that the facts proven did not constitute a cause of action, which motion was overruled. The defendant then rested, and asked the court to instruct the jury "that the delivery of the power of attorney to Coolbaugh, and the time of such delivery, were questions of fact for the jury to find; and that in the absence of proofs as to the time of delivery, the presumption was that it was delivered at the time it was acknowledged." This instruction the court refused, but instructed the jury that in the absence of proof the presumption was that the power of attorney was delivered to the agent, Coolbaugh, at the time it bears date. *Verdict and judgment for the plaintiff.*

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[1] Statements as to an application for leave to file a supplemental answer have been omitted. — ED.

J. C. Hopkins, for appellant.

Abbott, *Gregory*, *& Pinney*, for respondent.

DIXON, C. J.[1] Of the questions arising upon the trial, the first is whether the agent, Coolbaugh, was authorized by the letter of attorney offered in evidence to sell the lands of which the plaintiff was sole owner. We think, upon the facts of the case as now presented, that he was not. His agency was special, and the authority conferred distinctly stated. It was a joint letter, being executed by the plaintiff and Clara Ann, his wife. The business to be transacted was that in which they were jointly concerned. The agent was to sell and convey the lots and outlots of which they were possessed in the city of Madison, — more particularly those which were conveyed to them by James Duane Doty, as trustee of the Four Lake Company, and Moses M. Strong, as attorney of the late Stevens J. Mason, for the numbers and description of which reference was made to the records of the deeds in the county of Dane. He was to execute and deliver for them, and in their names and behalf, all necessary deeds and other instruments in writing. This was the substance of the authority given. No reference was made to the separate property of either of the parties; and, if they had any, it cannot be inferred that they intended to authorize Coolbaugh to dispose of it. The rule of law is well settled that the authority of a special agent must be strictly pursued, and if it is not, the principal will not be bound. The authorities on this subject are collected and reviewed by Chief Justice Savage, in Rossiter *v.* Rossiter, 8 Wend. 494. It seems to us too obvious for argument that upon the face of the instrument the agent had no power to sell the plaintiff's separate estate. We are to dispose of the question as if the plaintiff were here resisting instead of endeavoring to avail himself of the authority exercised. If the positions of the parties were reversed, — the plaintiff repudiating the contract as unauthorized, and the defendant seeking a specific performance, — it would hardly be seriously contended that the letter of attorney alone would bind him. Reference was made to the records in the office of the register. An examination of the conveyances referred to might reveal the fact that the title of the lots was vested solely in the plaintiff, and that there was no joint estate to which the letter of attorney could be applied, which would place matters in a very different attitude. It might then be very reasonably urged that Mrs. Dodge joined in the letter of attorney for the purpose of releasing her right of dower in the estate of her husband. Unaided by extrinsic evidence, we cannot assume that there was no joint estate to which the authority could be applied, or depart from the strict language of the instrument.

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[1] After holding that there was no error in refusing to receive the supplemental answer. — ED.

We are next to ascertain the effect of this want of authority upon the rights of the defendant. It is very clear, in the present condition of the case, that the plaintiff was not bound by the contract, and that he was at liberty to repudiate it at any time before it had actually received his sanction. Was the defendant bound? And if he was not, could the plaintiff, by his sole act of ratification, make the contract obligatory upon him? We answer both these questions in the negative. The covenants were mutual, — those of the defendant for the payment of the money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties was that they should be mutually bound; that each should execute the instrument so that the other could set it up as a binding contract against him, at law as well as in equity, from the moment of its execution. In such cases it is well settled, both on principle and authority, that if either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the other. Townsend *v.* Corning, 23 Wend. 435, and Same *v.* Hubbard, 4 Hill, 351, and cases there cited. The same authorities also show that where the instrument is thus void in its inception, no subsequent act of the party, who has neglected to execute it, can render it obligatory upon the party who did execute without his assent. The opinion of Judge Bronson, in the first-named case, is a conclusive answer to all arguments to be drawn from the subsequent ratification of the party who was not originally bound. In that case, as in this, the vendors had failed to bind themselves by the agreement. He says: "It would be most extraordinary if the vendors could wait and speculate upon the market, and then abandon or set up the contract as their own interests might dictate. But without any reference to prices, and whether the delay was long or short, if this was not the deed of the vendee at the time it was signed by himself and Baldwin (the agent), it is impossible that the vendors, by any subsequent act of their own without his assent, could make it his deed. There is, I think, no principle in the law which will sanction such a doctrine." The only point in which the facts in that case differ materially from those here presented, is that no part of the purchase money was advanced to the agent. But that circumstance cannot vary the application of the principle. The payment of the money to the agent did not affect the validity of the contract, or make it binding upon the plaintiff. He was at liberty to reject the money, and his acceptance of it was an act of ratification with which the defendant was in no way connected, and which, although it might bind him, imposed no obligation upon the defendant until he actually assented to it. It required the assent of both parties to give the contract any vitality or force.

I am well aware that there are dicta and observations to be found in the books which, if taken literally, would overthrow the doctrine of the cases to which I have referred. It is said, in Lawrence *v.* Taylor, 5 Hill, 113, that "such adoptive authority relates back to the time of the transaction, and is deemed in law the same to all purposes as if it had been given before." And in Newton *v.* Bronson, 3 Kern. 594, the court say: "That a subsequent ratification is equally effectual as an original authority is well settled." Such expressions are, no doubt, of frequent occurrence; and although they display too much carelessness in the use of language, yet if they are understood as applicable only to the cases in which they occur, they may be considered as a correct statement of the law. The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the foundation of a right in favor of the party who has ratified, and those where it is made the basis of a demand against him. There is a broad and manifest difference between a case in which a party seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal, by an unauthorized act of his agent, to which validity is afterwards given by the assent or recognition of the principal. Paley on Agency, 192, note. The principal in such case may, by his subsequent assent, bind himself; but if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the principal, which, if he does, the contract, by virtue of such mutual ratification, becomes mutually obligatory. There are many cases where the acts of parties, though unavailable for their own benefit, may be used against them. It is upon this obvious distinction, I apprehend, that the decisions which I have cited are to be sustained. Lawrence *v.* Taylor and Newton *v.* Bronson were both actions in which the adverse party claimed rights through the agency of individuals whose acts had been subsequently ratified. And the authorities cited in support of the proposition laid down in the last case (4 Wend. 219; 1 Pick. 372; 3 Hill, 552; 5 Id. 137; 9 Cranch, 153, and 5 Wheat. 241) will, when examined, be found to have been cases where the subsequent assent was employed against the persons who had given it and taken the benefit of the contract.[1] . . .

No original authority to the agent making the contract having been shown, and no evidence offered on the trial of such ratification as bound the defendant, it follows that the judgment must be reversed, and a new trial awarded. *Ordered accordingly.*[2]

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[1] Here followed passages holding that, under the Wisconsin Statute of Frauds, a contract for the purchase of land does not bind the vendee, unless signed by the vendor or by his lawfully authorized agent. — ED.

[2] *Acc.*: Atlee *v.* Bartholomew, 69 Wis. 43 (1887).

See Andrews *v.* Ætna Life Ins. Co., 92 N. Y. 596, 604 (1883); McClintock *v.* South Penn Oil Co., 146 Pa. 144 (1892).

There are comments on the principal case in 5 Am. St. Rep. 109; 24 Am. L. Rev 580; 25 Am. L. Rev. 74; and 9 Harv. Law Rev. 60. — ED.

WALTER *v.* JAMES.

EXCHEQUER. 1871.

[*L. R.* 6 *Ex.* 124.]

ACTION on an attorney's bill, amounting to £63 17*s.* 3*d.* The defendant paid into court £3 17*s.* 3*d.*, and to the residue pleaded payment.

The cause was tried before MELLOR, J., at the Gloucestershire Summer Assizes, 1870. It appeared at the trial that the plaintiff had a claim against the defendant for professional services; that Southall, acting as the defendant's attorney, had been concerned in negotiation with the plaintiff in respect of this claim, and had induced him to accept £60 in discharge of it; that Southall had been instructed by defendant to pay that sum to plaintiff, but that before paying it those instructions had been countermanded, and he had ceased to act as defendant's attorney; that, nevertheless, considering himself under a moral obligation to the plaintiff to see him paid, he subsequently did pay the £60, and paid it, as he stated in evidence, in discharge of plaintiff's claim upon defendant; but that afterwards, and before any act of defendant assenting to or adopting the payment, he requested plaintiff to return him the money, which was accordingly done. It was left in some doubt on the evidence whether Southall did or did not inform plaintiff, at the time of paying him, that he had ceased to act as defendant's attorney. No evidence was given of any adoption of the payment by defendant before plea.

The learned judge ruled that the defendant could take advantage of the payment by Southall, and a verdict was entered for the defendant, with leave to the plaintiff to move to enter the verdict for him, the court to have power to draw inferences of fact. A rule having been obtained accordingly,

Cave (*Huddleston*, Q. C., with him), showed cause.

Henry James, Q. C., and *Griffits*, in support of the rule.

Cur. adv. vult.

KELLY, C. B. [after stating the facts of the case, proceeded:] Southall, therefore, in paying the debt appeared to act as the defendant's agent; but it turned out afterwards that, although he had originally been authorized by the defendant to come to an arrangement with the plaintiff, and to make this payment, that authority had been revoked before the payment was made. He did not, however, communicate to the plaintiff that he had no authority; on the contrary, he professed to act for the defendant, and the plaintiff believed him to be so acting, and received the sum paid in full satisfaction of his debt. But when the plaintiff found that the money had been paid without the defendant's authority, he returned the money to Southall. And now the question is, whether the defendant can by his plea of payment adopt and ratify the act of Southall, although before action that act had, by arrangement between the plaintiff and Southall, been undone.

Now, the law is clear, that where one makes a payment in the name and on behalf of another without authority, it is competent for the debtor to ratify the payment; and there seems to be no doubt on the authorities that he can ratify after action by placing the plea of payment on the record. *Prima facie*, therefore, we have here a ratification of the payment by the defendant's plea; but whether the payment was then capable of ratification depends on whether previously it was competent to the plaintiff and Southall, apart from the defendant, to cancel what had taken place between them. I am of opinion that it was competent to them to undo what they had done. The evidence shows that the plaintiff received the money in satisfaction under the mistaken idea that Southall had authority from the defendant to pay him. This was a mistake in fact, on discovering which he was, I think, entitled to return the money, and apply to his debtor for payment. If he had insisted on keeping it, the defendant might at any moment have repudiated the act of Southall, and Southall would then have been able to recover it from the plaintiff as money received for Southall's use. I am, therefore, of opinion that the plaintiff, who originally accepted this money under an entire misapprehension, was justified in returning it, the position of the parties not having been in the meantime in any way altered, and that the defendant's plea of payment fails. The rule must accordingly be made absolute.

MARTIN, B. I am of the same opinion. The rule which I conceive to be the correct one may be stated as follows. When a payment is not made by way of gift for the benefit of the debtor, but by an agent who intended that he should be reimbursed by the debtor, but who had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, and thereupon the payment is at an end, and the debtor again responsible. This being, in my judgment, the true rule, the plaintiff in this case was entitled to recover.

KELLY, C. B. My brother Cleasby concurs in the judgment of the court. *Rule absolute.*[1]

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[1] See Stillwell *v.* Staples, 19 N. Y. 401, 406 (1859). — ED.

WHITING, ADMINISTRATOR, v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1880.

[129 *Mass.* 240.]

COLT, J. It is expressly provided in the policy of life insurance upon which this action is brought, that it "shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured."

It appeared at the trial, that, in February, Henry L. Fairfield, the plaintiff's intestate, made application for insurance in the defendant company; and that, in the early part of May following, the policy in suit was left at Fairfield's place of business, by an agent of the company, who by letter requested payment of the premium "if the policy was correct and satisfactory." This request was repeated by letter dated May 21, addressed to Fairfield, who was then at home, having arrived there in ill health on the 18th of the same month. He died of this illness on May 27. The letter of the 21st was opened by his sister, who, without communication with or direction from him, caused the advance premium to be paid to the company, by a check signed by a member of the firm in which Fairfield was a partner. Fairfield died without knowledge of this payment.

Upon this state of facts, it is plain that no contract of insurance existed between the parties at the time of the death of the plaintiff's intestate. The possession of the policy, without a waiver, on the part of the company, of the condition upon the performance of which it was to take effect, does not, on the facts disclosed, show a delivery of it in completion of the contract, or furnish any evidence that the minds of the parties had met. It is not enough that the form of the policy had been approved, for it was still optional with Fairfield whether he would by payment make it a binding contract. If he declined or neglected to pay, the company would have no claim for the premium against him, or against his estate, because the risk never attached. A payment by a stranger, made without the knowledge or consent of the assured, though made with his money, would not bind him or the company; and the money, so wrongfully appropriated, could be recovered back by him or by his administrator. Hoyt v. Mutual Benefit Ins. Co., 98 Mass. 539; Markey v. Mutual Benefit Ins. Co., 103 Mass. 78; Badger v. American Ins. Co., 103 Mass. 244; Thayer v. Middlesex Ins. Co., 10 Pick. 326; Piedmont & Arlington Ins. Co. v. Ewing, 92 U. S. 377.

After the death of Fairfield, the administrator of his estate, and the widow, to whom the policy was made payable, joined in the proofs of loss, and the administrator, for the benefit of the widow, brought this action against the company. But these proceedings do not amount to such ratification of the unauthorized payment by the sister as will give validity to the policy. The difficulty is, that there was no contract existing at the time of the death to be ratified. The payment of the premium was not the payment by another of a debt due from the intestate, which the administrator, without affecting the rights of the company, would have power to ratify; and to say that the administrator may now do it, so as to bind the company, would be to say that a policy of life insurance may be made to take effect as a contract by an act of ratification by the administrator after the death of the person whose life is thereby insured; or, as was said by Mr. Justice Miller in Piedmont & Arlington Ins. Co. *v.* Ewing, above cited, "to affirm that one party to a negotiation can delay his consent to the terms of the contract until the changes of fortune enable him to reap all the benefits, and throw all the losses on the other side, and then, for the first time, do what was necessary on his part to make the contract obligatory."

It is laid down, in general rules governing the relation of principal and agent, that no unauthorized act of the latter can be made valid by subsequent ratification to the prejudice of third persons without their consent; and that no ratification is valid unless the principal at the time of ratifying the act has power to confer the authority for such act. Sturtevant *v.* Robinson, 18 Pick. 175; Bird *v.* Brown, 4 Exch. 786; McCracken *v.* San Francisco, 16 Cal. 591, 624; Story on Agency, §§ 245, 246.

It is contended that there is some authority for the proposition that the payment of a renewal premium by a stranger to the contract after it becomes due will be sufficient to prevent the lapsing of a policy on the life of one who dies after it becomes due and before it is paid; although the policy contains the usual condition requiring its payment in order to continue the contract in force. But the case of Howell *v.* Knickerbocker Ins. Co., 44 N. Y. 276, cited by the plaintiff, was decided expressly on the ground that there had been a waiver by the company of a prompt payment of the annual premium, so that the contract of insurance was in force at the time of the death. See also Pritchard *v.* Merchants' & Tradesmen's Assurance Society, 3 C. B. (N. S.) 622. Whatever may be the law as applicable to the payments of annual premiums under a policy which has once attached, we are of of opinion that the contract cannot be originally created without the consent of the assured.

Under the law of marine insurance, as laid down in the cases cited by the plaintiff,[1] it is said that when a vessel is insured by a part-owner for the benefit of the other part-owners, without their previous authority, the latter may ratify the act, after knowledge of the loss. But that is because in those cases a valid contract of insurance is at once created by the part-owner by payment of the premium, or by a promise to pay upon which the policy is issued.

The judge at the trial refused to rule, as requested by the defendant, that the payment of the premium by the sister, Miss Whiting, would not be a payment by Fairfield which would make the defendant liable on the policy; and for this refusal, the entry must be

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[1] The plaintiff's counsel cited on this point Hagedorn *v.* Oliverson, 2 M. & S. 485; Routh *v.* Thompson, 13 East, 274; Barlow *v.* Leckie, 4 J. B. Moore, 8; Finney *v.* Fairhaven Ins. Co., 5 Met. 192. — REP.

Exceptions sustained.

G. Wells, for the defendant.

G. M. Stearns, for the plaintiff.

BOLTON PARTNERS *v.* LAMBERT.

CHANCERY DIVISION. 1888.

COURT OF APPEAL. 1889.

[41 *Ch. D.* 295.]

THE plaintiffs, Bolton Partners (Limited), were a limited company, incorporated under the Companies Acts, and were owners of a factory and hereditaments at Lavenham, Suffolk, known as the Lavenham Sugar Works, for the residue of a term of ten years from the 25th of March, 1884.

On the 8th of December, 1886, the defendant, A. J. Lambert, wrote to P. Scratchley, who was then acting as managing director of the company in the absence of the chairman, a letter in which he said: —

"Re Lavenham Sugar Works.

"I beg to make you an offer for the above-mentioned works, and at the same time allow me to call your attention to the following facts, which are matters too important to be overlooked on either side."

He then stated several particulars in which expense must be incurred by the purchaser, and proceeded as follows: —

"As it is absolutely necessary to commence the new works almost immediately, I propose to take the factory over from the 25th of March, 1887, possession to be given on the 1st of January, 1887, to enable me to get the necessary alterations completed, and also to get the new machinery fixed. Taking into consideration all the facts which I have brought under your notice, I think a fair annual rental to offer you for the use of the factory (including depreciation of the buildings, plant, and machinery) would be £3,500, the lease to be the remainder of your term, and subject to the conditions described therein. But as the wall requires repairs, and the machinery, which is now dismantled, will require to be restarted, an allowance of £500 should be made from the first quarter's rent, thus reducing the rent for the first year to £3,000, which should be paid on the usual quarter days."

Scratchley wrote to the defendant on the 9th of December acknowledging the receipt of his letter, and saying that he would refer the matter to the directors.

Scratchley was a member of the works committee, which was appointed by the board of directors. On the 13th of December, 1886, a meeting of the works committee was held at which it was resolved that the defendant's offer should be accepted, and that a letter should be written to him accordingly, and that the company's solicitor should be instructed to prepare the necessary documents. It was admitted that the works committee had no power to accept the defendant's offer, or to bind the company by a sale of its property. On the same day, Scratchley wrote to the defendant a letter in which he informed him that the directors accepted the offer contained in his letter of the 8th of December, and that the company's solicitor had been instructed to prepare the necessary documents.

On the 17th of December the plaintiffs' solicitor sent the defendant a draft agreement containing certain stipulations not mentioned in the defendant's offer, and in particular a stipulation as to a guarantee for rent. To these the defendant objected. After some correspondence the defendant, on the 13th of January, 1887, wrote to the plaintiffs withdrawing his offer on the ground that he had been misled by the statements that had been made to him as to the value of the property.

On the 17th of January, 1887, the writ in this action was issued by direction of the board of directors. The plaintiffs claimed specific performance of the agreement contained in the letters before stated.

On the 28th of January the board of directors held a meeting at which they confirmed the minutes of the meeting of the works committee of the 13th of December, 1886; and Scratchley's letter of the same date was also read and confirmed.

The defendant denied that there had been any complete contract; and contended that after the defendant had repudiated his offer it was too late for the company to ratify Scratchley's acceptance. He also alleged that he had been induced to make the offer by misrepresentation.

The action came on before Mr. Justice KEKEWICH on the 19th of December, 1888.

Warmington, Q. C., and *Chadwyck Healey*, for the plaintiffs.

Brice, Q. C., and *Ribton*, for the defendant.

KEKEWICH, J.[1] The doctrine of ratification is this, that when a principal on whose behalf a contract has been made, though it may be made in the first instance without his authority, adopts it and ratifies it, then, whether the contract is one which is for his benefit and which he is enforcing, or which is sought to be enforced against him, the ratification is referred to the date of the original contract, and the contract becomes as from its inception as binding on him as if he had been originally a party. That doctrine, combined with one in respect of mutuality, the limits of which I have already stated, seems to me to get rid entirely of the third objection on the ground of *ultra vires*, and to dispose of this case. There must, therefore, I think, be judgment for specific performance. . . .

From this judgment the defendant appealed.

Brice, Q. C., and *Ribton*, for the appellant.[2]

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[1] At the beginning and at the end of this opinion are omitted passages not dealing with ratification. — ED.

[2] In reprinting this argument, passages not dealing with ratification have been omitted. — ED.

An offer may be withdrawn without formal notice at any time before acceptance. Dickinson *v.* Dodds, 2 Ch. D. 463; and after withdrawal any ratification comes too late. Thus, in Lyell *v.* Kennedy, 18 Q. B. D. 796, 814, it was held that ratification after the Statute of Limitations had run came too late. [LOPES, L. J., referred to Walter *v.* James, Law Rep. 6 Ex. 124.] That case is in our favor; after the contract was rescinded ratification was too late. Stoppage *in transitu* by a person having no authority cannot be ratified after the goods have got into the hands of third parties. Bird *v.* Brown, 4 Ex. 786. In Brewer *v.* Broadwood, 22 Ch. D. 105, the principle was acted on that ratification must be before the contract is broken off, and so in Lee *v.* Soames, 36 W. R., 884. [COTTON, L. J. That case comes to this: something is necessary to make a good title. The purchaser says get it within a certain time, if not, I withdraw. That is not like a case of a sale by an agent without authority.] If the party repudiates, then the negotiation is at an end, and no subsequent confirmation by the principal can revive it.

Warmington, Q. C., and *Chadwyck Healey*, for the plaintiffs, were not called on to argue the question whether there was a complete contract between Scratchley and the defendant, or whether there had been misrepresentation.

With respect to the question of ratification, the maxim *omnis ratihabitio retrotrahitur et mandato equiparatur* is applicable to this case. It is only a matter of evidence whether or not the agent had authority to make the contract. If the authority is proved, it makes no difference at what time it is proved. Brook *v.* Hook, Law Rep. 6 Ex. 89. The defendant argues that if a man makes a contract with an agent, there is a *locus pœnitentiæ* until the contract is confirmed by the principal; but there is no trace of any such doctrine in the law. He is bound, though the principal may not be. It may seem unfair upon him, but it is the law. The cases on marine insurance are strong instances of the rule being acted on in hard cases. Hagedorn *v.* Oliverson, 2 M. & S. 485; Ancona *v.* Marks, 7 H. & N. 686; Maclean *v.* Dunn, 4 Bing. 722. The only exceptions to the rule are: (1) where a vested estate is divested; (2) when there has been forgery; (3) where the ratification is after the time when the act could be done. In the present case, the contract being a good binding contract there was no power of withdrawing from it, which would have been in fact a rescission.

COTTON, L. J.[1] But then it is said that on the 13th of January, 1887, the defendant entirely withdrew the offer he had made. Of course the withdrawal could not be effective, if it were made after the contract had become complete. As soon as an offer has been accepted the contract is complete. But it is said that there could be a withdrawal by the defendant on the 13th of January on this ground, that the offer of the defendant had been accepted by Scratchley, a director of the plaintiff company, who was not authorized to bind the company by acceptance of the offer, and therefore that until the company ratified Scratchley's act there was no acceptance on behalf of the company binding on the company, and therefore the defendant could withdraw his offer. Is that so? The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had had authority to do the act at the time the act was done by him. Various cases have been referred to as laying down this principle, but there is no case exactly like the present one. The case of Hagedorn *v.* Oliverson is a strong case of the application of the principle. It was there pointed out how favorable the rule was to the principal, because till ratification he was not bound, and he had an option to adopt or not to adopt what had been done. In that case the plaintiff had effected an insurance on a ship in which another person was interested, and it was held that long after the ship had been lost the other person might adopt the act of the plaintiff, though done without authority, so as to enable the plaintiff to sue upon the policy. Again, in Ancona *v.* Marks, where a bill was indorsed to and sued on in the name of Ancona, who had given no authority for that purpose, yet it was held that Ancona could, after the action had been brought, ratify what had been done, and that the subsequent ratification was equivalent to a prior authority so as to entitle Ancona to sue upon the bill. It was said by Mr. Brice, that in that case there was a previously existing liability of the defendant towards some person; but the liability of the defendant to Ancona was established by Ancona's authorizing and ratifying the act of the agent, and a previously existing liability to others did not affect the principle laid down.

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[1] After discussing matters foreign to ratification. — ED.

The rule as to ratification is of course subject to some exceptions. An estate once vested cannot be divested, nor can an act lawful at the time of its performance be rendered unlawful, by the application of the doctrine of ratification. The case of Walter *v.* James, L. R. 6 Ex. 124, was relied on by the appellant, but in that case there was an agreement between the assumed agent of the defendant and the plaintiff to cancel what had been done before any ratification by the defendant; in the present case there was no agreement made between Scratchley and the defendant that what had been done by Scratchley should be considered as null and void.

The case of Bird *v.* Brown, 4 Ex. 786, which was also relied on by the appellant, is distinguishable from this case. There it was held that the ratification could not operate to divest the ownership which had previously vested in the purchaser by the delivery of the goods before the ratification of the alleged stoppage *in transitu.* So also in Lyell *v.* Kennedy, 18 Q. B. D. 796, the plaintiff, who represented the lawful heir, desired, after the defendant Kennedy had acquired a title to the estate by means of the Statute of Limitations, and after the title of the heir was gone, to ratify the act of Kennedy as to the receipt of rents, so as to make the estate vest in the heir. In my opinion none of these cases support the appellant's contention.

I think the proper view is that the acceptance by Scratchley did constitute a contract, subject to its being shown that Scratchley had authority to bind the company. If that were not shown there would be no contract on the part of the company, but when and as soon as authority was given to Scratchley to bind the company the authority was thrown back to the time when the act was done by Scratchley, and prevented the defendant withdrawing his offer, because it was then no longer an offer, but a binding contract.

This point therefore must also be decided against the appellant. Another point was raised as to misrepresentation, but, having regard to the evidence, in my opinion that has not been made out. The appeal therefore fails.

Lindley, L. J. I am of the same opinion. Three defences are set up. The first is that the two letters of the 8th of December and the 13th of December did not amount to a contract at all, but were mere negotiations; the second is, that the contract, if any, was based on a misrepresentation such as to entitle the defendant to resist specific performance; and the third is, that no contract was made, because the offer was withdrawn before acceptance. In my opinion there is nothing in the first or second points. As to the first point, it is impossible to read the two letters otherwise than as amounting to a clear offer and an acceptance; and as to the second point there is no proof of misrepresentation. The third point is altogether a different one, and is much more difficult. [His lordship referred briefly to the facts of the case, and continued]: —

The question is what is the consequence of the withdrawal of the offer after acceptance by the assumed agent — but before the authority of the agent has been ratified? Is the withdrawal in time? It is said on the one hand that the ordinary principle of law applies, viz., than an offer may be withdrawn before acceptance. That proposition is of course true. But the question is — acceptance by whom? It is not a question whether a mere offer can be withdrawn, but the question is whether, when there has been in fact an acceptance which is in form an acceptance by a principal through his agent, though the person assuming to act as agent has not then been so authorized, there can or cannot be a withdrawal of the offer before the ratification of the acceptance? I can find no authority in the books to warrant the contention that an offer made, and in fact accepted by a principal through an agent or otherwise, can be withdrawn. The true view on the contrary appears to be that the doctrine as to the retrospective action of ratification is applicable.

If we look at Mr. Brice's argument closely it will be found to turn on this — that the acceptance was a nullity, and unless we are prepared to say that the acceptance of the agent was absolutely a nullity, Mr. Brice's contention cannot be accepted. That the acceptance by the assumed agent cannot be treated as going for nothing is apparent from the case of Walter v. James. I see no reason to take this case out of the application of the general principle as to ratification. The appeal therefore fails on all points.

Lopes, L. J. An important point is raised with regard to the withdrawal of the offer before ratification in this case.

If there had been no withdrawal of the offer this case would have been simple. The ratification by the plaintiffs would have related back to the time of the acceptance of the defendant's offer by Scratchley, and the plaintiffs would have adopted a contract made on their behalf.

It is said that there was no contract which could be ratified, because Scratchley at the time he accepted the defendant's offer had no authority to act for the plaintiffs. Directly Scratchley on behalf and in the name of the plaintiffs accepted the defendant's offer, I think there was a contract made by Scratchley assuming to act for the plaintiffs, subject to proof by the plaintiffs that Scratchley had that authority.

The plaintiffs subsequently did adopt the contract, and thereby recognized the authority of their agent Scratchley. Directly they did so the doctrine of ratification applied and gave the same effect to the contract made by Scratchley as it would have had if Scratchley had been clothed with a precedent authority to make it.

If Scratchley had acted under a precedent authority the withdrawal of the offer by the defendant would have been inoperative, and it is equally inoperative where the plaintiffs have ratified and adopted the contract of the agent. To hold otherwise would be to deprive the doctrine of ratification of its retrospective effect. To use the words of Baron Martin in Brook *v.* Hook, L. R. 6 Ex. 96, the ratification would not be "dragged back as it were, and made equipollent to a prior command."

I have nothing to add with regard to the other points raised. I agree with what has been said on those points. The appeal must be dismissed.[1]

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[1] See *In re* Portuguese Consolidated Copper Mines, 45 Ch. D. 16 (C. A. 1890), where, in the Chancery Division, North, J., commenting on the principal case, said: "It comes to this, that if an offer to purchase is made to a person who professes to be the agent for a principal, but who has no authority to accept it, the person making the offer will be in a worse position as regards withdrawing it than if it had been made to the principal; and the acceptance of the unauthorized agent in the meantime will bind the purchaser to his principal, but will not in any way bind the principal to the purchaser. . . . That case governs the present; and all that I can say is that I am glad to have such an authority to guide me; for I am afraid I should have gone wrong if I had not had the assistance of that decision." And in the same case in the Court of Appeal, Lindley, L. J., said: "Then it is said that the fact that the contract was made by persons without authority makes it void. . . . That was the very point urged in Bolton Partners *v.* Lambert; but the court repudiated it, and said: 'No, it is voidable at the option of the principal; he can avoid it if he likes; he can elect to stand upon it if he likes.'"

There are comments on the principal case in 5 Law Q. Rev. 440; Fry on Specific Performance (3d ed.), 711–713; 9 Harv. Law Rev. 60. — Ed.

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